

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 345 Liens and Bonds

**SPONSOR(S):** Regulatory Reform Subcommittee, Civil Justice & Property Rights Subcommittee, Overdorf

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	17 Y, 0 N, As CS	Mawn	Jones
2) Regulatory Reform Subcommittee	16 Y, 0 N, As CS	Brackett	Anstead
3) Judiciary Committee			

### SUMMARY ANALYSIS

Persons who provide 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 in certain situations and they follow certain procedures set forth in ch. 713, F.S., Florida's construction lien law.

CS/HB 345:

- Modifies the notice of commencement, notice of termination, and notice of nonpayment forms.
- Allows licensed general or building contractors providing construction or program management services to claim construction liens for such services.
- Changes when a notice of termination must be recorded and served, and when such notice is effective.
- Modifies service requirements for documents required by the construction lien law.
- Authorizes a person intending to make a claim against a payment bond to serve the surety with a copy of the notice of nonpayment, instead of an original document.
- Specifies that the methods for discharging a lien may also be used to release a lien, in whole or in part, and modifies the requirements for recording a satisfaction or release of lien with the clerk's office.
- Modifies the amount of cash or bond necessary to deposit or file with the clerk's office to transfer a lien to a security and requirements related to the clerk's certificate of deposit or filing.
- Entitles the prevailing party in an action to enforce a lien transferred to a security to recover reasonable attorney fees.
- Specifies that after a clerk's office records a notice of dispute and certifies service of such notice, the clerk must serve a copy of the notice to the lienor and to the owner or the owner's attorney.
- Authorizes a building permit applicant to provide the issuing authority with the clerk's office official records identifying information in lieu of a certified copy of the notice or a notarized statement of filing.
- Provides a method for computing time periods for recording a document or filing an action under the construction lien law and tolls such time periods in specified emergency circumstances.
- Removes the ability of a contractor working on a public project to file certain alternative forms of security in lieu of the payment bond typically required.
- Repeals s. 713.25, F.S., relating to the applicability of ch. 65-456, F.S.
- Modifies the definitions of "clerk's office" and "final furnishing" and defines "finance charge" and "specially fabricated materials."

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

The bill provides an effective date of July 1, 2022.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

Florida law ensures that people working on construction projects are paid 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<sup>1</sup> on the property, provided the person complies with statutory procedures.<sup>2</sup> These procedures require the filing or serving of various documents, including a:

- Notice of Commencement;<sup>3</sup>
- Notice to Owner;<sup>4</sup>
- Claim of Lien;<sup>5</sup>
- Notice of Termination;<sup>6</sup>
- Waiver or Release of Lien;<sup>7</sup>
- Notice of Contest of Lien;<sup>8</sup>
- Contractor's Final Payment Affidavit;<sup>9</sup> and
- Demands of Written Statement of Account.<sup>10</sup>

To record a construction lien on real property, the lienor must record a claim of lien with the clerk's office in the county where the property is located and serve the owner with the claim of lien within 15 days of recording the lien.<sup>11</sup> If a claim of lien is not recorded, the lien is void to the extent that the failure to record the claim prejudices any person entitled to rely on service of the claim of lien.<sup>12</sup>

A person may file a claim of lien at any time during the progress of the work but may not file a claim of lien later than 90 days after the person's final furnishing of labor or materials.<sup>13</sup> A person may record a single claim of lien for multiple services or materials provided to different properties as long as such services or materials were provided under the same contract, the person is in privity with the owner, and the properties have the same owner.<sup>14</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>15</sup>

A construction lien extends to the right, title, and interest of the person who contracts for the improvement to the extent such right, title, and interest exists at the improvement's commencement or is acquired in the real property.<sup>16</sup> However, when a lessee makes an improvement under an agreement between the lessee and his or her lessor, the lien also extends to the lessor's interest unless:<sup>17</sup>

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<sup>1</sup> A lien is a claim against property that evidences a debt, obligation, or duty. Fla. Jur. 2d Liens § 37:1.

<sup>2</sup> Ch. 713, F.S.

<sup>3</sup> S. 713.13, F.S.

