

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 Judiciary

BILL: CS/SB 868

INTRODUCER: Judiciary Committee and Senator Albritton

SUBJECT: Construction Contracting

DATE: February 4, 2020 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Cibula	JU	Fav/CS
2.			IT	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 868 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 laws provide several statutory forms for parties to a construction contract to use to waive or release their rights to record a lien or to 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 which are not related to the provisions of the statutory forms are unenforceable unless authorized by the claimant's direct contract.

A Notice of Commencement form is another form prescribed by the construction lien laws. The form identifies those responsible for a construction project. The bill revises the form to more clearly identify 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 laws. The revised procedures will permit the recommencement of a construction project while protecting the lien rights of those who previously performed work on the project.

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 permits a

person or subcontractor to record a single consolidated lien for amounts owed under multiple contracts for the same construction project.

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 and in s. 255.05, F.S., for public construction contracts.

These mechanisms to ensure payment 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.

Notice of Commencement: The Beginning of a Construction Project

A construction project generally begins with the posting of a "notice of commencement" on the job site and the recording of the notice in the court clerk's office.¹ 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 than the owner, the contractor, any lessees, the lender, and the surety.²

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.³ 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.⁴

A notice to owner informs the owner of a lienor's identity and work performed.⁵ Upon receipt of a notice to owner, 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:

¹ Section 713.13(1)(a), F.S.

² Section 713.13(1)(a) and (d), F.S.

³ Sections 255.05(2)(a)2., 713.06(2), and 713.23(1)(c), F.S.

⁴ *Id.*

⁵ Section 713.06(2)(c), F.S.

**TO AVOID A LIEN AND PAYING TWICE, YOU MUST OBTAIN A WRITTEN
RELEASE FROM US EVERY TIME YOU PAY YOUR CONTRACTOR.⁶**

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.⁷ 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.

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."⁸ 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."⁹

"[A] lienor who has not received payment for furnishing his or her labor, services, or materials must, as a condition precedent to recovery under the bond, serve a written notice of nonpayment to the contractor and the surety. The notice 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."¹⁰

Materials are furnished when they are incorporated into an improvement or delivered to the site of the improvement.¹¹ Additionally, specially fabricated materials¹² may be fabricated off site, and the materials may be installed by a person other than the fabricator.¹³ But the specially fabricated materials might not be installed or delivered to the job site for reasons other than the fault of the fabricator or installer. In these cases where there is no final furnishing or delivery, the statutes do not appear to establish a clear timeframe for a lienor to record a lien or serve a notice to contractor.

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

⁶ *Id.*

⁷ Sections 713.23(1)(a) and 255.05(2)(a)2., F.S.

⁸ Section 713.01(12), F.S.

⁹ Section 713.08(5), F.S.

¹⁰ Section 713.23(1)(d), F.S. With respect to notices of nonpayment for public construction projects, s. 255.05(2)(a)2., F.S., provides the same deadline.

¹¹ Section 713.01(13), F.S.

¹² Specially fabricated materials are materials that are "designed for a particular project" and "have no other useful purpose other than for that project." *Oolite Industries, Inc., v. Millman Const. Co., Inc.*, 501 So. 2d 655, 56 (Fla. 3d DCA 1987).

¹³ The definition of materialman in s. 713.01(20), F.S., includes a person who furnishes specially fabricated materials off the site of the improvement for installation in the improvement by another person.

payment bond in exchange for payments.¹⁴ The forms to waive or release a lien are shown below, but forms for payment bonds are essentially identical:

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.”¹⁵

¹⁴ Sections 713.20(4) and (5) and 713.235(1) and (2), F.S.

¹⁵ 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.¹⁶ 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.¹⁷

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.¹⁸

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.

An exception to the general rule on the priority of liens might result from the doctrine of equitable subrogation. If the doctrine of equitable subrogation applies, it allows a subsequently recorded lien to take priority over an earlier recorded lien.¹⁹ The doctrine of equitable subrogation can be generally defined as:

Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right. Subrogation arises by operation of law, where one having a liability or a right or a fiduciary relation in the premises pays a debt due by another under such circumstances that he is, in equity, entitled to the security or obligation held by the creditor whom he has paid.

