

STORAGE NAME: h0613.sgc.doc
DATE: April 18, 2001

HOUSE OF REPRESENTATIVES
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS

BILL #: HB 613
RELATING TO: Construction Contracts
SPONSOR(S): Representative Ross
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
- (2) JUDICIAL OVERSIGHT YEAS 10 NAYS 0
- (3) COUNCIL FOR SMARTER GOVERNMENT YEAS 12 NAYS 0
- (4)
- (5)

I. SUMMARY:

Current law establishes certain criteria for work completed on both public and private construction projects. On public projects, the contractor must obtain a payment or performance bond. A claimant¹ must submit a notice to the contractor stating that he or she will look to the bond for protection. If the claimant is not paid for services, he or she must submit a notice of nonpayment to the contractor. On private projects, a payment or performance bond is not required. However, an owner must file a notice of commencement, and all lienors² may submit a claim of lien on the project which protects them from nonpayment. If a lienor is not paid, and the project is bonded, the lienor must submit a notice of nonpayment to both the contractor and the owner. The required notices for both public and private projects are subjected to certain time restraints and particular methods of delivery. HB 613 expands the current time periods in which claimants and lienors are allowed to submit notices and allows for additional methods to deliver such notices.

Current law also allows for conditional payment bonds. If the contractor's written obligation to pay lienors is expressly conditioned upon and limited to the payments made by the owner to the contractor, the duty of the surety to pay lienors will be coextensive with the duty of the contractor to pay. HB 613 repeals s. 713.245, F.S., eliminating the use of conditional payment bonds.

In addition, current law allows owners of private buildings, if challenged for nonpayment, to use a proper payment defense if at any time during the project improper payments were made to any lienor. HB 613 specifies that an owner is not permitted to use a proper payment defense if any improper payments were made throughout the project.

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

¹ Section 713.01, F.S., defines the following persons as claimants: a contractor; a subcontractor; a sub-subcontractor; a laborer; a materialman who contracts with the owner, contractor, subcontractor, or a sub-subcontractor.

² A "lienor" is the same concept as that of "claimant." However, the term "claimant" is used on public projects because one cannot submit a claim of lien on public property.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Chapter 255, F.S.

Chapter 255, F.S., deals with public property and publicly owned buildings. More specifically, the chapter specifies the requirements for construction bonds between a public entity and any contractors, subcontractors, or materialmen that are involved in the project.

Any person entering into a formal contract with the state or any county, city, or political subdivision, or other public authority, for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work must deliver to the public owner, and record in the public records, a payment and performance bond³. The bond must state on its front page the name, the principal business address and phone number of the contractor, the surety⁴, and the owner of the property being improved. If the contracting public entity is different from the owner, the bond must include the contract number assigned by the contracting public entity, and a description of the project. This bond requires the contractor to perform the contract in the time and manner prescribed in the contract and that the contractor make prompt payments to all persons defined in s. 713.01, F.S.⁵, whose claims derive directly or indirectly from the prosecution of the work provided for in the contract. Any claimant⁶ has a right to apply to the governmental entity having charge of the work for copies of the contract and bond. However, the claimant must comply with certain statutory requirements.

The claimant has a right of action against the contractor and surety for the amount due him or her, including finance charges due under the claimant's contract. A claimant, except a laborer, who is not in privity⁷ with the contractor, must within 45 days of beginning work furnish to the contractor a

³Black's Law Dictionary, 6th ed, p. 180, defines performance bond to mean: "type of contract bond which protects against loss due to the inability or refusal of a contractor to perform his contract. Such are normally required on public construction projects."

⁴ *Id.* at 1441, "One who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person."

⁵s. 713.01, F.S., defines the following persons: a contractor; a subcontractor; a sub-subcontractor; a laborer; a materialman who contracts with the owner, contractor, subcontractor, or a sub-subcontractor; and a professional lienor.

⁶ In this context, claimants are those persons defined in s. 713.01, F.S.

⁷ In this context, parties that are in privity with one another are parties who have a contractual relationship with one another. Parties not in privity do not have a contractual relationship with one another.

notice stating that the bond will be looked to for payment protection. A claimant, who is not in privity and who has not received payment for services,⁸ must also deliver to the contractor and the surety written notice of the performance of services and of the nonpayment. The notice of nonpayment is not to be served before 45 days after the first furnishing of services and no later than 90 days after the final furnishing of services. The claimant may not institute an action seeking payment for the performed services against the contractor or the surety unless both notices have been given. Any such action must be instituted against the contractor or the surety within one year after the performance of the labor or completion of the delivery of the materials or supplies. The time periods for service of a notice of nonpayment or for bringing an action against a contractor or a surety are calculated from the last day of furnishing services by the claimant and are not to be calculated from any other date.