<sup>4</sup> To secure construction lien rights, a person working on a construction project who is not in direct contract ("privity") with the owner must serve a notice to owner in the statutory form provided; laborers are exempt from this requirement. The notice informs the owner that someone with whom he or she is not in privity is providing services or materials on the property and that such person expects the owner to ensure he or she is paid. The notice must be served no later than 45 days after the person begins furnishing services or materials and before the date the owner disburses the final payment after the contractor has furnished his or her final payment affidavit. After receiving a notice to owner, the owner must obtain a waiver or release of lien from the notice's sender before paying the contractor, unless a payment bond applies, or risk payments to the contractor constituting improper payments that leave the owner liable to the notice sender if the contractor does not pay such person. *Stocking Bldg. Supply of Florida, Inc. v. Soares Da Costa Construction Services, LLC*, 76 So. 3d 313 (Fla 3d DCA 2011); S. 713.06, F.S.

<sup>5</sup> S. 713.08, F.S.

<sup>6</sup> S. 713.132, F.S.

<sup>7</sup> S. 713.20, F.S.

<sup>8</sup> S. 713.22(2), F.S.

<sup>9</sup> S. 713.06(3), F.S.

<sup>10</sup> S. 713.16, F.S.

<sup>11</sup> S. 713.08, F.S.

<sup>12</sup> S. 713.08(4), F.S.

<sup>13</sup> S. 713.08(5), F.S.

<sup>14</sup> S. 713.09, F.S.

<sup>15</sup> *Id.*; see also *Lee v. All Florida Construction Co.*, 662 So. 2d 365, 366-67 (Fla. 5th DCA 1995).

<sup>16</sup> S. 713.10(1), F.S.

<sup>17</sup> *Id.*

- The lease is recorded in the official records of the county where the property is located before the recording of a notice of commencement for improvements to the property and the lease's terms expressly prohibit such liability;
- The lease's terms expressly prohibit such liability, and a notice advising that leases for the rental of premises on a property prohibit such liability has been recorded in the official records of the county in which the property is located before the recording of a notice of commencement for improvements to the premises and the notice includes specified information; or
- The lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park.<sup>18</sup>

If a lease expressly provides that the lessor's interest will not be subject to the construction liens relating to improvements made by the lessee, the lessee must notify the contractor making any such improvements of the provision, and the knowing and willful failure of the lessee to provide such notice renders the contract voidable at the contractor's option.<sup>19</sup>

## Notice of Commencement

### Background

Before construction begins, a private property owner or the owner's authorized agent must generally file a notice of commencement with the clerk's office<sup>20</sup> and post a copy of the notice on the property to be improved.<sup>21</sup> The notice of commencement determines the priority of construction liens, provides details needed to complete a notice to owner, establishes the date on which the statute of limitations begins to run, and protects owners from double payments.<sup>22</sup>

A notice of commencement must be substantially similar to the statutorily-authorized form and contain:

- Descriptions of the real property to be improved and the improvements;
- The name and address of the:
  - Owner, fee simple title holder (if not the owner),<sup>23</sup> contractor, and any person lending money for the project, along with a description of the owner's interest in the property;<sup>24</sup>
  - Surety<sup>25</sup> on a payment bond, if any, and the bond amount;
  - Persons, designated by the owner, upon whom notices may be served or who may receive a claim of lien;
- The notice's expiration date; and
- A warning in uppercase type that the notice must be recorded, and that payments made after the notice expires could be improper and lead to the owner paying twice.<sup>26</sup>

Further, a building permit applicant must generally file with the issuing authority, before the first inspection, either a certified copy of the recorded notice of commencement or a notarized statement that the notice was filed for recording, along with a copy of the notice.<sup>27</sup> If a certified copy of the notice of commencement is not filed with the issuing authority, the issuing authority may not perform or approve subsequent inspections until the applicant files the certified copy; however, the issuing

<sup>18</sup> S. 713.10(2)(b), F.S.

<sup>19</sup> S. 713.10(2)(a), F.S.

<sup>20</sup> "Clerk's office" means the office of the clerk of the circuit court of the county in which the real property is located. S. 713.01(4), F.S.

<sup>21</sup> A notice of commencement is not required for direct contracts for \$2500 or less or for air conditioning or heating system repair or replacement for less than \$7500. A notice of commencement is also not required for public construction projects because public property is not lienable. Ss. 713.01(26), 713.02(5), 713.13, and 713.135(1)(d), F.S.

