

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

**SPONSOR(S):** Commerce Committee, Civil Justice Subcommittee, Business & Professions Subcommittee, Toledo and others

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	10 Y, 1 N, As CS	Brackett	Anstead
2) Civil Justice Subcommittee	14 Y, 0 N, As CS	Mawn	Luczynski
3) Commerce Committee	21 Y, 0 N, As CS	Brackett	Hamon

### SUMMARY ANALYSIS

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

The bill:

- Provides that a person may not be required to sign a waiver or release of lien that is different from the form provided in statute in exchange for payment, except pursuant to contractual agreement;
- Prohibits any provisions in a waiver or release of lien that are not related to the waiver or release unless the person has agreed to those provisions in their initial contract.
- Provides that the statutory requirements for a waiver of a right to claim against a bond for private and public construction projects also apply to Department of Transportation construction projects.
- Provides that licensed building and general contractors who provide construction management services may record a construction lien.
- Clarifies that construction liens may be filed against a lease for private leaseholds on public property.
- Provides that a person may file one claim of lien for multiple contracts with the same owner.
- Provides that an owner may not record a notice of termination until each person who worked on the property has been paid.
- Provides that an owner must provide a copy of the notice of termination to a person who timely serves a notice to owner after the notice of termination has been recorded.
- Provides that a prevailing party is entitled to attorney's fees in actions to enforce liens transferred to securities.
- Removes the requirement that a notice of commencement must include:
  - The owner or lessee's interest in the property; and
  - A statement that an ownership interest is a leasehold interest if a lessee contracted for the work.
- Repeals the requirement that construction lien and bond documents must be posted on the construction jobsite if they cannot be served by hand delivery or mail.
- Provides that service of any construction lien document on one owner of property or on one partner of a partnership that owns a property is deemed service to all of the owners or partners.
- Clarifies that a notice of commencement and a notice of nonpayment may be notarized online.

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

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Construction Liens**

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

The construction lien law requires various notices, demands, and requests to be provided in writing to the homeowner, contractor, subcontractor, lender, and building officials. Florida law requires that some notices, demands, and requests be in the statutory form provided in statute, while others do not have to be in the statutory form. The following notices are required by the act: Notice of Commencement,<sup>2</sup> Notice to Owner,<sup>3</sup> Claim of Lien,<sup>4</sup> Notice of Termination,<sup>5</sup> Waiver or Release of Lien,<sup>6</sup> Notice of Contest of Lien,<sup>7</sup> Contractor's Final Payment Affidavit,<sup>8</sup> and Demands of Written Statement of Account.<sup>9</sup>

Under part I of chapter 713, F.S., a person who is not in privity or direct contract with the owner, such as subcontractors and material suppliers, who intends to secure the right to claim a lien against the property must take several additional steps. For example, if a payment bond does not apply, a services or materials provider must serve a notice to owner<sup>10</sup> (in the statutory form provided) that sets forth the person's name and address and the nature of the services or materials furnished or to be furnished to the owner's property.<sup>11</sup> The notice informs the owner of who is providing services or materials on their property, and that the person serving the notice is looking to the owner to ensure he or she receives payment for their services or materials.<sup>12</sup> The notice to owner must be served no later than 45 days after the person begins furnishing labor, services, or materials.<sup>13</sup>

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

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

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

<sup>2</sup> S. 713.06(2), F.S.; *MHB Construction Services, LLC v. RM-NA HB Waterway Shoppes, L.L.C.*, 74 So. 3d 587, 589 (Fla. 4th DCA 2011) ("Though the Notice of Commencement was originally required to trigger a commencement date from which to measure time limitations under the Mechanic's Lien Law, the information contained in the Notice of Commencement provides all the details necessary to complete a Notice to Owner.")

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

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

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

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

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

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

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

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

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

<sup>12</sup> *Stocking Building Supply of Florida, Inc. v. Soares Da Costa Construction Services, LLC*, 76 So. 3d 313, 319 (Fla 3d DCA 2011).

