

## **2007 CHANGES TO THE FLORIDA LIEN LAW**

By  
Trent Cotney  
FRSA General Counsel

There are three certainties in life: death, taxes and changes to the lien law. The Legislature passed several bills which have revised Florida construction lien law. These changes became effective July 1, 2007. This article will summarize and explain the impact of the recent revisions to Chapter 713 governing construction liens in Florida.

Section 713.01, the definition section of the Florida Lien Law, was amended to add a definition of “final furnishing” also known as the “last day of work.” Lienors have 90 days from the “final furnishing” to record a Claim of Lien in the county where work was performed. Prior to this amendment, there was no specific definition of “final furnishing.” However, the Legislature followed the existing case law by making it clear that warranty and other repair work does not count as work encompassed under the definition of “final furnishing.” “Final furnishing” is defined under the recent revisions as “the last date that the lienor furnishes labor, services or materials. Such 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 lienor’s previously performed work or materials supplied.” In addition, for the purposes of rental equipment liens, final furnishing means the last available date equipment was on the job site and available for use on the project.

Section 713.01(13), Florida Statutes was also amended to clarify the definition of the actual use of rental equipment. The amendment to this section provides that once rental equipment is delivered to the job site it is considered to be in “actual use.” However, when the owner or lessee requests that the equipment be removed, actual use is terminated two (2) business days after written notice is provided by either the owner or lessee. The revision also states that a general or prime contractor cannot request the removal of a subcontractor’s rental equipment.

The Legislature created Section 713.012 to make it clear that all “notices, demands, or requests permitted or required under this part, except any required by 713.14 (dealing with the application of payment to a materials account), must be in writing.” As a matter of practice, all notices required under Chapter 713 should be sent in writing to ensure that the notice is properly documented.

For those of you that attended my FRSA seminars in April on construction contract provisions and defective workmanship, you were provided with a statutory warnings page. During the course of those lectures, I indicated to you that the warnings page that I provided to you would more than likely not be valid in a year. As predicted, the Legislature has made a change to the lien law warning notice. For those members

that would like an updated statutory warnings page, please contact my office and I will be happy to provide you with the current version.

The previous lien law warning required that the warning be in 14 point font on the first page of any contract with an owner of residential property regardless of whether it is single-family or multifamily up to four units. The current revisions to Section 713.015 provide that the warning is only necessary for contracts over \$2,500. In addition, the notice does not have to be on the front page of the contract but can be on a separate page provided that the owner sign and date the separate page indicating that it has reviewed the notice. The Legislature also reduced the font size from 14 to 12 and made some changes to the wording of the notice. The warning now reads as follows:

ACCORDING TO FLORIDA'S CONSTRUCTION LIEN LAW (SECTIONS 713.001 -- 713.37, FLORIDA STATUTES), THOSE WHO WORK ON YOUR PROPERTY OR PROVIDE MATERIALS AND SERVICES AND ARE NOT PAID IN FULL HAVE A RIGHT TO ENFORCE THEIR CLAIM FOR PAYMENT AGAINST YOUR PROPERTY. THIS CLAIM IS KNOWN AS A CONSTRUCTION LIEN. IF YOUR CONTRACTOR OR A SUBCONTRACTOR FAILS TO PAY SUBCONTRACTORS, SUB-SUBCONTRACTORS, OR MATERIAL SUPPLIERS, THOSE PEOPLE WHO ARE OWED MONEY MAY LOOK TO YOUR PROPERTY FOR PAYMENT, EVEN IF YOU HAVE ALREADY PAID YOUR CONTRACTOR IN FULL. IF YOU FAIL TO PAY YOUR CONTRACTOR, YOUR CONTRACTOR MAY ALSO HAVE A LIEN ON YOUR PROPERTY. THIS MEANS IF A LIEN IS FILED YOUR PROPERTY COULD BE SOLD AGAINST YOUR WILL TO PAY FOR LABOR, MATERIALS, OR OTHER SERVICES THAT YOUR CONTRACTOR OR SUBCONTRACTOR MAY HAVE FAILED TO PAY. TO PROTECT YOURSELF, YOU SHOULD STIPULATE IN THIS CONTRACT THAT BEFORE ANY PAYMENT IS MADE, YOUR CONTRACTOR IS REQUIRED TO PROVIDE YOU WITH A WRITTEN RELEASE OF LIEN FROM ANY PERSON OR COMPANY THAT HAS PROVIDED TO YOU A "NOTICE TO OWNER." FLORIDA'S CONSTRUCTION LIEN LAW IS COMPLEX, AND IT IS RECOMMENDED THAT YOU CONSULT AN ATTORNEY.

