

Committee Substitute for Senate Bill No. 1466

An act relating to liens; amending s. 255.05, F.S.; revising provisions pertaining to the bond of a contractor constructing public buildings; providing for revised time periods for certain claims; revising forms for waiver of right to claim against bond; providing for written statements to the contractor with respect to the nature of labor or services performed in certain circumstances; amending s. 713.01, F.S.; redefining amending s. 713.01, F.S.; redefining the terms “improve,” “improvement,” “subcontractor,” and “sub-subcontractor” to include reference to solid-waste removal; amending s. 713.06, F.S.; revising provisions relating to contractor’s affidavit; amending s. 713.132, F.S.; revising requirements pertaining to service of notice of termination; amending s. 713.18, F.S.; revising requirements pertaining to service of documents; amending s. 713.23, F.S.; amending the timeframe within which certain actions to enforce a claim against the payment bond may commence; providing a form; creating s. 713.235, F.S.; providing for waivers of right to claim against a payment bond; providing forms; amending s. 713.24, F.S.; revising the process for transferring liens to security; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (1) and paragraphs (a), (b), and (c) of subsection (2) of section 255.05, Florida Statutes, are amended, and subsection (8) is added to that section, to read:

255.05 Bond of contractor constructing public buildings; form; action by materialmen.—

(1)(a) Any person entering into a formal contract with the state or any county, city, or political subdivision thereof, or other public authority, for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work shall be required, before commencing the work or before recommencing the work after a default or abandonment, to execute, deliver to the public owner, and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer authorized to do business in this state as surety. The bond must state on its front page: the name, and principal business address, and phone number of the contractor, the surety, the owner of the property being improved, and, if different from the owner, the contracting public entity; the contract number assigned by the contracting public entity; and of both the principal and the surety and must contain a description of the project sufficient to identify it, including, if applicable, a legal description and the street address of the property being improved, and a general description of the improvement. Such bond shall be conditioned that the contractor perform the contract in the time and manner prescribed in the contract and promptly make payments to all persons defined in s. 713.01 whose claims derive directly or indirectly from the prosecu-

tion of the work provided for in the contract. Any claimant may apply to the governmental entity having charge of the work for copies of the contract and bond and shall thereupon be furnished with a certified copy of the contract and bond. The claimant shall have a right of action against the contractor and surety for the amount due him or her, including unpaid finance charges due under the claimant's contract. Such action shall not involve the public authority in any expense. When such work is done for the state and the contract is for \$100,000 or less, no payment and performance bond shall be required. At the discretion of the official or board awarding such contract when such work is done for any county, city, political subdivision, or public authority, any person entering into such a contract which is for \$200,000 or less may be exempted from executing the payment and performance bond. When such work is done for the state, the director of the Department of Management Services may delegate to state agencies the authority to exempt any person entering into such a contract amounting to more than \$100,000 but less than \$200,000 from executing the payment and performance bond. In the event such exemption is granted, the officer or officials shall not be personally liable to persons suffering loss because of granting such exemption. The Department of Management Services shall maintain information on the number of requests by state agencies for delegation of authority to waive the bond requirements by agency and project number and whether any request for delegation was denied and the justification for the denial.

(2)(a)1. If a claimant is no longer furnishing labor, services, or materials on a project, a contractor or the contractor's agent or attorney may elect to shorten the prescribed time in this paragraph within which an action to enforce any claim against a payment bond provided pursuant to this section may be commenced by recording in the clerk's office a notice in substantially the following form:

NOTICE OF CONTEST OF CLAIM AGAINST PAYMENT BOND

To: ...~~(Name and address of claimant)~~...

You are notified that the undersigned contests your notice of nonpayment, dated,, and served on the undersigned on,, and that the time within which you may file suit to enforce your claim is limited to 60 days after the date of service of this notice.

DATED on,

Signed:...(Contractor or Attorney)...