<sup>22</sup> *Stocking Bldg. Supply*, So. 3d at 319; 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. 27, 2022); 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>23</sup> Fee simple title is 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>24</sup> A lessee may contract for improvements as an owner but must be listed as the owner in the notice of commencement. S. 713.13(1)(a)3., F.S.

<sup>25</sup> A surety guarantees the performance or obligations of a second party (the principal) to a third party (the obligee) under a three-party contract. National Association of Security Bond Providers, *What are Surety Bonds*, [https://www.nasbp.org/getabond/about-surety#:~:text=A%20surety%20bond%20is%20a,third%20party%20\(the%20obligee\)](https://www.nasbp.org/getabond/about-surety#:~:text=A%20surety%20bond%20is%20a,third%20party%20(the%20obligee)) (last visited Jan. 27, 2022).

<sup>26</sup> S. 713.13(1)(a)-(d), F.S.

<sup>27</sup> S. 713.135(1)(d), F.S.

authority is not liable in any civil action for failing to verify that the building permit applicant submitted a certified copy of the notice of commencement.<sup>28</sup>

### Effect of Proposed Changes

CS/HB 345 modifies the statutorily-provided notice of commencement form to reflect that the person signing the notice may use an online notary.<sup>29</sup> Additionally, the bill:

- Authorizes a building permit applicant to submit the clerk's office<sup>30</sup> official records identifying information for the recorded notice of commencement, including the instrument number, to the issuing authority in lieu of a certified copy of the notice or notarized statement of filing.
- Provides that the building permit issuing authority is not liable in any civil action for failing to verify that the building permit applicant submitted one of the acceptable forms of proof that the applicant filed a notice of commencement.

## **Payment Bonds**

### Background

A payment bond is a type of surety bond that generally guarantees that all subcontractors, laborers, and material suppliers will be paid for their work on or materials contributed to a construction project.<sup>31</sup> It forms a three-part contract between the owner, the contractor, and the surety to ensure that liens are not filed on the property, serving as the security for payment in lieu of the typical right to claim a lien. The payment bond must be furnished in at least the amount of the original contract price before beginning the construction project, and a copy of the bond must be attached to the recorded notice of commencement.<sup>32</sup>

For a private project, contractors are not obligated to obtain a payment bond, but current law requires contractors to obtain a payment bond for public projects over \$100,000.<sup>33</sup> However, in lieu of the payment bond, a contractor working on a public project may file with the state, county, city, or other political authority an alternative form of security in the form of cash, a money order, a certified check, a cashier's check, an irrevocable letter of credit, or a security of a type listed in part II of chapter 625, F.S., dealing with investments.<sup>34</sup>

Payment bonds may be unconditional or conditional. An unconditional payment bond obligates the surety to pay unpaid subcontractors, laborers, and material suppliers, regardless of whether the owner paid the contractor for the labor, services, or materials such persons provided. Thus, where an unconditional payment bond applies, the subject real property is exempt from constructions liens. In contrast, a conditional payment bond only obligates the surety to pay unpaid subcontractors, laborers, and material suppliers if the owner pays the contractor for the labor, services, or materials such persons provided; where the owner fails to pay the contractor, the unpaid subcontractors, laborers, and material suppliers must seek payment by claiming a lien on the subject property.<sup>35</sup> Thus, where a conditional payment bond applies, the subject real property is not necessarily exempt from constructions liens.

Before paying a subcontractor, laborer, or material supplier, a contractor may request that such person provide a waiver of right to claim against the payment bond. Such a waiver serves as a receipt

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<sup>28</sup> S. 713.135(1)(d) and (3), F.S.

<sup>29</sup> In 2019, the Legislature authorized the use of online notaries. An online notary may perform an online notarization, regardless of the physical location of the principal at the time of the notarial act, if the notary is physically located in Florida; and confirms that the principal desires for the notarial act to be performed by a Florida notary public under Florida law. Ch. 2019-71, Laws of Fla.; S. 117.265(3), F.S.

<sup>30</sup> The bill redefines "clerk's office" to mean the office of the clerk of the circuit court of the county, or another officer serving as the county recorder as provided by law, in which the real property is located.

<sup>31</sup> S. 713.23, F.S.

<sup>32</sup> S. 713.23(1)(a), F.S.

<sup>33</sup> S. 255.05(1)(d), F.S.