Unfortunately, there is little information, including appellate court opinions, showing whether or the extent to which the doctrine of equitable subrogation can be successfully used to displace the priority of a recorded construction lien. However, materials provided by the proponents of the bill show that the doctrine has been an issue in trial court proceedings.

¹⁶ 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)).

¹⁷ Section 713.07(2), F.S.

¹⁸ Section 713.07(3), F.S.

¹⁹ *Velazquez v. Serrano*, 43 So. 3d 82 (Fla. 3d DCA 2010).

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.”²⁰ 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.”²¹ The law further provides that service of an instrument is generally effective on the “date of mailing.”²² 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.

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., and a related statute, as detailed below.

Form Waivers and Releases (Sections 1, 9, & 11)

Existing law provides forms for parties to a construction contract to use to waive and release a lien or to waive a claim against a payment bond. These statutory forms include an acknowledgment of payment for labor, services, or materials and a waiver or release of a lien or the waiver of the right to make a claim against the contractor’s 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 which differ from the provisions of the statutory forms are unenforceable unless the provisions are authorized under the lienor’s direct contract.

Notice of Commencement Form (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.

²⁰ 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.

²¹ Section 713.18(2)(a)(b), F.S.

²² Section 713.13(3)(a), F.S.

The bill makes changes to the form to more clearly identify the owner or lessee who is responsible for the project, and the form requires the inclusion of their phone numbers.

Notice of Termination (Section 7)

Under current law, when work on a construction project has stalled, construction sometimes cannot be recommenced until the time periods expire for those who worked on the project to submit lien notices. The amendment, by changing procedures relating to Notices of Termination, will allow a construction project to be recommenced while protecting the lien rights of those who previously performed work on the project.

Single Claim of Lien (Section 4)

A large construction project may result in a lienor receiving multiple contracts on the project. The amendment 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.

Revised Defined Terms (Section 3)

The bill revises the definition of "contractor" for purposes of the construction lien laws to include general contractors who perform construction management services.

The bill revises the definition of "real property" for purposes of the construction lien laws to include private leasehold interests in government owned property.

Serving Notices & Documents (Sections 1, 8, & 10)

Provisions of existing law 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. The bill provides that a lienor must only serve an original notice to contractor on the contractor, and the lienor must serve a copy of the notice on the surety.

Existing s. 713.18, F.S., which governs the effective date of documents served under the lien laws, can be read to have different meanings. The bill clarifies that documents served under the construction lien laws are effective on mailing or shipping if they are mailed or shipped by an authorized method.

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.

Contracts by the Department of Transportation (Section 2)

The bill expressly provides that construction contracts issued by the Department of Transportation are subject to s. 255.05, F.S., a statute regulating construction bonds for public construction projects.

Transfers of Liens to Security (Section 12)

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 (Sections 1, 6, & 10)

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.

The bill takes effect July 1, 2020.

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

This bill does not appear to be a mandate because it does not appear to require counties or municipalities to spend funds or limit their revenues.

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

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, 713.23, 713.235 and 713.29.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on February 4, 2020:

The committee substitute does not include provisions relating to the priority of liens and provisions relating to specially fabricated materials which were included in the original bill. The following changes to the construction lien laws which were not included in the original bill are included in the committee substitute:

- The statute relating to bonds for public contracts applies to contracts issued by the Department of Transportation.
- The terms “contractor” and “real property” for purposes of the construction lien laws are redefined.
- A lienor may record a single lien covering multiple direct contracts on the same construction project.
- A mobile home park is not subject to liens due to improvements made by a lessee.
- Online notarization may be used to notarize the notices required to be notarized under the construction lien laws.
- Procedural changes relating to Notices of Commencement will facilitate recommencement of stalled construction projects.
- Attorney fees remain available when enforcing a lien that is transferred to other security.

B. Amendments:

None.