The claim of any claimant upon whom such notice is served and who fails to institute a suit to enforce his or her claim against the payment bond within 60 days after service of such notice shall be extinguished automatically. The clerk shall mail a copy of the notice of contest to the claimant at the address shown in the notice of nonpayment or most recent amendment thereto and shall certify to such service on the face of such notice and record the notice. Service is complete upon mailing.

2. A claimant, except a laborer, who is not in privity with the contractor shall, before commencing or not later than 45 days after commencing to

furnish labor, materials, or supplies for the prosecution of the work, furnish the contractor with a notice that he or she intends to look to the bond for protection. A claimant who is not in privity with the contractor and who has not received payment for his or her labor, materials, or supplies shall deliver to the contractor and to the surety written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment. The notice of nonpayment may be served at any time during the progress of the work or thereafter but not before 45 days after the first furnishing of labor, services, or materials, and not later than 90 days after the final furnishing of the labor, services, or materials by the claimant or, with respect to rental equipment, not later than 90 days after the date that the rental equipment was last on the job site available for use. No action for the labor, materials, or supplies may be instituted against the contractor or the surety unless both notices have been given. An ~~No~~ action, except for an action exclusively for recovery of retainage, must ~~shall~~ be instituted against the contractor or the surety on the payment bond or the payment provisions of a combined payment and performance bond ~~within~~ ~~after~~ 1 year ~~after~~ ~~from~~ the performance of the labor or completion of delivery of the materials or supplies. An action exclusively for recovery of retainage must be instituted against the contractor or the surety within 1 year after the performance of the labor or completion of delivery of the materials or supplies, or within 90 days after the contractor's receipt of final payment (or the payment estimate containing the owner's final reconciliation of quantities if no further payment is earned and due as a result of deductive adjustments) by the contractor or surety, whichever comes last. A claimant may not waive in advance his or her right to bring an action under the bond against the surety. In any action brought to enforce a claim against a payment bond under this section, the prevailing party is entitled to recover a reasonable fee for the services of his or her attorney for trial and appeal or for arbitration, in an amount to be determined by the court, which fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions.

(b) When a person is required to execute a waiver of his or her right to make a claim against the payment bond in exchange for, or to induce payment of, a progress payment, the waiver may be in substantially the following form:

WAIVER OF RIGHT TO CLAIM
AGAINST THE PAYMENT BOND
(PROGRESS PAYMENT)

The undersigned, in consideration of the sum of \$...., hereby waives its right to claim against the payment bond 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)...., for improvements to the following described project:

(description of project)

This waiver does not cover any retention or any labor, services, or materials furnished after the date specified.

DATED ON, 19....

...(Claimant)...
By:.....

(c) When a person is required to execute a waiver of his or her right to make a claim against the payment bond, in exchange for, or to induce payment of, the final payment, the waiver may be in substantially the following form:

WAIVER OF RIGHT TO CLAIM
AGAINST THE PAYMENT BOND (FINAL PAYMENT)

The undersigned, in consideration of the final payment in the amount of \$...., hereby waives its right to claim against the payment bond for labor, services, or materials furnished to ...(insert the name of your customer)... on the job of ...(insert the name of the owner)...., for improvements to the following described project:

(description of project)

DATED ON, 19....

...(Claimant)...
By:.....

