

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

**SPONSOR(S):** Toledo and others

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee		Brackett	Anstead
2) Civil Justice Subcommittee			
3) Commerce Committee			

### SUMMARY ANALYSIS

A construction lien is designed to protect those who provide work or materials to improve property for a property owner that 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 they timely notify the property owner.

Under part I of chapter 713, F.S., a person who is not in direct contract with the owner, such as subcontractors and material suppliers, that intends to secure the right to claim a lien against the property must take several steps. If a payment bond does not apply, the first step is to serve a notice to owner setting 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. The notice to owner must be served no later than 45 days after the person begins furnishing labor, services, or materials.

Once the owner receives a notice to owner from a subcontractor or material supplier, the owner must obtain a waiver or release of lien from the subcontractor or material supplier before paying the contractor. Otherwise, a payment to the contractor may constitute an improper payment and the owner would be liable to the subcontractor or material supplier if he or she is not paid by the contractor.

The bill:

- Provides that any provision in a waiver or release of lien that is not related to the waiver or release of lien is not enforceable.
- Clarifies the definition of "final furnishing" related to specially fabricated materials.
- Provides that construction liens have priority over debts that are recorded after the construction lien is recorded, even if such debts relate back to a debt that was recorded before the construction lien attached pursuant to the operation of "any common law doctrine or remedy."
- Removes the requirement that a notice of commencement must include:
  - 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; and
  - The address of the fee simple titleholder if it is different from the owner.

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:

#### Present Situation

##### Background

Florida law ensures that people who work on construction projects can obtain payments 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>

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 steps. 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>

For example, if a payment bond does not apply, the person 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>

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

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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*, 76 So. 3d 313, 319.

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

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

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

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 of 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*

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.

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<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 Nov. 12, 2019).

<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> Levelset, *Florida's "Non-Required" Statutory Lien Waivers Can Lead to Confusion*, (May 20, 2019)

<https://www.levelset.com/blog/florida-statutory-lien-waivers-lead-to-confusion/> (last visited Dec. 6, 2019); 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 Dec. 6, 2019).

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 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.

#### *Priority of Construction Liens — Current Law*

Construction liens have priority over any conveyance, encumbrance, or demand (debt) not recorded against the real property prior to the time the lien attaches. Any debt recorded prior to the time the lien attaches and any proceeds thereof, regardless of when disbursed, have priority over construction liens.<sup>28</sup>

However, under the common law doctrine of subrogation, any debt that is recorded after the time a lien attaches will take priority over the lien if the debt was obtained to satisfy a previous debt that was recorded prior to the time the construction lien attaches.<sup>29</sup>

The doctrine of subrogation is the substitution of one party for another, where one party pays the debt of another party, entitling the paying party to rights, remedies, or securities (including priority) that would otherwise belong to the original debtor.<sup>30</sup> There are two types of subrogation: conventional and equitable.<sup>31</sup>

Conventional subrogation occurs when parties who have recorded debts against real property agree that a person who pays the debt of one of the parties will have the rights, remedies, and securities of that party.<sup>32</sup>

Equitable subrogation does not depend on a contract. It arises by operation of law to provide a remedy and prevent unjust enrichment.<sup>33</sup> Equitable subrogation applies when the person paying the debt or lien with higher priority: made the payment to protect his or her own interest; did not act as a volunteer; is not primarily liable for the debt her or she is paying; paid off the entire debt; and subrogating the person

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

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

<sup>27</sup> Levelset, *supra* note 24.

<sup>28</sup> S. 713.07(3), F.S.

<sup>29</sup> *Federal Land Bank of Columbia v. Godwin*, 107 Fla. 537, 549-551 (Fla. 1933); *Bankers Lending Company, LLC v. Angela Jackson*, 253 So. 3d 1174, 1177 (Fla. 5th DCA 2018).

<sup>30</sup> Black's Law Dictionary (11th ed. 2019).

<sup>31</sup> *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 646 (Fla. 1999).

<sup>32</sup> *Id.*

<sup>33</sup> *Federal Land Bank of Columbia v. Godwin*, 107 Fla. 537, 549-551 (Fla. 1933).

for the original debtor does not injustice the rights of another debt holder.<sup>34</sup> If a person meets the requirements of equitable subrogation then he or she will have the rights, remedies, and securities of the debt or lien he or she paid regardless if any other person with a debt or lien against the property agrees to it.<sup>35</sup>

#### *Priority of Construction Liens— Effect of the Bill*

The bill provides that construction liens have priority over any debt not recorded against the real property prior to the time the lien attaches, *including* any debt that relates back to a debt recorded before the construction lien is recorded “pursuant to the operation of any common law doctrine or remedy.”

#### *Final Furnishing of Materials & Specially Fabricated Materials— 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>36</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 been prejudicial to any person entitled to rely on service of the claim of lien.<sup>37</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>38</sup>

Current law provides that the final furnishing date is the last day the person furnishes labor, services, or materials. The date may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of final completion, and does not include correction of deficiencies in the person’s previously performed work or materials supplied. With respect to rental equipment, the term means the date that the rental equipment was last on the job site and available for use.<sup>39</sup>

Materials must be incorporated in the jobsite in order for the materials to be considered furnished. Current law provides that the delivery of materials to the jobsite is prima facie evidence that the materials have been incorporated into the jobsite.<sup>40</sup>

However, “specially fabricated materials” do not have to be incorporated into a jobsite in order for the materials to be considered furnished. Specially fabricated materials are materials made for a particular project and are not suited or readily adaptable for use in a different project.<sup>41</sup> Since specially fabricated materials cannot be used for another project, Florida courts have determined that specially fabricated materials do not have to be delivered to a jobsite in order for the supplier to file lien on the real property.<sup>42</sup> However, current law does not provide a date to determine the last day specially fabricated materials are furnished.