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

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

A payment bond is a type of bond that guarantees that a contractor will pay subcontractors, laborers, and material suppliers for their work.<sup>15</sup> It forms a three-part contract between the owner, the contractor, and the surety, and ensures that liens are not filed on the project. A payment bond for a construction project exempts the owner from the construction lien law because the surety insurer providing the bond guarantees the subcontractors, laborers, and material suppliers will receive payment for their work or materials. Current law requires contractors to obtain a payment bond for public projects over \$100,000.<sup>16</sup>

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

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

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

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

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

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

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

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

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

<sup>17</sup> S. 713.20, F.S.; Leonard Klingen, *Florida's unwieldy but effective construction lien law*, Florida Bar Journal (Jan./Feb. 2019), <https://www.floridabar.org/the-florida-bar-journal/floridas-unwieldy-but-effective-construction-lien-law/> (last visited Jan. 16, 2020).

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

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

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

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

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

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

<sup>24</sup> Alex Benarroche, *Florida's "Non-Required" Statutory Lien Waivers Can Lead to Confusion*, Levelset (May 20, 2019), <https://www.levelset.com/blog/florida-statutory-lien-waivers-lead-to-confusion/> (last visited Jan. 16, 2020); Craig Distel, *Understanding waivers and releases for Florida construction contractors*, (Dec. 20, 2018), <https://mcdonaldhopkins.com/Insights/Blog/Industry-Insights/2018/12/20/Understanding-waivers-and-releases-for-Florida-construction-contractors> (last visited Jan. 16, 2020).

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

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

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

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

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

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

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

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

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

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

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

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

For DOT construction or maintenance projects, the bill provides:

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

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

<sup>27</sup> Benarroche, *supra* note 23.

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

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

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

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

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

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

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

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

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

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

### *Construction Management Services - Current Law*

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

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

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

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

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

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

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

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

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

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

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

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

Section 255.103, F.S., also allows a local government to hire a program management entity. The program management entity is “responsible for schedule control, cost control, and coordination in providing or procuring planning, design, and construction services.”<sup>40</sup> Construction managers and program management entities hired by local governments are not required to be a licensed contractor, engineer, or architect. However, if such persons or entities are not licensed, they must hire a licensed professional to perform any job that does require a license.<sup>41</sup>

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

The construction lien law allows any person who provides services, labor, or materials for improving real property (except public property) to place a construction lien on the property.<sup>43</sup> However, it is unclear if construction managers may place a lien on a property because they do not necessarily provide labor, services, or materials that improves real property.<sup>44</sup> Some courts have determined that construction managers are not permitted to file such a lien.<sup>45</sup> The lien law also provides that a contractor may file a lien for any money owed to him or her for labor, services, or materials.<sup>46</sup> The construction lien law defines a “contractor” as any person other than materialmen or laborer who contracts with an owner to improve the owner’s real property. The definition also includes a licensed architect and engineer who improve real property through a design-build contract.<sup>47</sup> However, the contractor definition does not include construction manager services.<sup>48</sup>

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

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

The bill defines construction management services to mirror the definition of a construction management entity in s. 255.103, F.S., providing that such services include: “responsibility for scheduling and coordination in both preconstruction and construction phases and for the successful, timely, and economical completion of the construction project.”

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

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

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

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

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

<sup>44</sup> Scott Wolfe Jr., *Can Construction Managers File Mechanics Liens?* Levelset, (Jul. 19, 2019), <https://www.levelset.com/blog/can-construction-managers-file-mechanics-liens/> (last visited Jan. 16, 2020).

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

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

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

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

The bill also defines program management services to mirror the definition of a program management entity in s. 255.103, F.S., providing that such services include: “responsibility for scheduling control, cost control, and coordination in providing or procuring planning, design, and construction.”

#### *Construction Liens for Private Leasehold Interests in Public Property - Current Law*

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

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

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

#### *Construction Liens for Private Leasehold Interests in Public Property - Effect of the Bill*

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

#### *Claim of Lien - Current Law*

In order to record a construction lien on real property, a person must record a claim of lien with the clerk of court of the county where the property is located and serve the owner with the claim of lien. The person must serve the owner with the claim of lien before recording the lien or within 15 days of recording the lien.<sup>53</sup> If a claim of lien is not recorded, the lien is void to the extent that the failure or delay is shown to have prejudiced any person entitled to rely on service of the claim of lien.<sup>54</sup>

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

A person may record a single claim of lien for multiple services or materials that are provided to different lots, parcels, or tracts of land (properties) as long as the multiple services or materials are under the same contract, the contract is directly with the owner, and the properties have the same owner.<sup>56</sup> However, a person may not record a single claim of lien for multiple services or materials if there is more than one contract, even if the contracts for services and materials are with the same owner.<sup>57</sup>

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

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<sup>49</sup> Adam B. Edgecombe, *How do construction liens impact a commercial landlord in Florida?*, JimersonBirr (May 7, 2019), <https://www.jimersonfirm.com/blog/2019/05/how-construction-liens-impact-commercial-landlord/> (last visited Jan. 16, 2020).