(8) When a contractor has furnished a payment bond pursuant to this section, he or she may, when the state, county, municipality, political subdivision, or other public authority makes any payment to the contractor or directly to a claimant, serve a written demand on any claimant who is not in privity with the contractor for a written statement under oath of his or her account showing the nature of the labor or services performed and to be performed, if any; the materials furnished; the materials to be furnished, if known; the amount paid on account to date; the amount due; and the amount to become due, if known, as of the date of the statement by the claimant. Any such demand to a claimant who is not in privity with the contractor must be served on the claimant at the address and to the attention of any person who is designated to receive the demand in the notice to contractor served by the claimant. The failure or refusal to furnish the statement does not deprive the claimant of his or her rights under the bond if the demand is not served at the address of the claimant or directed to the attention of the person designated to receive the demand in the notice to contractor. The failure to furnish the statement within 30 days after the demand, or the furnishing of a false or fraudulent statement, deprives the claimant who fails to furnish the statement, or who furnishes the false or fraudulent statement, of his or her rights under the bond. If the contractor serves more than one demand for statement of account on a claimant and none of the information regarding the account has changed since the claimants last response to a demand, the failure or refusal to furnish such statement does not deprive the claimant of his or her rights under the bond. The negligent inclusion or omission of any information deprives the claimant of his or her rights under the bond to the extent that the contractor can demonstrate prejudice from such act or omission by the claimant. The failure to furnish a response to a demand for statement of account does not affect the validity of any claim on the bond being enforced in a lawsuit filed before the date the demand for statement of account is received by the claimant.

Section 2. Subsections (12), (13), (26), and (27) of section 713.01, Florida Statutes, are amended to read:

713.01 Definitions.—As used in this part, the term:

(12) “Improve” means build, erect, place, make, alter, remove, repair, or demolish any improvement over, upon, connected with, or beneath the surface of real property, or excavate any land, or furnish materials for any of these purposes, or perform any labor or services upon the improvements, including the furnishing of carpet or rugs or appliances that are permanently affixed to the real property and final construction cleanup to prepare a structure for occupancy; or perform any labor or services or furnish any materials in grading, seeding, sodding, or planting for landscaping purposes, including the furnishing of trees, shrubs, bushes, or plants that are planted on the real property, or in equipping any improvement with fixtures or permanent apparatus or provide any solid-waste collection or disposal on the site of the improvement.

(13) “Improvement” means any building, structure, construction, demolition, excavation, solid-waste removal, landscaping, or any part thereof existing, built, erected, placed, made, or done on land or other real property for its permanent benefit.

(26) “Subcontractor” means a person other than a materialman or laborer who enters into a contract with a contractor for the performance of any part of such contractor’s contract, including the removal of solid waste from the real property.

(27) “Sub-subcontractor” means a person other than a materialman or laborer who enters into a contract with a subcontractor for the performance of any part of such subcontractor’s contract, including the removal of solid waste from the real property.

Section 3. Paragraph (a) of subsection (2), and paragraph (d) of subsection (3) of section 713.06, Florida Statutes, are amended to read:

713.06 Liens of persons not in privity; proper payments.—

(2)(a) All lienors under this section, except laborers, as a prerequisite to perfecting a lien under this chapter and recording a claim of lien, must serve a notice on the owner setting forth the lienor’s name and address, a description sufficient for identification of the real property, and the nature of the services or materials furnished or to be furnished. A sub-subcontractor or a materialman to a subcontractor must serve a copy of the notice on the contractor as a prerequisite to perfecting a lien under this chapter and recording a claim of lien. A materialman to a sub-subcontractor must serve a copy of the notice to owner on the contractor as a prerequisite to perfecting a lien under this chapter and recording a claim of lien. A materialman to a sub-subcontractor shall serve the notice to owner on the subcontractor if the materialman knows the name and address of the subcontractor. The notice must be served before commencing, or not later than 45 days after commencing, to furnish his or her labor, services, or materials, but, in any event, before the date of the owner’s disbursement of the final payment after the

contractor has furnished the affidavit under subparagraph (3)(d)1. The notice must be served regardless of the method of payments by the owner, whether proper or improper, and does not give to the lienor serving the notice any priority over other lienors in the same category; and the failure to serve the notice, or to timely serve it, is a complete defense to enforcement of a lien by any person. The serving of the notice does not dispense with recording the claim of lien. The notice is not a lien, cloud, or encumbrance on the real property nor actual or constructive notice of any of them.