Chapter 713, F.S.

Chapter 713, F.S., deals with private property and privately owned buildings. More specifically, the chapter specifies the requirements of lienors when providing notice to owners, or when bringing a claim of lien against the property.

A lienor has a lien or a prospective lien upon the property to which he or she provides services for any money owed to him or her for labor, services, or materials furnished in accordance with a particular contract. The following persons can be defined as lienors: a contractor, a subcontractor, a sub-subcontractor, a laborer, or a materialman. A lienor, not in privity with the owner, must serve a notice on the owner stating the lienor's name and address, a description sufficient to identify the real property, and the nature of the services or materials furnished or to be furnished. A sub-subcontractor or materialman must serve a copy of the notice on the subcontractor and owner related to the project if the names and addresses are known. The notice must be served within 45 days after commencing service, and in any event before the date of the owner's disbursement of the final payment. A claim of lien can be filed at any time during the progress of work, but no later than 90 days after the final furnishing of services. No lien continues past a period of one year from the day the claim of lien is recorded, unless a suit to foreclose the lien is filed in that year.

The owner of the private property may make proper payments on the direct contract to particular lienors. When the owner has properly retained all sums required by law, "but has otherwise made improper payments, the owner's real property is liable to all laborers, subcontractors, sub-subcontractors, and materialmen complying with [Chapter 713, F.S.] only to the extent of the retentions and the improper payments."⁹ Any money paid by the owner on a direct contract will be held as properly paid to the lienor, as long as it is "proved to have caused no detriment to any certain lienor."¹⁰

In the construction of a privately owned building, a contractor can issue a payment bond to the owner. The payment bond is executed by the surety insurer, and requires that the contractor must make proper payments to all lienors under the contractor's direct contract. A lienor, not in privity with the contractor, must serve the contractor within 45 days of commencing services with a notice stating that the lienor will look to the bond for payment protection. If a lienor seeks payment recovery under the bond, the lienor is required to serve a written notice of nonpayment to the contractor and the surety within 90 days after the final furnishing of services. The lienor is entitled to any payment described in the notice of nonpayment as well as to any other payments which become due to the lienor after the service of the notice of nonpayment. The lienor may not institute an action seeking payment for the performed services against the contractor or the surety unless

⁸Services may include the furnishing of supplies, materials, labor, or actual services performed on property.

⁹ Section 713.06(3)(h), F.S.

¹⁰ *Id.*

both notices have been given. The time period for serving a written notice of nonpayment can only be calculated from the last day of furnishing services by the lienor.¹¹

A contractor can also issue a conditional payment bond to an owner. If the contractor's written obligation to pay lienors is expressly conditioned upon and limited to the payments made by the owner to the contractor, the duty of the surety to pay lienors will be coextensive with the duty of the contractor to pay if the bond contains on the front page a clear reference to the conditional requirements. A lienor can still serve a notice to the owner and file a claim of lien on the project under a conditional payment bond. No action can be instituted or prosecuted against the contractor or the surety after one year from the date the lien is transferred to the bond.¹²

There are particular requirements in the delivering of notices and other instruments. All services of notices, claims of lien, affidavits, assignments, and other instruments must be made by one of the following methods: by actual delivery to the person to be served, or if a partnership, to one of the partners, or if a corporation, to an officer, director, managing agent, or business agent thereof; by mailing the same, postage prepaid, by registered or certified mail to the person to be served at her or his last known address and evidence of delivery; or by facsimile transmission if the person being served listed a facsimile number on the notice of commencement.¹³ If a notice to an owner or a notice to a contractor is mailed within 40 days after the date the lienor first furnishes services, service of that notice is effective as of the date of mailing if the person who served the notice maintains: a registered or certified mail log that shows the date the notice was serviced; the registered or certified mail number issued by the United States Postal Service; the name and address of the person served; and the date stamp of the United States Postal Service confirming the date of mailing. If the notice is not received, but is returned by the United States Postal Service as being "refused," "moved," "not forwardable," or "unclaimed," or is otherwise not delivered through no fault of the person serving the item, then service is effective as of the date of mailing. If none of the mentioned methods can be accomplished when attempting to serve a notice, it can be accomplished through posting on the premises.¹⁴

C. EFFECT OF PROPOSED CHANGES:

Chapter 255, F.S.