The revision makes it clear that failure to provide the notice does not completely bar the claim of lien from being filed. Instead, the owner must show it was prejudiced by the lienor's failure to provide the owner with the written notice.

The Legislature amended Section 713.02(6) by providing that an owner and a contractor can agree to require a payment bond on a private project. The previous version of this statute indicated that an owner "may require" a contractor to furnish a payment bond. The Legislature softened the language to indicate that there must be an agreement between the owner and the contractor to post a payment bond. As another

point of clarification, the Legislature amended Section 713.07 to state that an owner can recommence construction if the prime contract was terminated.

Section 713.08(2), Florida Statutes, was amended to provide that only a lienor, his or her employee, or an attorney can prepare and record a Claim of Lien. In other words, although third party companies can be hired to serve Notices to Owner, a third party company cannot be used to prepare Claims of Lien unless the person preparing the lien is an attorney. Otherwise, the preparation of a Claim of Lien by a non-employee or attorney is considered to be the unauthorized practice of law.

As part of the general consultation line, I have received several questions recently regarding the changes to the Notice of Commencement statute, Section 713.13, Florida Statutes. Under the new version of the statute, a tax folio number of the property must be included on the Notice of Commencement (assuming a tax folio number has been created). The statutory form for the Notice of Commencement was also revised to add the following warning notice:

**WARNING TO OWNER: ANY PAYMENTS MADE BY THE OWNER AFTER THE EXPIRATION OF THE NOTICE OF COMMENCEMENT ARE CONSIDERED IMPROPER PAYMENTS UNDER CHAPTER 713, PART I, SECTION 713.13, FLORIDA STATUTES, AND CAN RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS TO YOUR PROPERTY. A NOTICE OF COMMENCEMENT MUST BE RECORDED AND POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION. IF YOU INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN ATTORNEY BEFORE COMMENCING WORK ON RECORDING YOUR NOTICE OF COMMENCEMENT.**

The revisions also require the person signing to verify under oath that the information on the Notice of Commencement is correct. Section 713.138(5) was added to provide that any amendment to the Notice must identify the previous Notice of Commencement and that a copy of the amended Notice must be served by the owner on the contractor and any lienor that provided a Notice to Owner on or before 30 days of the recording date of the amended Notice. As a matter of practice, the amended Notice of Commencement should also be recorded. In addition, 713.135 was amended to change some of the form language contained on the permit card and building permit application. Permitting authorities will be required to change the language on these documents to comply with the Legislative revisions.

Section 713.16, Florida Statutes, was modified significantly. This statute relates to an owner or lienor's ability to demand a copy of the contract and a statement of account. The revisions provide that all responses by a lienor must be under oath or the lienor loses its lien rights. In addition, 713.16(5) clarifies the items a lienor can request from an owner under the statute, which include the amount of the direct contract under which the lien was recorded, the dates and amounts paid or to be paid by the owner for

the improvements under the direct contract, and the cost of completion if known. Section 713.31 governing fraudulent liens was also amended to provide that the prevailing party in any action involving a fraudulent lien is entitled to its attorney's fees and costs.

Finally, although not part of Chapter 713, Florida Statutes, Section 255.05 was amended to provide that the bond posting requirement extend to private entities that own public buildings. In other words, even if a contractor contracts with a private entity owner/operator for the improvement or repair of a public building, a payment and performance bond must be posted as required by Section 255.05, Florida Statutes. There was also a revision to Section 255.05(2)(a)(2) to clarify that claimants under a 255.05 bond must give the contractor the required notice in writing.

If you have any question regarding these revisions or the impact on your business, please do not hesitate to use the FRSA's free consultation line and contact me at (813) 229-3333 or [tcotney@glennrasmussen.com](mailto:tcotney@glennrasmussen.com).

Trent Cotney, a construction attorney at Glenn Rasmussen Fogarty & Hooker, P.A., in Tampa, Florida, prepared this article. Cotney is Florida Bar Certified in Construction Law. Cotney is a board committee member and the General Counsel of the FRSA and a member and director of the Tampa FRSA affiliate, the West Coast Roofing Contractors' Association (WCRCA).