

**EIGHTH ANNUAL
SOUTHERN SURETY AND FIDELITY CLAIMS
CONFERENCE
APRIL 3 - 4, 1997**

**“CLAIMS AGAINST THE SURETY UNDER THE NEW
CHANGES TO FLORIDA CONSTRUCTION LIEN LAW”**

PRESENTED BY:

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I. INTRODUCTION

This paper will provide a general overview of Florida's current Construction Lien Law ("Lien Law"), highlighting the recent relevant statutory changes and analyze the operation of the Lien Law with respect to claims made against private contractor payment bonds furnished pursuant to it.

II. PURPOSE OF CONSTRUCTION LIEN LAW AND SURETY'S ROLE

The Lien Law ensures that the private owner of real property does not make duplicate payments for improvements to that property after he has paid once for the work and also ensures timely payment to the persons supplying labor, material and services for the improvement of the owner's property.¹ Under the Lien Law, the owner has the option of furnishing a payment bond or a conditional payment bond to protect his property from liens and to ensure that persons working on the property are paid.

III. PRIVATE CONSTRUCTION PAYMENT BOND

A payment bond is one of two types of bond typically furnished on a construction project. A payment bond furnished pursuant to the Lien Law must strictly conform with the requirements set out in the statute for furnishing such a bond. Otherwise, the bond will be considered a common law bond and the surety will lose its defenses available under the Lien Law.

The statute clearly states the requirements for a payment bond:

The payment bond required to exempt an owner under this part shall be furnished by the contractor in at least the amount of the original contract price before commencing the construction of the improvement under the direct contract; and a copy of the bond shall be attached to the notice of commencement when the notice of commencement is recorded. The bond shall be executed as surety by a surety insurer authorized to do business in this state and shall be conditioned that the contractor shall promptly make payments for labor, services, and material to all lienors under the contractor's direct contract. Any form of bond given by a contractor conditioned to pay for labor, services, and material used to improve real property shall be deemed to include the condition of this subsection.

The bond must be in an amount of no less than the original contract price. The Courts will consider a bond in an amount less than the contract price a common law bond.² A bond which expands coverage beyond the statutory limits also may not be considered a statutory bond.³

¹ Stunkel v. Gazebo Landscaping, Inc., 660 So.2d 623 (Fla. 1995).

² General Electric Co. v. Commercial Standard Ins. Co., 335 So.2d 624 (Fla. 1st DCA 1976) (The payment bond posted was only 10% of the contract price and therefore not a statutory bond).

³ National Fire Insurance Co. of Hartford v. L. J. Clark Construction Co., Inc., 579 So.2d 743 (Fla. 4th DCA 1991) (A payment bond is a common law bond if it provides greater coverage than provided for in §713.23 Florida Statutes).

Additionally, the principal must provide the bond prior to the start of construction on the project.⁴ The statute sets out a bond form that complies with this section:⁵

PAYMENT BOND

BY THIS BOND We, _____, as Principal, and _____, a corporation, as Surety, are bound to _____, herein called Owner, in the sum of \$_____ for the payment of which we bind ourselves, our heirs, personal representatives, successors, and assigns, jointly and severally.

THE CONDITION OF THIS BOND is that if Principal:

1. Promptly makes payments to all lienors supplying labor, material, and supplies used directly or indirectly by Principal in the prosecution of the work provided in the contract dated _____, 19__, between Principal and Owner for construction of _____, the contract being made a part of this bond by reference; and

2. Pays Owner all loss, damage, expenses, costs, and attorney's fees, including appellate proceedings, that Owner sustains because of default by Principal under paragraph 1. of this bond;

then this bond is void; otherwise, it remains in full force.

Any changes in or under the contract documents and compliance or noncompliance with formalities connected with the contract or with the changes do not affect Surety's obligation under this bond.

DATED on _____, 19__.