This bill amends s. 255.05(2)(a)2, F.S., by allowing claimants, after the initial 45-day period, to serve the contractor with a notice stating that the claimant will look to the payment bond for protection. However, the claim against the bond may only include amounts due to the claimant for labor, services, and materials furnished on the project on or after the date the notice was sent, and any unpaid finance charges due to the claimant during that period. If the claimant serves the notice before the 45-day period expires, a claim against the bond may include amounts due to the claimant for all labor, services, or materials furnished on the project and any unpaid finance charges due under the claimant's contract, as is currently authorized by law.

¹¹Section 713.06(2)(a), F.S.

¹²Section 713.245, F.S.

¹³Section 713.13, F.S., Notice of Commencement – An owner, or an owner's authorized agent, is required to record a notice of commencement before actual work begins on the property. The notice is filed with the clerk's office and contains the following information: a description sufficient for identification of the property; a general description of the improvement; 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; the name and address of the contractor; the name and address of the surety; the name and address of any person making a loan for the construction; and any person the owner designates to receive a copy of the lienor's notice.

¹⁴Section 713.18, F.S.

The bill further amends s. 255.05(2)(a)2, F.S., by allowing a claimant to file a notice of nonpayment from the commencing of his or her services. The bill eliminates the 45-day waiting period that is currently authorized by law.

Chapter 713, F.S.

The bill amends s. 713.06(2)(a), F.S., by allowing lienors, after the initial 45-day period, to serve a notice to owner which states the lienor's name and address, a sufficient description of the property, and the nature of the services to be furnished. However, the lienor's claim of lien may only include amounts due to the lienor for labor, services, materials furnished on the project on or after the date the notice was sent, and any unpaid finance charges due to the lienor during that period. If the lienor serves the notice before the 45-day period expires, the lienor's claim of lien may include amounts due to the lienor for all labor, services, or materials furnished on the project and any unpaid finance charges due under the lienor's contract, as is currently authorized by law.

The bill amends s. 713.06(3)(h), F.S., to add: "An owner is not entitled to a proper payment defense to the extent of improper payments made by the owner at any time during the project." This means that if an owner, at any time, made improper payments, if challenged, the owner is not able to claim that proper payments were executed throughout the project and therefore avoid paying particular charges due lienors. In *Meredith v. Lowe's of Florida, Inc.*, the Fifth District Court of Appeal ruled: "[T]he liability of the owner and his lands is limited to the contract price remaining after deducting therefrom payments properly made . . . Payments reasonably necessary to complete the work, if made as required under chapter 713, Florida Statutes, are proper payments."¹⁵ This added language essentially avoids any court ruling such as that in *Meredith v. Lowe's of Florida, Inc.*, and does not allow owners to use a proper payment defense if at any time improper payments are made.

The bill amends s. 713.18, F.S., by eliminating any references to partnerships in the delivery of notices. Moreover, it places in statute specific language regarding the permissibility of using overnight or second-day delivery when delivering notices. In addition, it amends this section by allowing any person serving a notice to use the records of the Secretary of State to locate the particular address of a business entity or corporation.

The bill amends s. 713.23, F.S., by allowing unpaid finance charges due under the lienor's contract to be included in the written notice of nonpayment. This is not a substantive change to the statute, for finance charges are already provided for in s. 255.05, F.S., for public bonded projects, and s. 713.08, F.S., for private projects.

The bill repeals s. 713.245, F.S., creating Conditional Payment Bonds. The use of conditional payment bonds are no longer permissible in any private construction projects as a result of this repeal.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes" section.

¹⁵ *Meredith v. Lowe's of Florida*, 405 So. 2d 1061,1063, (Fla. 5th DCA 1981).