(3) The owner may make proper payments on the direct contract as to lienors under this section, in the following manner:

(d) When the final payment under a direct contract becomes due the contractor:

1. The contractor shall give to the owner an affidavit stating, if that be the fact, that all lienors under his or her direct contract who have timely served a notice to owner on the owner and the contractor have been paid in full or, if the fact be otherwise, showing the name of each such lienor who has not been paid in full and the amount due or to become due each for labor, services, or materials furnished. The contractor shall have no lien or right of action against the owner for labor, services, or materials furnished under the direct contract while in default for not giving the owner the affidavit; however, the negligent inclusion or omission of any information in the affidavit which has not prejudiced the owner does not constitute a default that operates to defeat an otherwise valid lien. The contractor shall execute the affidavit and deliver it to the owner at least 5 days before instituting an action as a prerequisite to the institution of any action to enforce his or her lien under this chapter, even if the final payment has not become due because the contract is terminated for a reason other than completion and regardless of whether the contractor has any lienors working under him or her or not.

2. If the contractor's affidavit required in this subsection recites any outstanding bills for labor, services, or materials, the owner may, after giving the contractor at least 10 days' written notice, pay such bills in full direct to the person or firm to which they are due, if the balance due on a direct contract at the time the affidavit is given is sufficient to pay them and lienors giving notice, and shall deduct the amounts so paid from the balance due the contractor. Lienors listed in said affidavit not giving notice, whose 45-day notice time has not expired, shall be paid in full or pro rata, as appropriate, from any balance then remaining due the contractor; but no lienor whose notice time has expired shall be paid by the owner or by any other person except the person with whom that lienor has a contract.

3. If the balance due is not sufficient to pay in full all lienors listed in the affidavit and entitled to payment from the owner under this part and other lienors giving notice, the owner shall pay no money to anyone until such time as the contractor has furnished him or her with the difference; however, if the contractor fails to furnish the difference within 10 days from delivery of the affidavit or notice from the owner to the contractor to furnish the affidavit, the owner shall determine the amount due each lienor and

shall disburse to them the amounts due from him or her on a direct contract in accordance with the procedure established by subsection (4).

4. The owner shall have the right to rely on the contractor's affidavit given under this paragraph in making the final payment, unless there are lienors giving notice who are not listed in the affidavit. If there are lienors giving notice who are not so listed, the owner may pay such lienors and any persons listed in the affidavit that are entitled to be paid by the owner under subparagraph (d)2. and shall thereupon be discharged of any further responsibility under the direct contract, except for any balance that may be due to the contractor.

5. The owner shall retain the final payment due under the direct contract that shall not be disbursed until the contractor's affidavit under subparagraph (d)1. has been furnished to the owner.

6. When final payment has become due to the contractor and the owner fails to withhold as required by subparagraph (d)5., the property improved shall be subject to the full amount of all valid liens of which the owner has notice at the time the contractor furnishes his or her affidavit.

Section 4. Subsection (1) of section 713.132, Florida Statutes, is amended to read:

713.132 Notice of termination.—

(1) An owner may terminate the period of effectiveness of a notice of commencement by executing, swearing to, and recording a notice of termination that contains:

- (a) The same information as the notice of commencement;
- (b) The recording office document book and page reference numbers and date of the notice of commencement;
- (c) A statement of the date as of which the notice of commencement is terminated, which date may not be earlier than 30 days after the notice of termination is recorded;
- (d) A statement specifying that the notice applies to all the real property subject to the notice of commencement or specifying the portion of such real property to which it applies;
- (e) A statement that all lienors have been paid in full; and
- (f) A statement that the owner has, before recording the notice of termination, served a copy of the notice of termination on the contractor and on each lienor who has given notice. The owner is not required to serve a copy of the notice of termination on any lienor who has executed a waiver and release of lien upon final payment in accordance with s. 713.20.