<sup>34</sup> S. 255.05(7), F.S.

<sup>35</sup> S. 713.245, F.S.

acknowledging payment for services performed or materials provided and waives the ability to seek payment from the surety.<sup>36</sup> Current law provides a statutory form for a waiver of right to claim against a payment bond and prohibits a contractor from requiring anyone to sign a waiver that is substantially different from the form.<sup>37</sup>

### Effect of Proposed Changes

The bill deletes a provision authorizing a contractor working on a public project to file alternative forms of security with the state, local government, or other political authority, including an irrevocable letter of credit or a security of the type listed in part II of chapter 625, F.S., in lieu of the payment bond typically required for a public project.

A contractor working on a public project may still file a money order, certified check, cashier's check, or cash with the state, county, city, or other political authority as an alternative form of security in lieu of obtaining a payment bond.

### **Transfer of Liens to Security**

#### Background

Any construction lien claimed may be transferred from the real property to a security by a person with an interest in the real property or the contract under which the lien is claimed by either depositing money or filing a bond with the clerk's office.<sup>38</sup> Cash deposited or a bond filed to transfer a lien must be in an amount equal to the amount demanded in the lien, plus interest thereon at the legal rate for three years, plus \$1,000 or 25 percent of the demanded amount, whichever is greater.<sup>39</sup> Once such a deposit is made, the clerk must record a certificate showing the transfer of the lien from the real property to the security, and upon the recording of such certificate, the real property is released from the lien, which is transferred to the security.<sup>40</sup>

However, any person having an interest in such security or the property from which the lien was transferred may file a complaint in the circuit court of the county where such security is deposited, or file a motion in a pending action to enforce a lien, for an order to require additional security, the reduction of security, a change or substitution of securities, the payment of discharge thereof, or any other matter affecting the security.<sup>41</sup>

### Effect of Proposed Changes

The bill increases the amount of the cash or bond required to be deposited or filed with the clerk's office to transfer a lien to a security. Specifically, the bill changes the amount required to the amount demanded in the lien, plus interest at the legal rate for three years, plus \$5,000 or 25 percent of the amount demanded in the lien, whichever is greater. Further, the bill requires that the clerk include a copy of the deposit or bond used for the transfer with the certificate made and recorded to show the lien's transfer.

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<sup>36</sup> Ss. 255.05(2), and 713.235, F.S.

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

<sup>38</sup> S. 713.24(1), F.S.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> S. 713.24(3), F.S.

# Licensed General and Building Contractors

## Background

Licensed construction contractors are either certified by or registered with the Construction Industry Licensing Board (“CILB”) within the Department of Business and Professional Regulation (“DBPR”). “Certified contractors” are persons who pass the state competency examination and obtain a certificate of competency issued by DBPR.<sup>42</sup> Certified contractors can contract in any jurisdiction in the state without fulfilling the local jurisdiction’s competency requirements.<sup>43</sup> “Registered contractors” are persons who have taken and passed a competency examination administered by a local government and who have then registered with DBPR.<sup>44</sup> Registered contractors can perform contracting only in the local jurisdiction where their license is issued.<sup>45</sup>

Contractors, whether certified or registered, may be general contractors or building contractors. A “general contractor” is a person who may contract for and perform any type of construction service unless the work must be subcontracted to a licensed subcontractor.<sup>46</sup> A “building contractor” is a person who may contract for and perform construction services for commercial and residential buildings not exceeding three stories in height, or for any size building if the construction does not affect the building’s structural frame, unless such work must be subcontracted to a licensed subcontractor.<sup>47</sup>

Current law allows a local government to hire a construction manager<sup>48</sup> and program manager<sup>49</sup> for its construction projects, and allows the state to hire a construction manager for state construction projects.<sup>50</sup> A construction or program manager hired by a local government is not required to be a licensed contractor, engineer, or architect, but if such person is not licensed, he or she must hire a licensed professional to perform any job requiring a license.<sup>51</sup> However, a construction manager hired by the state must be a licensed general or building contractor.<sup>52</sup>

Though 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>53</sup> it is unclear if construction or program managers may do so because they do not necessarily provide labor, services, or materials that improves real property.<sup>54</sup>

Further, the lien law provides that a contractor may file a lien for any money owed to him or her for labor, services, or materials<sup>55</sup> but defines a “contractor” as any person other than a materialman or laborer who contracts with an owner to improve the owner’s real property.<sup>56</sup> The definition also includes a licensed architect or engineer who improve real property through a design-build contract<sup>57</sup> but does not include a licensed general or building contractor providing construction or program manager

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<sup>42</sup> S. 489.105(8), F.S.