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

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

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

<https://www.lorman.com/resources/property-interests-subject-to-construction-liens-in-florida-17322> (last visited Jan. 16, 2020); 8 Fla. Prac., Constr. Law Manual § 8.3 (2019-2020 ed.).

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

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

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

<sup>56</sup> S. 713.09, F.S.

<sup>57</sup> *Lee v. All Florida Construction Co.*, 662 So. 2d 365, 366-67 (Fla. 5th DCA 1995).

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

#### *Notice of Commencement - Current Law*

Before construction begins, a property owner or the owner's authorized agent generally must file a notice of commencement for recording by the clerk of court in the official records. The notice of commencement must also be posted on the construction site, and filed with the building department before the first inspection.<sup>58</sup> The notice of commencement determines the priority of construction liens, provides details needed to fill out a notice to owner, establishes the date on which the statute of limitations begins to run, and protects owners from double payments.<sup>59</sup>

Current law provides a statutory form for the notice of commencement, and the notice must be substantially similar to the form. The notice of commencement must contain information describing: the real property on which the improvement will be located; a general description of the improvement; the name and address of the owner and contractor; information relating to a surety bond, if a bond applies; the contact information for the lender for the project; contact information designated by the owner upon whom notices may be served; the notice's expiration date; a warning in all caps stating that the notice must be recorded and payments after the notice expires could be improper and lead to the owner paying twice.<sup>60</sup>

The owner's information required in the notice of commencement must include:<sup>61</sup>

- The name and address of the owner or lessee if the lessee contracted for the work;
- The owner or lessee's interest in the property;
- A statement that the ownership interest is a leasehold interest if a lessee contracted for the work;
- The name and address of the fee simple titleholder<sup>62</sup> (if different from the owner); and
- Any person designated by the owner to receive a claim of lien.

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

The bill repeals the requirement that the notice of commencement must include:

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

#### *Notice of Termination - Current Law*

Current law allows an owner to terminate a notice of commencement before it expires. In order to terminate a notice of commencement, an owner must record a notice of termination that includes:<sup>63</sup>

- All the information in the notice of commencement, including the reference numbers in the official records of the clerk of court and the date of the notice of commencement;
- The date which the notice of commencement is terminated, which may not be earlier than 30 days after the notice of termination is recorded;
- A statement that all persons who worked on the property have been paid in full; and

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<sup>58</sup> Ss. 713.13(1)(a), and 713.135(1)(d), F.S.

<sup>59</sup> *Stocking Building Supply of Florida, Inc.*, 76 So. 3d at 317; The Florida Senate Committee on Regulated Industries, *Review of the Florida Construction Lien Law*, November 2007, [http://archive.flsenate.gov/data/Publications/2008/Senate/reports/interim\\_reports/pdf/2008-149ri.pdf](http://archive.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-149ri.pdf) (last visited Jan. 16, 2020); Fred Dudley, William A. Buzzett, & Deborah Kaveney Kearney, *Construction Lien Law Reform: The Equilibrium of Change*, 18 Fla. St. U. L. Rev., 278 (1991).

<sup>60</sup> S. 713.13(1)(a), F.S.

<sup>61</sup> S. 713.13(1)(d), F.S.

<sup>62</sup> The construction lien law does not define fee simple titleholder; however, Black's Law Dictionary defines fee simple title as an interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs. Black's Law Dictionary (11th ed. 2019).

<sup>63</sup> S. 713.132(1), F.S.



- A statement that the owner has served a copy of the notice of termination to every person with a direct contract with the owner and every person who timely served a notice to owner and will serve a copy of the notice of termination on each lienor who timely serves a notice to owner after the notice of termination has been recorded.

An owner may record a notice of termination after:<sup>64</sup>

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

If the owner serves a copy of the notice of termination on every person with a direct contract with the owner and who served a notice to owner before the recording of the notice of termination, a notice of commencement will terminate 30 days after the notice of termination is recorded or on the termination date stated in the notice, whichever is later.<sup>65</sup>

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

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

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

The bill clarifies that the notice of termination must include the notice of commencement's date that was affixed by the clerk of court.