#### *Final Furnishing of Materials & Specially Fabricated Materials — Effect of the Bill*

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<sup>34</sup> *Bankers Lending Company, LLC v. Angela Jackson*, 253 So. 3d 1174, 1177 (Fla. 5th DCA 2018).

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

<sup>36</sup> S. 713.08, F.S.

<sup>37</sup> S. 713.08(4), F.S.

<sup>38</sup> S. 713.08(5), F.S.

<sup>39</sup> S. 713.01(12), F.S.

<sup>40</sup> S. 713.01(13), F.S.

<sup>41</sup> *Surf Properties v. Markowitz Bros.*, 75 So. 298, 302 (Fla. 1954).

<sup>42</sup> *Oolite Industries, Inc. v. Millman Construction Company, Inc.*, 501 So. 2d 655, 656 (Fla. 3rd DCA 1987); *Aquatic Plant Management, Inc. v. Paramount Engineering, Inc.*, 977 So. 2d 600, 603, (Fla. 4th DCA 2007).

The bill provides that the final furnishing date for specially fabricated materials is the date that the last portion of the specially fabricated materials is delivered to the jobsite, or if any portion of the specially fabricated materials is not delivered to the jobsite by no fault of the material supplier, the final furnishing date is the later of:

- One year after the date the material supplier completes the fabrication;
- One year after the date the material supplier receives the last portion of the specially fabricated materials needed to complete the order; or
- The date the notice of commencement expires.

#### *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>43</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>44</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>45</sup>

The owner’s information required in the notice of commencement must include:<sup>46</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>47</sup> (if different from the owner); and
- Any person designated by the owner to receive a claim of lien.

The construction lien law defines “owner” as a person who is the owner of any legal or equitable interest in real property, which interest can be sold by legal process, and who enters into a contract for the improvement of the real property.<sup>48</sup>

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

The bill repeals the requirement that the notice must include:

- 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; and

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<sup>43</sup> Ss. 713.13(1)(a), & 713.135(1)(d), F.S.

<sup>44</sup> *Stocking Building Supply of Florida, Inc. v. Soares Da Costa Construction Services, LLC*, 76 So. 3d 313, 317 (Fla 3rd DCA 2011); 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 Nov. 11, 2019); 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>45</sup> S. 713.13(1)(a), F.S.

<sup>46</sup> S. 713.13(1)(d), F.S.

<sup>47</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>48</sup> S. 713.01(23), F.S.

- The name and address of the fee simple titleholder if different from the owner.

The bill also provides that instead of the owner's information, the notice must include the name, address, and phone number of the "owner of record" for the property. The construction lien law does not currently use or define the term "owner of record."<sup>49</sup>

*Manner of Serving Documents — Current Law*

Notices, claims, and waivers must be served by one of the following methods:<sup>50</sup>

- By actual delivery to the person being served;
- 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; or
- By posting on the construction site if service cannot be performed by the other two methods.

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**, if it is:<sup>51</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.

*Manner of Serving Documents — Effect of the Bill*

The bill 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**.

*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 is the one who guarantees a subcontractor, laborer, or material supplies that they will receive payment from the general contractor. If the general contractor fails to do so then the subcontractor, laborer, or material 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 who does not have a direct contract with the contractor must provide a written notice of nonpayment to the contractor and the surety.<sup>52</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.

**B. SECTION DIRECTORY:**

- Section 1. Amends s. 255.05, F.S., relating to the notice of nonpayment and the waiver or release of claim against a payment bond for public projects.
- Section 2. Amends s. 713.01, F.S., relating to the final furnishing of specially fabricated materials.
- Section 3. Amends s. 713.07, F.S., relating to the priority of construction liens.

<sup>49</sup> See Ch. 713, F.S.

<sup>50</sup> S. 713.18(1), F.S.

<sup>51</sup> 713.18(3), F.S.

<sup>52</sup> Ss. 255.05(2), & 713.23(1)(d), F.S. F.S.

- Section 4. Amends s. 713.13, F.S., relating to the notice of commencement.
- Section 5. Amends s. 713.18, F.S., relating to the service of instruments.
- Section 6. Amends s. 713.20, F.S., relating to the waiver or release of construction liens.
- Section 7. Amends s. 713.23, F.S., relating to the notice of nonpayments.
- Section 8. Amends s. 713.235, F.S., relating to the waiver or release of claim against a payment bonds for private projects.
- Section 9. Providing 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:**

None.

#### **2. Other:**

None.

### **B. RULE-MAKING AUTHORITY:**

None.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides that construction liens have priority over any debt not recorded against the real property prior to the time the lien attaches, including any debt that relates back to a debt recorded before the construction lien is recorded pursuant to the operation of “any common law doctrine or remedy.” It is not clear exactly what “pursuant to the operation of any common law doctrine or remedy” means or how many common law doctrines or remedies exist. Thus, the effect of this provision is unknown.

The bill does not provide a definition for “owner of record,” and the construction lien law does not define the term. However, “owner of record” is defined in multiple places in current law with different interpretations of who is an owner of record. For example, s. 45.032(1)(a), F.S., defines “owner of record” as the person or persons who appear to be the owners of a property that is the subject of a foreclosure proceeding. Section 328.0015(1)(r), F.S., defines “owner of record” as the owner indicated in the Department of Highway Safety and Motor Vehicles. It is recommended that in order to prevent confusion the bill be amended to include a definition of “owner of record.”

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES