

2012 REVISIONS: CONSTRUCTION LIEN AND BOND LAWS

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The Florida Legislature was busy this year making changes to the construction lien and bond laws. The good news is that some lingering questions have been answered. The bad news is the process has not been simplified; rather, we just have more technicalities with which to deal. It's important that potential lienors understand the revisions and adapt their operations and procedures to ensure their lien and bond rights are protected. Following is a brief discussion of the most important amendments, which went into effect on October 1, 2012.

Public Payment Bonds

Section 255.05(1) has been amended to provide the bond must state on its front page the bond number assigned by the surety. In addition, prior to commencing work the contractor must provide to the public entity a certified copy of the recorded bond. The public entity may not make a payment to the contractor until the contractor has provided the public entity a certified copy of the recorded bond. This change obviously adds incentive for the contractor to timely record the bond and will help ensure that potential lienors can simply go to the public record and get all the information needed to make a bond claim.

Section 255.05(1) also now declares unenforceable provisions in bonds which limit or expand the effective duration of the bond or which add conditions precedent to the enforcement of a claim against the bond beyond those provided in 255.05. Previously, the case law said having such provisions in the bond would convert a purported statutory bond to a common law bond. However, this change in the statute means that such provisions are simply deemed "unenforceable" (i.e., ignored) and the bond is still considered a statutory bond.

In addition, the revised Section 255.05 requires the Notice of Non-Payment to be served upon the surety. The revised statute also says the contractor or the contractor's attorney shall serve a copy of the Notice of Contest to the claimant at the address shown on the Notice of Non-Payment or most recent amendment thereto and shall certify to such service on the face of the notice and record the notice. (As to what constitutes "serving" see the discussion below on revised Section 713.18.)

Finally, the revised Section 255.05 states that when a contractor furnishes and records a payment and performance bond for a public project and provides the public entity with a written consent of surety, the public entity may not condition payment to the contractor on the production of a release from a claimant demonstrating the claimant does not have an outstanding claim for payment on the project against the contractor, the surety, the payment bond or the

public entity. This change makes sense, since the bond is there to protect the public entity from non-payment claims and there is no reason to hold up government payments until all the releases have been gathered.

Private Project Liens and Bonds

Section 713.13 was amended to delete language in the Notice of Commencement stating that it may not expire before completion of construction and final payment to the contractor. This revision simply reflects the reality that the statutes allow for a Notice of Termination.

The Legislature revised Section 713.10(2), which sets forth the requirements for a notice to a contractor that a lease provides the lessor's interest shall not be subject to liens for improvements made by the lessee. Under the revised statute, a notice that is consistent with the requirements in 713.10(2) effectively prohibits liens for improvements made by the lessee even if other leases for premises on the parcel do not expressly prohibit liens or if provisions of each lease restricting the application of liens are not identical. This change also makes sense, since it is not uncommon for only some of the leases on a particular parcel to prohibit liens on the landlord's interest and not all anti-lien provisions in leases are identical. The idea here is to enforce the intent of the parties to a particular lease, without regard to the language in other leases.

Section 713.132 was amended to provide that a Notice of Termination (of the Notice of Commencement) shall be served on the contractor and each lienor who has a direct contract with the owner or who has served a Notice to Owner. If the Notice of Termination has been so served, it is effective at the later of: (i) 30 days after recording the Notice of Termination; or (2) the date stated on the Notice of Termination as the date on which the Notice of Commencement is terminated. This provision ensures lienors get at least 30 days' notice before a Notice of Commencement is terminated.

The revised version of Section 713.16 now requires a request for sworn statement of account to include the property description, name of the contractor and name of the lienor's customer. This change should make it easier for parties receiving requests for sworn statements to find the information needed to properly and timely respond to such requests.

Section 713.18 prescribes the manner of serving notices and other instruments. Revised Section 713.18(1) now provides that service of notices, claims of lien, affidavit, assignments and other instruments must be made by one of the following methods:

- (a) By actual delivery to the person to be served;
- (b) 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, which may be in electronic format;

(c) By posting on the site of improvement if service as provided above cannot be accomplished.

The revised statute adds to the methods of serving notices: “common carrier delivery services” and “Global Express Guaranteed” delivery service.

According to the revised statute, service of a Notice to Owner or a Preliminary Notice to Contractor is effective as of the date of mailing, if:

(a) The notice is mailed by registered, Global Express Guaranteed, or certified mail, with postage prepaid, to the person to be served at any of the addresses set forth in subsection 3.

(b) The notice is mailed within 40 days after the date the lienor first furnishes labor, services or materials; and

(c) The person who served the notice maintains a registered or certified mail log that shows the registered or certified mail number issued by the U.S. Postal Service, the name and address of the person served, and the date stamp of the U.S. Postal Service confirming the date of mailing; or the person who served the notice maintains electronic tracking records generated by the U.S. Postal Service containing the postal tracking number, the name and address of the person served, and verification of the date of receipt by the U.S. Postal Service.

Service of the Notice to Owner or a Preliminary Notice to Contractor is effective on the date of mailing if it is:

(a) sent to the last address in the notice of commencement or any amendment thereto or, in the absence of a notice of commencement, to the address shown on the building permit application, or to the last known address of the person to be served; and

(b) returned as being “refused,” “moved, not forwardable,” or is otherwise not deliverable through no fault of the person serving the item.

Note: a Notice to Owner or Notice to Contractor still must be served no later than 45 days after the date the lienor first furnishes labor, services or materials. The revision to Section 713.18 merely ensures service will be deemed timely if the specific service provisions are followed.

Section 713.23(1)(c) now provides that if a notice of commencement with the attached bond is not recorded before commencement of construction, the lienor not in privity with the contractor may elect to serve the Notice to Contractor up to 45 days after the date the lienor is served with a copy of the bond. This revision gives the bond claimant sufficient time to serve its Notice to Contractor in the event recording is delayed. The revised statute also says a Notice to Owner that has been timely served on the contractor satisfies the requirement of this paragraph. The Notice to Contractor may be entitled “Notice to Owner/Notice to Contractor.”

Section 713.23(d) now provides if the payment bond is not recorded before commencement of construction, the time period for the lienor to serve a Notice of Non-Payment may at the option of the lienor be calculated from the date specified in this section (90 days after final furnishing labor, services or materials) or the date the lienor is served a copy of the bond. This revision gives the bond claimant sufficient time to serve its Notice of non-Payment in the event recording is delayed.

Under the new version of 713.23(e), the contractor or the contractor's attorney (as opposed to the County Clerk) shall serve a copy of the Notice of Contest on the lienor.

Revised Section 713.23(f) now states a provision in a payment bond which limits or expands the effective duration of the bond or which adds conditions precedent to the enforcement of a claim against the bond beyond those in the statute is unenforceable. This change is identical to that made in Section 255.05 relating to public projects.

Section 713.23(2) now provides a copy of the bond must be attached to the recorded Notice of Bond. The person recording the Notice of Bond (not the County Clerk) must serve the lienor with a copy of the notice with a copy of the bond. This change helps ensure the potential claimant has all the information needed to make a timely claim without having to ask the contractor for a copy of the bond and hope the contractor complies.

As this summary demonstrates, potential lienors (or their counsel) will need to closely review their procedures, update their documents and strictly follow the new rules to ensure compliance with the new statutory requirements.