Section 5. Section 713.18, Florida Statutes, is amended to read:

713.18 Manner of serving notices and other instruments.—

(1) Service of notices, claims of lien, affidavits, assignments, and other instruments permitted or required under this part, or copies thereof when so permitted or required, unless otherwise specifically provided in this part, must be made by one of the following methods:

(a) By actual delivery to the person to be served; or, if a partnership, to one of the partners; or, if a corporation, to an officer, director, managing agent, or business agent thereof.

(b) By mailing the same, postage prepaid, by registered or certified mail to the person to be served at her or his last known address and evidence of delivery. If a notice to owner is mailed pursuant to this paragraph within 40 days after the date the lienor first furnishes labor, services, or materials, service of that notice is effective as of the date of mailing if the person who served the notice maintains a registered or certified mail log that shows the date the notice was served, the registered or certified mail number issued by the United States Postal Service, the name and address of the person served, and the date stamp of the United States Postal Service confirming the date of mailing. If an instrument served pursuant to this paragraph by this method to the last address shown in the notice of commencement or any amendment thereto or, in the absence of a notice of commencement, to the last address shown in the building permit application is not received, but is returned by the United States Postal Service as being “refused,” “moved, not forwardable,” or “unclaimed,” or is otherwise not delivered or deliverable through no fault of the person serving the item, then service is effective as of the date of mailing.

(c) If neither of the foregoing methods can be accomplished, by posting on the premises.

(2) If the real property is owned by more than one person, a lienor may serve any notices or other papers under this part on any one of such owners, and such notice is deemed notice to all owners.

(3) Service of notices or copies thereof, permitted or required under this part, may be made by facsimile transmission when the person being served has listed that person’s facsimile phone number in the Notice of Commencement. ~~The owner must be served with the Notice to Owner in the manner specified in subsection (2) of this section.~~ The lienor’s facsimile confirmation sheet with the correct facsimile phone number shall be proof of the date and time the notice was served.

Section 6. Paragraph (e) of subsection (1) of section 713.23, Florida Statutes, is amended to read:

713.23 Payment bond.—

(1)

(e) No action for the labor or materials or supplies may be instituted or prosecuted against the contractor or surety unless both notices have been given. No action shall be instituted or prosecuted against the contractor or against the surety on the bond under this section after 1 year from the

performance of the labor or completion of delivery of the materials and supplies. A contractor or the contractor’s agent or attorney may elect to shorten the prescribed time within which an action to enforce any claim against a payment bond provided pursuant to this section or s. 713.245 may be commenced by recording in the clerk’s office a notice in substantially the following form:

NOTICE OF CONTEST OF CLAIM AGAINST PAYMENT BOND

To: ...(Name and address of lienor)...

You are notified that the undersigned contests your notice of nonpayment, dated,, and served on the undersigned on,, and that the time within which you may file suit to enforce your claim is limited to 60 days from the date of service of this notice.

DATED on,

Signed: ...(Contractor or Attorney)...

The claim of any lienor upon whom such notice is served and who fails to institute a suit to enforce his or her claim against the payment bond within 60 days after service of such notice shall be extinguished automatically. The clerk shall mail a copy of the notice of contest to the lienor at the address shown in the notice of nonpayment or most recent amendment thereto and shall certify to such service on the face of such notice and record the notice. Service is complete upon mailing.

Section 7. Section 713.235, Florida Statutes, is created to read:

713.235 Waivers of right to claim against payment bond; forms.—

(1) When a person is required to execute a waiver of his or her right to make a claim against a payment bond provided pursuant to s. 713.23 or s. 713.245, in exchange for, or to induce payment of, a progress payment, the waiver may be in substantially the following form:

WAIVER OF RIGHT TO CLAIM
AGAINST THE PAYMENT BOND
(PROGRESS PAYMENT)

The undersigned, in consideration of the sum of \$..... hereby waives its right to claim against the payment bond 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)...., for improvements to the following described project:

(description of project)

This waiver does not cover any retention or any labor, services, or materials furnished after the date specified.