III. 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:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Members of the Construction Law Committee of the Real Property, Probate and Trust Law Section of The Florida Bar are opposed to HB 613. The members believe this legislation creates more problems than it solves. Their opposition is based, in part, as follows:¹⁶

- Current law states that the bond must be conditioned on the contractor performing the contract. The amended language states that the bond must be conditioned upon the contractor's performance of the construction work. The amended language places the point of concentration away from the contract, which is what this particular area of statute is referencing. *See changes made on page 2, lines 16-18.*
- The original language allowing 45 days for the delivery of notice is sufficient. The changes made are too radical and would create administrative difficulties. The original language sets a clear objective for determining whether or not a party has perfected their lien rights. By expanding the time period in which claimants are allowed to serve a notice to owner, it only results in confusion regarding the application of these particular rights. *See changes made on page 4, line 27 thru page 5, line 13.*
- The original language states in s. 255.05(2)(a)2.F.S., with regard to the time requirements of claimants to take action against the contractor and surety, "or within 90 days after *the contractor's* receipt of final payment." The amended language eliminates the reference to the contractor. It is not clear whose receipt is being referenced; the language is confusing. *See changes made on page 6, lines 7-8.*
- Elimination of a proper payment defense for an owner is unnecessary. The proper payment defense is extremely difficult to utilize, and since this vague inclusion does not tie the loss of proper payment defense to a particular party, it will only make the proper payment defense even more difficult to be used by an owner. *See Changes made on page 8, lines 28-30.*
- The additional language allowing a lienor to locate an address for a business entity utilizing records of the Secretary of State leaves some entities removed from statute for it makes no reference to foreign corporations. *See Changes made on page 10, lines 24-31.*
- Elimination of conditional payment bonds is too radical. Many contractors use what are commonly referred to as "pay-if-paid" clauses, meaning that the contractor's delivery of payment to both subcontractors and materialmen is conditioned upon the owner's delivery of payment to the contractor. It is a common practice that should be allowed to continue. *See Changes made on page 13, lines 26-27.*

The Florida Associated General Contractors of America (AGC) opposes HB 613. The AGC does not agree with any changes made to the current 45-day period that both claimants and lienors have to serve notices for the following two reasons: It will result in administrative confusion where a claimant has some work or materials that are protected by bond and lien rights, and some that is

¹⁶ Pursuant to multiple discussions with George Meyer, Chair of the Construction Law Committee of the Real Property, Probate, and Trust Law Section of the Florida Bar beginning on March 5, 2001.

not; and a study was performed by the Mechanics Lien Law Study Commission in 1990 that found that time limits on the serving of notices should be "strictly construed," and the AGC believes that strict compliance to the time periods are just as important today as in 1990. Furthermore, the AGC is opposed to the recommended changes that would limit the proper payment defense of the owner. The AGC believes that if the proper payment defense is eliminated for one technical violation, this will result in payments being delayed as owners seek to collect all the releases and waivers required from the claimants. Lastly, the AGC is opposed to the repeal of Conditional Payment Bonds. These bonds are necessary due to case law which allows claimants to make a claim for payment against the bond, even when the terms of the contract, in this case a "pay if paid" clause, have not been met.¹⁷

The National Association of Credit Management Improved Construction Practices Committee (NACM-ICPC) proposed this legislation and therefore is in support. NACM-ICPC believes this legislation will better protect subcontractors due to the additional time allowed to file notices. According to NACM-ICPC, if a subcontractor provides supplies and materials of a minimal amount, often the subcontractor does not submit an initial notice. Then, if the subcontractor is asked to provide additional materials or supplies in a massive order for the same project at a later time, the subcontractor does not have lien rights for he or she never filed the initial notice. With the revisions in this legislation, the subcontractor could still file a notice at the later day. In addition, NACM-ICPC proposed the repeal of Conditional Payment Bonds as an effort to protect subcontractors from nonpayment.¹⁸

The Florida Surety Association and the Associated Builders and Contractors support HB 613, except for the repeal of s. 713.245, F.S., outlining conditional payment bonds.¹⁹

The Underground Utility Contractors of Florida, the Mechanical Contractors of South Florida, the Southeast Glass Association, the Florida Solar Energy Industries Association,²⁰ and the Florida Home Builders Association²¹ support all aspects of HB 613.

There is language in HB 613 that is confusing and subject to varying interpretations. The bill states: "An owner is not entitled to a proper payment defense to the extent of improper payments made by the owner at any time during the project." It is unclear whether this language means that an owner is not allowed to use a proper payment defense if at any time improper payments are made, even if some proper payments are made; or if the owner is not allowed to use a proper payment defense for any improper payments made, and proper payments are recorded as properly paid.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 29, 2001, the Committee on State Administration heard HB 613 and adopted one amendment to this bill. The amendment:

¹⁷ Pursuant to position letter received from Allen Douglas, Executive Director of the Florida Associated General Contractors of America, on March 8, 2001 by facsimile transmission.