(Principal) (SEAL)

(Surety's name)
By _____
As Attorney In Fact

The owner must attach the bond to the notice of commencement at the time the owner records notice in the Clerk's office.⁶ The failure to attach a copy of the bond to the notice of commencement subjects the owner's property to liens but the bond may be used as a transfer bond.⁷ Owner compliance with this statutorily mandated duty is critical to preserving the bond's status as a statutory bond. Failure to record the bond as required by statute could render the bond a common law bond.⁸ If the owner fails to record the bond with the notice of commencement the surety probably has a cause of action against the owner for any resulting damages it suffers.

⁴ §713.23(1)(a), Florida Statutes (1995).

⁵ §713.23(3), Florida Statutes (1995).

⁶ §713.13(1)(e), Florida Statutes (1995).

⁷ Id.

⁸ See Martin Paving Co. v. United Pacific Insurance Co., 646 So.2d 268 (Fla. 5th DCA 1994) (The failure to record a payment bond for a public works project as required by §255.05, Florida Statutes renders the bond a common law bond and not a statutory bond).

pursuant to the contract terms, and necessary to a finished job.¹⁶ Completing punch list items and warranty work is not considered the final furnishing of work under this statute.¹⁷ The statute also sets out a form of this notice:¹⁸

NOTICE OF NONPAYMENT

To _____
(name of contractor and address)

(name of surety and address)

The undersigned notifies you that he has furnished (describe labor, services, or materials) for the improvement of the real property identified as (property description). The amount now due and unpaid is \$_____.

(signature and address of lienor)

Failure to provide the notice to contractor and notice of non-payment is fatal to any claim by a lienor.¹⁹

A lienor who has properly perfected his claim has a right of direct action against the surety.²⁰ Any action, however, must be filed within one year of performance of the labor on the project or completion of delivery of the materials or supplies.²¹ A surety may be estopped from asserting this defense if its conduct has precluded the lienor from filing an action within that time period.²² The owner may shorten the one year time period by recording a notice of contest of lien which requires the lienor to file an action within 60 days of service of the notice.²³

Every claim of lien filed subsequent to the execution and delivery of the bond is required to be transferred to the bond.²⁴

¹⁶ Aison v. Keaty, 386 So.2d 822 (Fla. 4th DCA 1980).

¹⁷ Viking Builders, Inc. v. Felices, 391 So.2d 302 (Fla. 5th DCA 1980).

¹⁸ §713.23(1)(d), Florida Statutes (1995).

¹⁹ §713.23(1)(e), Florida Statutes (1995).

²⁰ §713.23(1)(f), Florida Statutes (1995).

²¹ §713.23(1)(e), Florida Statutes (1995).

²² See Generally Harris Paint Co. v. Multicom Properties, Inc., 326 So.2d 43 (Fla. 1st DCA 1976) (Conduct of party may estop party from raising a limitation defense).

²³ §713.22(2), Florida Statutes (1995).

²⁴ §713.23(2), Florida Statutes (1995).

The statutory form for the transfer is set out in the statute:²⁵

NOTICE OF BOND

To Name and Address of Lienor

You are notified that the claim of lien filed by you on _____, 19__, and recorded in Official Records Book _____ at Page _____ of the public records of _____ County, Florida, is secured by a bond, a copy being attached.

Signed: (Name of person recording notice)

The contractor or any other individual with an interest in the real property must record the notice in the Clerk's office which in turn is to be forwarded by mail to the lienor.²⁶

IV. PRIVATE CONSTRUCTION CONDITIONAL PAYMENT BOND

A conditional payment bond may also be furnished by a contractor under the statute. If certain statutory requirements are met, a condition payment bond serves to condition the contractor's payments to lienors or the owner's payment to the contractor.²⁷ The surety's obligation to pay lienors under this bond is co-extensive with the contractors obligations.²⁸

The statute sets out the requirements of a conditional payment bond:

(1) Notwithstanding any provisions of ss.713.23 and 713.24 to the contrary if the contractor's written contractual obligation to pay lienors expressly conditioned upon and limited to the payments made by the owner to the contractor, the duty of the surety to pay lienors will be coextensive with the duty of the contractor to pay, if the bond contains on the front page, in at least 10-point type, the statement: THIS BOND ONLY COVERS CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES, OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF LIEN ON THIS PROJECT.