DATED on

...(Lienor)...

By:.....

(2) When a person is required to execute a waiver of his or her right to make a claim against a payment bond provided pursuant to s. 713.23 or s. 713.245, in exchange for, or to induce payment of, the final payment, the waiver may be in substantially the following form:

WAIVER OF RIGHT TO CLAIM
AGAINST THE PAYMENT BOND (FINAL PAYMENT)

The undersigned, in consideration of the final payment in the amount of \$....., hereby waives its right to claim against the payment bond for labor, services, or materials furnished to ...(insert the name of your customer)... on the job of ...(insert the name of the owner)..., for improvements to the following described project:

(description of project)

DATED on

...(Lienor)...
By:.....

(3) A person may not require a claimant to furnish a waiver that is different from the forms in subsections (1) and (2).

(4) A person who executes a waiver in exchange for a check may condition the waiver on payment of the check.

(5) A waiver that is not substantially similar to the forms in this section is enforceable in accordance with its terms.

Section 8. Section 713.24, Florida Statutes, is amended to read:

713.24 Transfer of liens to security.—

(1) Any lien claimed under this part may be transferred, by any person having an interest in the real property upon which the lien is imposed or the contract under which the lien is claimed, from such real property to other security by either:

(a) Depositing in the clerk's office a sum of money, or

(b) Filing in the clerk's office a bond executed as surety by a surety insurer licensed to do business in this state,

either to be in an amount equal to the amount demanded in such claim of lien, plus interest thereon at the legal rate for 3 years, plus \$1,000 or 25 percent of the amount demanded in the claim of lien, whichever is greater, \$500 to apply on any attorney's fees and court costs that which may be taxed in any proceeding to enforce said lien. Such deposit or bond shall be conditioned to pay any judgment or decree which may be rendered for the satisfaction of the lien for which such claim of lien was recorded. Upon making such deposit or filing such bond, the clerk shall make and record a certificate showing the transfer of the lien from the real property to the security and shall mail a copy thereof by registered or certified mail to the lienor named

in the claim of lien so transferred, at the address stated therein. Upon filing the certificate of transfer, the real property shall thereupon be released from the lien claimed, and such lien shall be transferred to said security. In the absence of allegations of privity between the lienor and the owner, and subject to any order of the court increasing the amount required for the lien transfer deposit or bond, no other judgment or decree to pay money may be entered by the court against the owner. The clerk shall be entitled to a fee for making and serving the certificate, in the sum of \$10. If the transaction involves the transfer of multiple liens, an additional charge of \$5 for each additional lien shall be charged. For recording the certificate and approving the bond, the clerk shall receive her or his usual statutory service charges as prescribed in s. 28.24. Any number of liens may be transferred to one such security.

(2) Any excess of the security over the aggregate amount of any judgments or decrees rendered plus costs actually taxed shall be repaid to the party filing the same or her or his successor in interest. Any deposit of money shall be considered as paid into court and shall be subject to the provisions of law relative to payments of money into court and the disposition of same.

(3) Any party having an interest in such security or the property from which the lien was transferred may at any time, and any number of times, file a complaint in chancery 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, reduction of security, change or substitution of sureties, payment of discharge thereof, or any other matter affecting said security. If the court finds that the amount of the deposit or bond in excess of the amount claimed in the claim of lien is insufficient to pay the lienor's attorney's fees and court costs incurred in the action to enforce the lien, the court must increase the amount of the cash deposit or lien transfer bond.

(4) ~~If a proceeding to enforce a transferred lien is not shall be commenced within the time specified in s. 713.22 or if it appears that the transferred lien has been satisfied of record, the clerk shall return said security upon request of the person depositing or filing the same, or the insurer.~~

Section 9. This act shall take effect July 1, 1998.

Became a law without the Governor's approval May 22, 1998.

Filed in Office Secretary of State May 21, 1998.