¹⁸ Pursuant to materials received from Deborah Lawson representing the NACM-ICPC, by facsimile transmission on March 6, 2001.

¹⁹ Pursuant to discussion with Rick Watson, representing the Florida Surety Association and the Associated Builders and Contractors, on March 6, 2001.

²⁰ Pursuant to multiple discussions with Bruce Kershner, representing the Underground Utility Contractors of Florida, the Mechanical Contractors of South Florida, the Southeast Glass Association, and the Florida Solar Energy Industries Association, beginning on March 6, 2001

²¹ Pursuant to telephone conversation with Wayne Bertsch, Political Director of Florida Home Builders Association, on March 6, 2001.

- Requires that a notice to owner served later than 45 days after first commencing to provide services or materials, the notice must be accompanied by a sworn statement of account for services and materials provided prior to the date of the notice.
- Changes the permissive form for a public construction bond, set forth at s. 255.05(3), F.S., to be a mandatory form.
- Provides that construction lien notices under ch. 713, F.S., can, in addition to being sent by certified or registered mail, be sent by overnight or second-day delivery service.
- Removes the change to s. 713.23, F.S., in the bill as filed, that would have required that a demand for payment, a condition precedent to collection on a payment bond, must include any finance charges due under the construction contract.
- Removes the repeal of s. 713.245, F.S., regarding conditional payment bonds. Additionally, requires that notice of the existence of a conditional payment bond must be listed in the notice of commencement, a conditional payment bond must be recorded with the notice of commencement, and the conditional payment bond must be titled as such in the title at the top of the first page of the bond.
- Amends the five year statute of limitations provisions of s. 95.11(2), F.S. (action on a contract), to specify that a suit on a payment bond is governed by the provisions of s. 255.05(2)(a)2., F.S. (one year limitation on action against bond on public buildings) and s. 713.23(1)(e), F.S. (one year limitation on action against private payment bond). The amendment further amends the one year statute of limitations provisions of s. 95.11(5)(e), F.S., which section specifically states that the statute of limitations on any action to recover under a construction payment bond, where a subcontractor is the principal, is one year; to add that s. 95.11(5)(e), F.S., is also applicable where the principal is a contractor.

The bill was then reported favorably, as amended.

On April 12, 2001, the Committee on Judicial Oversight adopted one "remove everything after the enacting clause" amendment, which amendment makes the following changes to the bill:

- Amends s. 20.165(7), F.S., to provide that the Department of Business and Professional Regulation may move the Construction Industry Licensing Board without being authorized to do so in the General Appropriations Act.
- Amends s. 95.11, F.S., to provide that the statute of limitations for an action against a construction payment bond is one year.
- Removes the provisions that would allow the filing of a notice to owner beyond 45 days.
- Removes provisions regarding the "proper payment defense".
- Adds a "temporary help firm" to the definitions of "subcontractor" and "sub-subcontractor".
- Amends s. 713.02, F.S., to provide that persons not required to hold a contractor's license may impose a construction lien.
- As to notices required under the construction lien law, adds authority to serve by private delivery service, and removes authority to serve by facsimile.

- Conditional payment bonds are not repealed. Clear notice of a conditional payment bond is required.

The bill was then reported favorably, as amended.

On April 18, 2001, the Council for Smarter Government heard HB 613 and adopted two amendments. The first amendment incorporates the language of HB 165 relating to unlicensed contracting. HB 165 provides for issuance of a notice of noncompliance, provides for the imposition of an administrative fine, provides for assessment of reasonable investigative and legal costs of prosecution for unlicensed contracting, and provides for uses of fine proceeds. HB 165 additionally requires the Department of Business and Professional Regulation to create a web page on its Internet website dedicated to listing known information on unlicensed contractors. Moreover, HB 165 provides that the remedies included in the bill are not exclusive.

The second amendment reinserts original statutory language regarding a notice of nonpayment. The strike-all amendment that was adopted by the Committee on Judicial Oversight, which is traveling with the bill, removed the mandatory 45-day waiting period that current laws requires before filing a notice of nonpayment. The second amendment reinserts this mandatory 45-day waiting period.

The bill, as amended, was reported favorably.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION

Prepared by:

Lauren Cyran

Staff Director:

J. Marleen Ahearn, Ph.D., J.D.

AS REVISED BY THE COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Nathan L. Bond, J.D.

Staff Director:

Lynne Overton, J.D.

AS FURTHER REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:

Lauren Cyran

Staff Director:

Don Rubottom