<sup>43</sup> *Id.*

<sup>44</sup> S. 489.105(10), F.S.

<sup>45</sup> S. 489.103, F.S.

<sup>46</sup> Ss. 489.105(3), and 489.113, F.S.

<sup>47</sup> *Id.*

<sup>48</sup> A construction manager is responsible for the overall management of a construction project. DBPR does not regulate construction managers. The Florida Bar, *Florida Construction Law Practice*, Chapter 4: Rights and Liabilities of Construction Managers (9th ed. 2018).

<sup>49</sup> A program manager is “responsible for schedule control, cost control, and coordination in providing or procuring planning, design, and construction services.” DBPR does not regulate program managers. S. 255.103(3), F.S.

<sup>50</sup> S. 255.32(2), F.S.

<sup>51</sup> *Id.*

<sup>52</sup> S. 255.32(1), F.S.

<sup>53</sup> See generally ch. 713, F.S.

<sup>54</sup> Scott Wolfe, Jr., *Can Construction Managers File Mechanics Liens?*, <https://www.levelset.com/blog/can-construction-managers-file-mechanics-liens/> (last visited Jan. 27, 2022).

<sup>55</sup> S. 713.05, F.S.

<sup>56</sup> S. 713.01(8), F.S.

<sup>57</sup> S. 713.01(8), F.S.

services.<sup>58</sup> Some courts have determined that persons serving as construction or program managers may not file construction liens, even where such persons are licensed contractors.<sup>59</sup>

### Effect of Proposed Changes

The bill amends the construction lien law's definition of "contractor" to include any licensed general or building contractor who provides construction or program management services.<sup>60</sup> This guarantees to licensed general and building contractors providing such services the ability to claim construction liens if they are not paid for their work.

### **Notice of Termination**

#### Background

An owner may terminate a notice of commencement before it expires by recording a notice of termination that includes:

- All the information in the notice of commencement;
- The notice of commencement's reference numbers from the official records of the clerk's office and effective date;
- The date 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
- A statement that the owner has served a copy of the notice of termination to the contractor and every person in privity with the owner who timely served a notice to owner.<sup>61</sup>

An owner may record a notice of termination after:

- Completion of the construction project; or
- Work stops on the project and every person who worked on the property has been paid.<sup>62</sup>

If the owner serves a copy of the notice of termination on every person in privity with the owner and who served a notice to owner before the recording of the notice of termination, a notice of commencement terminates 30 days after the notice of termination is recorded or on the termination date stated in the notice, whichever is later.<sup>63</sup>

### Effect of Proposed Changes

The bill:

- Requires an owner to serve a copy of the notice of termination on any lienor who timely serves a notice to owner after the notice of termination is recorded and to state in the notice of termination that he or she will do so.
- Deletes a provision allowing an owner to record a notice of termination after construction completion or when construction ceases before completion, requiring instead that such notice be recorded only after all lienors have been paid.
- Clarifies that the notice of termination must include the official records reference numbers and recording date affixed to the notice of commencement by the clerk's office.

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<sup>58</sup> *Id.*

<sup>59</sup> See, e.g., *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.'"); see also, e.g., *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 also The Florida Bar *supra* note 51.

<sup>60</sup> The bill specifies that construction management services include scheduling and coordinating both preconstruction and construction phases for the construction project. The bill also specifies that program management services include schedule control, cost control, and coordination in providing or procuring planning, design, and construction.

<sup>61</sup> S. 713.132(1), F.S.

<sup>62</sup> S. 713.132(3), F.S.

<sup>63</sup> S. 713.132(4), F.S.

The bill also requires that a notice of termination be served before recording on each lienor in privity with the owner and on each person who timely served a notice to owner before the recording of the notice of termination. The bill specifies that the notice of termination must be recorded in the official records of the county in which the improvement is located and, if properly served, the notice terminates the notice of commencement 30 days after the notice of termination is recorded.

However, a notice of commencement is not terminated as to any lienor not in privity with the owner who timely serves a notice to owner after the notice of termination is recorded until 30 days after such person is served with the notice of termination.

## **Manner of Serving Documents**

### Background

Documents authorized or required under the construction lien law, and notices to contractors for payment bonds for public construction projects, must be served by:

- Actual delivery to the person being served; if a partnership, to one partner; if a corporation, to an officer, director, managing agent, or business agent; or if a limited liability company, to a member or manager.
- 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
- Posting on the construction site if service cannot be performed by the other two methods.<sup>64</sup>

Service of a document by common carrier delivery service or by registered, Global Express Guaranteed, or certified mail is effective on the day the document is mailed, if it is:

- Sent to the last address shown in the notice of commencement or, in the absence of such 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.<sup>65</sup>

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

- 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
  - 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.<sup>66</sup>

Current law also provides that service of a construction lien notice on one property owner or on one partner of a partnership that owns a property is deemed to provide notice to all owners or partners.<sup>67</sup>

### Effect of Proposed Changes

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<sup>64</sup> S. 713.18(1), F.S.

<sup>65</sup> S. 713.18(3), F.S.

<sup>66</sup> S. 713.18(2), F.S.

<sup>67</sup> S. 713.18, F.S.



The bill:

- Clarifies that “actual delivery” of a notice means “hand delivery.”
- Provides that service by mail must be made to the person to be served.
- Clarifies that service of a notice sent through the mail is effective upon mailing or shipping.

Further, the bill modifies the requirement that, for service to be effective on the date of mailing, the person serving a notice to contractor where a payment bond applies must maintain electronic tracking records generated by the USPS, deleting the requirement that the records be electronic and specifying that they may be either generated or approved by the USPS. The bill also deletes the requirements that such tracking records contain the name and address of the person served.

## **Notice to Contractor and Notice of Nonpayment**

### Background

Under a payment bond, if the general contractor fails to pay a subcontractor, laborer, or material supplier, such person may seek payment directly from the surety. In order to receive protection under a payment bond for a project, a subcontractor or material supplier<sup>68</sup> not in privity with the contractor must serve the contractor with a written notice of intent to seek protection under the bond.<sup>69</sup> Such notice must be served no later than 45 days after the first furnishing of services or materials for the project.<sup>70</sup>

Additionally, a subcontractor, laborer, or material supplier not in privity with the contractor who has not received payment for furnishing labor, services, or materials must also serve a written notice of nonpayment on the contractor and the surety.<sup>71</sup> For a construction project on a public building or with the Department of Transportation, the claimant must serve the notice of nonpayment during the work’s progress but:

- No earlier than 45 days after the first furnishing of labor, services, or materials; or
- No later than 90 days after the final furnishing of labor, services, or materials.<sup>72</sup>

For a private construction project, the claimant must serve the notice of nonpayment after beginning his or her work but no later than 90 days after the final furnishing of labor, services, or materials.<sup>73</sup> Practically speaking, this means that, for a private construction project, a notice of nonpayment can be served on the claimant’s first day of work, before the claimant has billed for the work or a payment cycle has been completed.

### Effect of Proposed Changes

The bill:

- Modifies a notice of nonpayment to reflect that the person signing the notice may use an online notary.
- Specifies that a lienor must still provide a notice of nonpayment to the general contractor to receive protection under a payment bond but requires such person to only provide a copy of the notice to the surety.

The bill also defines:

- “Final furnishing,” with respect to specially fabricated materials, as the date that the last portion of the specially fabricated materials is delivered to the site of the improvement, or if any portion of the specially fabricated materials is not delivered to the site by no fault of the lienor, 90 days after the date the lienor completes the fabrication or 90 days before the expiration of the notice of commencement, whichever is earlier.

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<sup>68</sup> Laborers are exempt from this requirement. Ss. 255.05(2)(a)2., 337.18(1)(c), and 713.23(1)(c), F.S.

<sup>69</sup> *Id.*

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

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

<sup>72</sup> Ss. 255.05(2)(a)2. and 337.18(1)(c), F.S.

<sup>73</sup> S. 713.23(1)(d), F.S.

- “Specially fabricated materials” to mean materials designed and fabricated for use in a particular improvement that are not generally suited for or readily adaptable for use in a like improvement.

Further, the bill provides that, for a construction project on a public building, if the payment bond is not recorded before the commencement of work or before the recommencement of work after a default or abandonment if applicable, the claimant may serve the notice to contractor up to 45 days after the date he or she is served with a copy of the bond.

## **Duration of Lien**

### Background

An action to enforce a properly recorded construction lien must be brought within one year of recording or one year after the recording of an amended claim of lien showing a later final furnishing date, unless the owner of the subject property chooses to shorten the enforcement period by recording a notice of contest of lien in the clerk’s office.<sup>74</sup> After a notice of contest of lien is filed, the clerk’s office must serve a copy of the notice on the lienor at the address shown in the claim of lien, certify to such service and the date of service on the notice’s face, and record the notice.<sup>75</sup> The lien of any lienor served with a notice of contest of lien who fails to sue to enforce the lien within 60 days of service of the notice is automatically extinguished.<sup>76</sup>

### Effect of Proposed Changes

The bill specifies that after the clerk’s office records the notice of contest of lien with the certificate of service, the clerk must serve a copy of the recorded notice to the lienor and to the owner or the owner’s attorney.

## **Discharge of Liens**

### Background

A construction lien may be discharged by:

- Entering satisfaction of the lien on the margin of the lien document recorded with the clerk’s office, if allowed by law;
- Filing satisfaction with the clerk’s office;
- Failing to begin an action to enforce the lien within the statutorily-prescribed time frame;
- The circuit court of the county where the property is located issuing an order; or
- Recording in the clerk’s office a court judgment or decree showing the action’s final determination.<sup>77</sup>

### Effect of Proposed Changes

The bill provides that the methods specified for discharging a lien may also be used to release a lien, in whole or in part. The bill also specifies that, if a satisfaction or release is filed with the clerk’s office, the satisfaction or release must include the lienor’s notarized signature and the official reference numbers and recording date associated with the subject lien.

## **Attorney’s Fees and Costs**

### Background

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<sup>74</sup> S. 713.22(1) and (2), F.S.

<sup>75</sup> S. 713.22(2), F.S.

<sup>76</sup> *Id.*

<sup>77</sup> S. 713.21, F.S.

The prevailing party in an action to enforce a lien or a claim against a payment bond is entitled to recover his or her reasonable attorney fees and costs.<sup>78</sup>

### Effect of Proposed Changes

The bill provides that a prevailing party in an action to enforce a lien transferred to a security may recover his or her reasonable attorney fees in an amount to be determined by the court.

## **Computation of Time**

### Background

Florida's construction lien law establishes many timeframes for filing or serving notices and other documents but does not specify a method for computing such time periods. However, Florida courts have noted that "the uniform rule in computing time periods is that the first day of the period is excluded from the computation, and the last day is included."<sup>79</sup> Further, where a statute does not specify a method for computing time, Rule 2.514 of the Florida Rules of Judicial Administration applies, providing that, when a time period is stated in days or a longer temporal unit, the parties should:

- Begin counting from the next day that is not a Saturday, Sunday, or legal holiday;
- Count every day, including intermediate Saturdays, Sundays, and legal holidays; and
- Include the last day of the period, unless that day is a Saturday, Sunday, or legal holiday, or falls within any time period extended through an order of the chief justice, in which case the time period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday and does not fall within any time period extended through an order of the chief justice.

### Effect of Proposed Changes

The bill provides that, in computing any time period for recording a document or filing an action, if the last day of the time period is a Saturday, Sunday, legal holiday, or any day observed as a holiday by the clerk's office, the time period is extended to the end of the next business day. For computing any other time period under the construction lien law, if the last day of the time period is a Saturday, Sunday, or legal holiday, the time period is extended to the end of the next business day.

The bill also provides that:

- If the clerk's office is directed to close by a federal, state, or local government in response to a state of emergency declared under ch. 252, F.S., all time periods for recording a document or filing an action under the construction lien law are tolled until the first business day after the clerk's office reopens.
- A clerk's office is considered opened if it is recording or filing documents submitted electronically.

## **Finance Charges**

### Background

Chapter 713, F.S., does not define "finance charge," but uses the phrase "finance charges due under the lienor's contract" everywhere the phrase "finance charges" appears in the chapter. Thus, it can be inferred that the lienor's contract would define "finance charge" in the construction lien context.