(2) Except as specified in this section, all bonds issued under this section must conform to the requirements of 713.23(1)(a), (b), (f), and (4)....

The statute requires the inclusion of the statement relating to the scope of bond coverage in at least 10 point type on the front page of the bond.²⁹ The bond must be at least in the amount of

²⁵ Id.

²⁶ Id.

²⁷ §713.245(1), Florida Statutes (1995).

²⁸ Id.

²⁹ §713.245(1), Florida Statutes (1995).

the original contract price.³⁰ A condition of the bond also must be that the contractor promptly pay all lienors for all services, labor and material under the contractor's contract with the owner.³¹ The bond must be attached to the Notice of Commencement when the Notice of Commencement is recorded.³²

The surety is responsible for furnishing a copy of the bond if requested to do so by any lienor.³³

This section does not exempt the owner's property from liens and all lienors must comply with the provisions of the Lien Law to preserve and perfect their lien rights.³⁴

To make a claim against the bond, a claim of lien must be recorded. After the recording of a claim of lien, the provisions of the lien law applicable to a conditional payment bond go into effect.³⁵ The owner or contractor has an obligation within ninety (90) days after the recording of a claim of lien for labor, services or materials for which the contractor has been paid to record a notice of bond with a copy of that bond attached to a sworn statement called a certificate of payment to the contractor.³⁶ The statute sets out the form for the certificate of payment to the contractor:³⁷

CERTIFICATE OF PAYMENT TO THE CONTRACTOR

TO: Lienor (Name and address from claim of lien)
Contractor (Name and address)
Surety (Name and address)

Under penalties of perjury, the undersigned certifies that the bond recorded with this certificate conforms with s. 713.245, F.S., that the bond is in full force and effect, and that the contractor has been paid \$ _____ for the labor, services, and materials described in the Claim of Lien filed by _____ dated _____, 19__ and recorded _____, 19__, in Official Records Book _____ at Page _____ of the Public Records of _____ County, Florida.

Dated this ___ day of _____, 19__.

(Owner)

(Address)

Sworn to and subscribed before me,
the undersigned authority, the
___ day of _____, 19__.

³⁰ §713.23(1)(a), Florida Statutes (1995).
³¹ §713.23(1)(a), Florida Statutes (1995).
³² §713.23(1)(a), Florida Statutes (1995).
³³ §713.23(1)(b), Florida Statutes (1995).
³⁴ §713.245(3), Florida Statutes (1995).
³⁵ §713.245(4), Florida Statutes (1995).
³⁶ §713.245(4), Florida Statutes (1995).
³⁷ §713.245(4), Florida Statutes (1995).

Name
NOTARY PUBLIC
My Commission Expires:

A notice of bond recorded more than ninety (90) days after the claim of lien has been filed is ineffective unless the owner, contractor and the surety sign the notice of the bond.³⁸ An ineffective notice of bond means that the claim of lien is not transferred to the bond.

The contractor has a right to record what is called a joinder in the certificate of payment attesting that the facts contained in the certificate of payment filed by the owner to the contract are true and correct.³⁹ The form for that notice is.⁴⁰

JOINDER IN CERTIFICATE OF PAYMENT

TO: Owner (Name and address from certificate of payment)
Lienor (Name and address from claim of lien)
Surety (Name and address)

The undersigned joins in the Certificate of Payment to the Contractor recorded on _____, 19__, in Official Records Book _____ at Page _____ of the Public Records of _____ County, Florida, and certifies that the facts stated in the Certificate of Payment to the Contractor are true and correct.

Dated this ___ day of _____, 19__.

(Name)

(Address)

Sworn to and subscribed before me,
the undersigned authority, this
___ day of _____, 19__.

Name
NOTARY PUBLIC
My Commission Expires:

However, if the contractor disagrees with the facts set out in the certificate of payment, the contractor has the duty to record, no later than fifteen (15) days after service of the certificate of payment to the contractor, a notice of contest of payment stating that the contractor has not been paid or has only been paid a certain sum for the labor, services and materials described in their certificate of payment to the contractor.⁴¹ The form for that notice is.⁴²

³⁸ §713.245(4), Florida Statutes (1995).

³⁹ §713.245(6), Florida Statutes (1995).

⁴⁰ §713.245(6), Florida Statutes (1995).

⁴¹ §713.245(8), Florida Statutes (1995).

⁴² §713.245(10), Florida Statutes (1995).

NOTICE OF CONTEST OF PAYMENT

TO: Owner (Name and address from certificate of payment) Lienor (Name and address from claim of lien) Surety (Name and address)

Under penalties of perjury, the undersigned certifies that the contractor has not been paid or has only been paid \$_____ for the labor, services, and materials described in Official Records Book _____ at Page _____ of the Public Records of _____ County, Florida.

Dated this ___ day of _____, 19__.

(Name)

(Address)

Sworn to and subscribed before me, the undersigned authority, this ___ day of _____, 19__.

Name
NOTARY PUBLIC
My Commission Expires:

If the contractor has recorded or signed the certificate of payment to the contractor, recorded a joinder in certificate of payment, or failed to record a notice of contest of payment, the lien transfers to the bond to the extent of the payment specified in the certificate of payment to the contractor.⁴³

If the notice of contest of payment indicates that the contractor has been paid less than the total amount due the lienor, the lien transfers to the bond in the amount of the payment specified in the notice of contest of payment.⁴⁴

The lienor has a right to directly sue the surety under the bond.⁴⁵ Furthermore, the lienor must institute any such action against the surety within one (1) year from the date that the lien transferred to the bond.⁴⁶ The surety may assert all defenses of the owner regarding the validity of the claim of lien or of the contractor regarding the amount due the lienor.⁴⁷

The owner has certain statutory defenses to claims of lien filed by lienors. The easiest and most potent defense that the owner may assert is the failure of the lienor to comply with the statutory notice requirements to perfect a lien.

⁴³ §713.245(10), Florida Statutes (1995).
⁴⁴ §713.245(11), Florida Statutes (1995).
⁴⁵ §713.23(f), Florida Statutes (1995).
⁴⁶ §713.245(2), Florida Statutes (1995).
⁴⁷ §713.245(10), Florida Statutes (1995).

A materialman or laborer not in privity with the owner, or a subcontractor, or a sub sub-contractor has a lien on the real property for any money that is owed to him for labor, services or materials furnished in accordance with his contract and the contract between the owner and contractor.⁴⁸ As a prerequisite for perfecting a lien and recording a claim of lien all materialman, subcontractors, and sub-subcontractors must serve a notice on the owner with the lienors name, address, description of the property and the nature of the services or materials provided on the project.⁴⁹ A sub sub-contractor or materialman to a sub sub-contractor must also serve a copy of the notice on the contractor.⁵⁰ If the materialman to a sub sub-contractor knows the name and address of the subcontractor then he also must serve the notice of owner on that subcontractor.⁵¹ The statute sets out the form of the notice to owner:⁵²

WARNING TO OWNER: UNDER FLORIDA LAW, YOUR FAILURE TO MAKE SURE THAT WE ARE PAID MAY RESULT IN A LIEN AGAINST YOUR PROPERTY AND YOUR PAYING TWICE.

TO AVOID A LIEN AND PAYING TWICE, YOU MUST OBTAIN A WRITTEN RELEASE FROM US EVERY TIME YOU PAY YOUR CONTRACTOR.

NOTICE TO OWNER

To _____ (Owner's name and address) _____

The undersigned hereby informs you that he has furnished or is furnishing services or materials as follows: _____ (General description of services or materials) _____ for the improvement of the real property identified as _____ (property description) _____ under an order given by _____.

Florida law prescribes the serving of this notice and restricts your right to make payments under your contract in accordance with Section 713.06, Florida Statutes.

IMPORTANT INFORMATION FOR YOUR PROTECTION

Under Florida's laws, those who work on your property or provide materials and are not paid have a right to enforce their claim for payment against your property. This claim is known as a construction lien.

If your contractor fails to pay subcontractors or material suppliers or neglects to make other legally required payments, the people who are owed money may look to your property for payment, EVEN IF YOU HAVE PAID YOUR CONTRACTOR IN FULL.

PROTECT YOURSELF:

RECOGNIZE that this Notice to Owner may result in a lien against your property unless all those supplying a Notice to Owner have been paid.

⁴⁸ §713.23(10), Florida Statutes (1995).

⁴⁹ §713.06(2)(a), Florida Statutes (1995).

⁵⁰ Id.

⁵¹ Id.

⁵² §713.06(2)(c), Florida Statutes (1995).

LEARN more about the Construction Lien Law, Chapter 713, Part I, Florida Statutes, and the meaning of this notice by contacting an attorney or the Florida Department of Business and Professional Regulation.

(Lienor's signature)

(Lienor's name)

(Lienor's Address)

Copies to: _____ (Those persons listed in Section 713.06(2)(a) and (b), Florida Statutes) _____.

The notice must be served before beginning or no later than 45 days after beginning to furnish services, materials or labor, but must be served before the date of the owner's distribution of the final payment.⁵³

The failure to serve the notice to owner or to timely serve the notice operates as a complete bar to the enforcement of the lien.⁵⁴ The lienor only has to substantially comply with the notice requirements with respect to the form of the notice unless the failure to provide the mandated information adversely affects the person.⁵⁵ However, the lienor must strictly comply with the time requirements as set out above.⁵⁶

To perfect a lien, all lienors must record a claim of lien. The statute sets out the information required to be included in a claim of lien.⁵⁷ Pursuant to a 1996 amendment to the Lien Law, a lienor now may include unpaid finance charges related to the lienors contract.⁵⁸ However, failure to include the required information or any errors in the form of the claim of lien will not bar enforcement of the lien unless the person can demonstrate that the error or omission has affected them adversely.⁵⁹

The lienor must record the claim of lien within 90 days of the final furnishing of the labor, services or materials.⁶⁰ In the event of a default by the contractor or termination of the contract, the lienor must record the claim of lien within 90 days of the default.⁶¹ The claim of lien must be served either prior to or at least within fifteen (15) days after its recording.⁶² The failure to timely serve

⁵³ Id.

⁵⁴ §713.06(2)(a), Florida Statutes (1995).

⁵⁵ §713.06(f), Florida Statutes (1995).

⁵⁶ Id.

⁵⁷ §713.08, Florida Statutes (1995).

⁵⁸ §713.08(1)(g), Florida Statutes (1996 Supplement).

⁵⁹ §713.08(4)(a), Florida Statutes (1995).

⁶⁰ §713.08(5), Florida Statutes (1995).

⁶¹ §713.08(5), Florida Statutes (1995).

⁶² §713.08(4)(c), Florida Statutes (1995).

Previously, the owner only was permitted to make such demand at the time of payment.⁶⁸ A lienor who fails to respond to an owner's demand for statement of account within 30 days also loses his lien.⁶⁹

VI. PROMPT PAYMENT PROVISION

If a person receives a payment for construction of the real property and fails to pay any undisputed obligations for such labor, services and materials within thirty (30) days after the furnishing of the labor, services and materials and payment for such becomes due, the person entitled to receive such payment may file an action against the person improperly withholding the payment.⁷⁰

The remedies available in such an action include an accounting, a temporary injunction against the person who received the payment, a pre-judgment attachment against the person who received such payment or any other legal or equitable remedies.⁷¹ The prevailing party in such lawsuit is entitled to receive reasonable attorneys fees at trial and on appeal.⁷²

VII. WAIVER OR RELEASE OF LIEN

The section of the Lien Law relating to waiver and release of liens was substantially amended in 1996. The statute now has a form for waiver and release of lien upon a progress payment⁷³ and a form for waiver and release of lien upon final payment.⁷⁴ Those forms are:

WAIVER AND RELEASE OF LIEN UPON PROGRESS PAYMENT

The undersigned lienor, in consideration of the sum of \$_____, hereby waives and releases its lien and right to claim a lien 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) to the following property:

(description of property)

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

DATED on _____, 19__.

(Lienor)
By: _____

⁶⁸ §713.16(2), Florida Statutes (1995).

⁶⁹ §713.16(2), Florida Statutes (1995).

⁷⁰ §713.346, Florida Statutes (1995).

⁷¹ §713.346(4), Florida Statutes (1995).

⁷² §713.346(7), Florida Statutes (1995).

⁷³ §713.20(4), Florida Statutes (1996 Supplement).

⁷⁴ §713.20(5), Florida Statutes (1996 Supplement).

**WAIVER AND RELEASE OF LIEN
UPON FINAL PAYMENT**

The undersigned lienor, in consideration of the final payment in the amount of \$ _____, hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished to _____ (insert the name of your customer) on the job of _____ (insert the name of the owner) to the following described property:

_____ (description of property) _____

DATED on _____, 19__.

(Lienor)
By: _____

By mandating that the lienor does not have to execute a waiver or release which differs in form the ones set out above, the amended section protects lienors in the event a person demands a lienor waive rights other than lien rights.⁷⁵ However, the fact that lienor executes a waiver and release in a substantially different form than those set out above does not render the waiver or release unenforceable.⁷⁶ Each waiver and release may be conditioned upon payment of a check.⁷⁷

VIII. IMPROVEMENTS TO PUBLIC PROPERTY

In Florida, governmental entities are typically requiring owners to make substantial improvements to the public infrastructure surrounding their projects as a condition for issuing a building permit. The State Legislature recognized this fact and in 1996 amended the Lien Law allowing a lienor to acquire a lien on an owner's property if the labor, materials, or services were furnished to improve public property if the improvement to the public property is done pursuant to his contract and the contract between the owner and contractor.⁷⁸ Those persons in privity with the owner have a lien on his real property for improvements to public property if the improvements are made a condition of the permit to improve the owners real property.⁷⁹

⁷⁵ §713.20(6), Florida Statutes (1996 Supplement).

⁷⁶ §713.20(8), Florida Statutes (1996 Supplement).

⁷⁷ §713.20(7), Florida Statutes (1996 Supplement).

⁷⁸ §713.06, Florida Statutes (1996 Supplement).

⁷⁹ §713.05, Florida Statutes (1996 Supplement).

IX. SERVICE

A 1996 amendment to the Lien Law permits service by facsimile if the person's facsimile phone number is listed in the notice of commencement.⁸⁰ A surety's facsimile phone number may be listed on the notice of commencement.⁸¹ A lienor's facsimile confirmation sheet with the surety's correct facsimile phone number is proof of the date and time the facsimile was served.⁸²

X. ATTORNEYS FEES

Under the Lien Law the prevailing party in any arbitration or lawsuit is entitled to attorneys fees and costs.⁸³

⁸⁰ §713.18(3), Florida Statutes (1996 Supplement).

⁸¹ §713.13(d), Florida Statutes (1996 Supplement).

⁸² §713.18(3), Florida Statutes (1996 Supplement).

⁸³ §713.29, Florida Statutes (1995).