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

Documents permitted or required under the Construction Lien law, and notices to contractors for payment bonds for public construction projects must be served by one of the following methods:<sup>66</sup>

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

Service of a document by common carrier delivery service or by registered, Global Express Guaranteed, or certified mail is effective on the day the notice, claim, or waiver is mailed, if it is:<sup>67</sup>

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

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<sup>64</sup> S. 713.132(3), F.S.

<sup>65</sup> S. 713.132(4), F.S.

<sup>66</sup> S. 713.18(1), F.S.

<sup>67</sup> S. 713.18(3), F.S.

However, for construction projects where there is a payment bond, a notice to contractor is effective on the date of mailing if:<sup>68</sup>

- The notice is mailed by registered, Global Express Guaranteed, or certified mail, with postage prepaid, to the person to be served at the last address shown in the notice of commencement, the last address shown in the building permit application, or the last known address of the person being served;
- The notice is mailed within 40 days after the date the person first furnishes labor, services, or materials; and
- The person who served the notice maintains a registered or certified mail log that shows the mail number issued by the United States Postal Service (USPS), the name and address of the person served, and the date stamp of the USPS confirming the date of mailing; or maintains electronic tracking records generated by the USPS containing the tracking number, the name and address of the person served, and verification of the date of receipt by the USPS.

Current law also provides that service of a construction lien **notice** on one owner of a property or on one partner of a partnership that owns a property is deemed providing notice to all of the owners or partners.<sup>69</sup>

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

The bill:

- Repeals the requirement that documents under the construction lien law and notices to contractors for public construction projects must be posted on the construction jobsite if they cannot be served by **hand** delivery or mail.
- Clarifies that **actual** delivery to the person being served means **hand** delivery to the person being served.
- Provides that, in addition to notices to contractor, any document permitted or required for payment bonds for public construction projects must be served by one of the following methods:
  - By hand delivery to the person being served; or
  - By common carrier delivery service or by registered, Global Express Guaranteed, or certified mail, to the person being served with postage or shipping paid by the sender and with evidence of delivery.
- Provides that service by common carrier delivery service or by registered, Global Express Guaranteed, or certified mail is effective on the day the notice, claim, or waiver is mailed or **shipped**.
- Provides that a notice to owner for a construction project where there is no payment bond is effective on the date of mailing if the person serving it meets the same requirements for a notice to contractor.
- Clarifies that in order to be effective on the date of mailing, notices to contractor and notices to owner must be sent to:
  - The person's address listed on the notice of commencement;
  - The person's address listed on the building permit application if there is not a notice of commencement; or
  - The person's last known address if there is not a notice of commencement or building permit application.
- Provides that service of any construction lien **document**, in addition to notices, on one owner of a property or on one partner of a partnership that owns a property is deemed service to all of the owners or partners.

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

Since a payment bond exempts the owner from having construction liens placed on their real property, the surety guarantees a subcontractor, laborer, or material supplier that they will receive payment from the general contractor. If the general contractor fails to pay, the subcontractor, laborer, or material

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<sup>68</sup> S. 713.18, F.S.

<sup>69</sup> S. 713.18, F.S.

supplier will seek payment from the surety. In order to receive protection under a payment bond for a public or private project, a subcontractor, laborer, or material supplier lacking a direct contract with the contractor must provide a written notice of nonpayment to the contractor and the surety.<sup>70</sup>

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

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

#### *Online Notarization for Notices of Commencement and Notices of Nonpayment – Current Law*

Current law provides a statutory form for the notice of commencement and notices of nonpayment. The statutory forms require the notices to be signed in the presence of a notary.<sup>71</sup> A notary's function is to authenticate signatures and administer oaths on documents, thereby preventing fraud. The notary is responsible for determining that the person signing the document is who he or she states.<sup>72</sup>

In 2019, the Legislature passed a law creating online notaries. An online notary can perform an online notarization, regardless of the physical location of the principal at the time of the notarial act, provided the notary is physically located in Florida while performing the online notarization. The validity of an online notarization performed by an online notary is determined by Florida law, regardless of the physical location of the principal at the time of the notarial act.<sup>73</sup>

#### *Online Notarization for Notices of Commencement and Notices of Nonpayment – Effect of the Bill*

The bill amends the statutory forms for the notice of commencement and the notice of nonpayment to allow online notarization in addition to in person notarization.