### Effect of Proposed Changes

The bill defines "finance charge" as the contractually specified additional amount to be paid by the obligor on any balance that remains unpaid by the due date set forth in the credit agreement or other contract.

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<sup>78</sup> S. 713.29, F.S.

<sup>79</sup> *Site-Prep, Inc. v. Tai*, 472 So. 2d 766 (Fla. 5th DCA 1985), citing *McMillen v. Hamilton*, 48 So. 2d 162 (Fla. 1950).

## Applicability of Ch. 65-456, Laws of Florida

### Background

Section 713.25, F.S., provides that ch. 65-456, Laws of Florida, takes effect on July 1, 1965, but does not apply to any act required to be done within a time period which is running on that date or to existing projects where its operation would impair vested rights.

### Effect of Proposed Changes

The bill repeals s. 713.25, F.S., as it is outdated and no longer applicable.

### **Miscellaneous Provisions**

The bill makes technical, grammatical, and conforming changes.

The bill provides an effective date of July 1, 2022.

#### B. SECTION DIRECTORY:

- Section 1:** Amends s. 255.05, F.S., relating to bond 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:** Creates s. 713.011, F.S., relating to computation of time.
- Section 5:** Amends s. 713.10, F.S. relating to extent of lien.
- 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. 713.135, F.S., relating to notice of commencement and applicability of lien.
- Section 9:** Amends s. 713.18, F.S., relating to manner of serving notices and other instruments.
- Section 10:** Amends s. 713.21, F.S., relating to discharge of lien.
- Section 11:** Amends s. 713.22, F.S., relating to duration of lien.
- Section 12:** Amends s. 713.23, F.S., relating to payment bond.
- Section 13:** Amends s. 713.24, F.S., relating to transfer of liens to security.
- Section 14:** Repeals s. 713.25, F.S., relating to applicability of ch. 65-456.
- Section 15:** Amends s. 713.29, F.S., relating to attorney's fees.
- Section 16:** Amends s. 95.11, F.S., relating to limitations for actions other than for the recovery of real property.
- Section 17:** Provides an effective date of July 1, 2022.

## 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:

The bill may cause more subcontractors, laborers, and material suppliers to receive compensation for the labor, services, or materials they supply for construction projects, which may have a positive indeterminate impact on the private sector. However, the bill may have a negative indeterminate impact on the private sector by:

- Making it costlier to transfer a lien to a payment bond.
- Eliminating the option for a contractor working on a public project to provide certain alternative forms of security in lieu of a payment bond.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 27, 2022, the Civil Justice and Property Rights Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all:

- Modified the requirements for service of a notice to contractor if a payment bond is not recorded, specifying that the timeframe for such service is triggered if the payment bond is not recorded before the commencement of work or before the recommencement of work after a default or abandonment if applicable.
- Decreased the minimum timeframe for serving a notice of nonpayment on a public project or a project with the DOT from 45 days to 30 days.
- Deleted a provision specifying that provisions for the waiver of or right to claim against a payment bond apply to all contracts under s. 337.18, F.S., relating to contracts with the DOT.
- Modified the definition of “final furnishing” and “finance charge.”
- Defined “specially fabricated materials.”
- Narrowed the scope of the provisions for computing any time period to only apply to time periods for recording a document or filing an action under the construction lien law, modified what is considered a state of emergency under this section, and specified when the clerk’s office is considered closed.

- Deleted a provision authorizing a lienor to file a single claim of lien for multiple direct contracts under specified circumstances.
- Restored the notice of commencement form requirements to current law, with the exception of the new online notary provision.
- Modified the bond amount necessary to transfer a lien to a security from 50 percent of the amount demanded in the lien to \$5,000 or 25 percent of the amount demanded, whichever is greater.
- Restored language relating to conditional payment bonds that the bill would have repealed.
- Made technical and conforming changes.

On February 3, 2022, the Regulatory Reform Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all:

- Maintains current law regarding:
  - The timeframe for serving notice of nonpayment.
  - Contractors filing alternate forms of security.
- Clarified that a clerk of court must serve a notice of contest of lien to all relevant parties after the clerk has recorded the notice.
- Clarified that the time period to record or file a document under the construction lien law is tolled if the clerk's office is closed for a state of emergency.

This analysis is drafted to the committee substitute as passed by the Regulatory Reform Subcommittee.