#### *Attorney's Fees - Current Law*

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

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

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

## B. SECTION DIRECTORY:

**Section 1.** Amends s. 255.05, F.S., relating to bonds of contractor constructing public buildings; form; action by claimants.

**Section 2.** Amends s. 337.18, F.S., relating to surety bonds for construction or maintenance contracts; requirement with respect to contract award; bond requirements; defaults; damage assessments.

**Section 3.** Amends s. 713.01, F.S., relating to definitions.

**Section 4.** Amends s. 713.09, F.S., relating to single claim of lien.

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<sup>70</sup> Ss. 255.05(2), and 713.23(1)(d), F.S.

<sup>71</sup> Ss. 255.05(2), 713.13(1)(d), and 713.23(d), F.S.

<sup>72</sup> Florida Notary Association, Inc., Resources – How to Become a Notary, <https://www.flnotary.com/requirements/> (last visited Feb. 13, 2020).

<sup>73</sup> See part II of ch. 117, F.S.; House Analysis of 2019 House Bill 409 (Jun. 10, 2019).

**Section 5.** Amends s. 713.10, F.S., relating to extent of liens.

**Section 6.** Amends s. 713.13, F.S., relating to notice of commencement.

**Section 7.** Amends s. 713.132, F.S., relating to notice of termination.

**Section 8.** Amends s. 713.18, F.S., relating to manner of serving notices and other instruments.

**Section 9.** Amends s. 713.20, F.S., relating to waiver or release of liens.

**Section 10.** Amends s. 713.23, F.S., relating to payment bond.

**Section 11.** Amends s. 713.235, F.S., relating to waivers of right to claim against payment bond; forms.

**Section 12.** Amends s. 713.29, F.S., relating to attorney's fees.

**Section 13.** Provides an effective date of July 1, 2020.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

Unknown.

### **D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to effect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

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

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

On January 16, 2020, the Civil Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The committee substitute:

- Deletes a provision of the bill giving a construction lien priority over any subordinate liens relating back to a lien recorded before the construction lien attached.
- Clarifies that a recorded notice of termination must contain the recording date affixed by the recording office on the recorded notice of commencement.
- Clarifies that a notice of termination must be served on a lienor who timely and properly served a notice to owner before the recording of the notice of termination.
- Changes references from “property records” to “official records” and from “instruments” to “documents” for purposes of serving documents.
- Provides the permissible manners of service for notices related to:
  - Contest of claim against a payment bond;
  - Intent to look to the bond for protection; and
  - Performance of labor or materials delivery and nonpayment.
- Changes a permissible manner of document service from actual delivery to hand delivery for documents required under the construction lien and related statutes.

- Clarifies that when a person serves a document required under the construction lien law and related statutes by common carrier delivery service or other mail he or she must mail or serve the document to the address of the person being served.
- Provides that service of a notice to contractor combined with a notice to owner is effective as of the date of mailing.
- Provides that service of any construction lien document on one owner of a property or a partner of a partnership owning a property is deemed service to all of the owners or partners.

On February 13, 2020, the Commerce Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The committee substitute:

- Clarifies that the notice of commencement and the notice of nonpayment may be notarized by online notarization in addition to in person notarization.
- Clarifies that provisions governing the waivers of the right to claim against a bond for public and private contracts also apply to DOT contracts.
- Removes the bill's provision providing a final furnishing date for specifically fabricated materials.
- Removes from current law the requirement that construction lien or bond related notices and documents must be posted on the construction jobsite if they cannot be served by hand delivery or mail.
- Clarifies that in order to be effective on the date of mailing, a notice to owner and a notice to contractor must be served to a person by mail and must be sent to:
  - The person's address listed on the notice of commencement;
  - The person's address listed on the building permit application if there is not a notice of commencement; or
  - The person's last known address if there is not a notice of commencement or building permit application.
- Removes the bill's provision that allows a lien to be transferred to a payment bond obtained by a subcontractor if the person who filed the lien is working for the subcontractor.
- Removes the bill's provision that increases the amount needed to obtain a security in order to transfer a lien to the security.

The analysis is drafted to the committee substitute as passed by the Commerce Committee.