

JULY 1ST, 2007 STATUTORY AMENDMENTS TO FLORIDA CONSTRUCTION LIEN LAW CHAPTER #713!!!

2007 Changes to Florida Construction Lien Law

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The following changes worthy of comment were enacted to Florida Statute 255.05 and the Florida Construction Lien law in the 2007 legislative regular session through passage of House Bill 1285. **The changes become effective July 1, 2007.**

1. Bonds required for private contracts to build public buildings or public works. Florida Statute 255.05 was amended to include a requirement that private entities who contract to build public buildings must provide the payment and performance bonds that were previously only required if the government entity entered into the construction contract. (There is still the possible exception of any bond for contracts under \$200,000).
2. 45 day preliminary notice of intent to claim against the bond must be in writing. Prior to this amendment a preliminary notice of intention to claim against bond was not required to be in writing. This amendment makes clear that the 45 day preliminary notice of intent to claim against the bond must be in writing.
3. Definition of final furnishing. This amendment defines "final furnishing," i.e. the last date from which to start counting 90 days within which to record a lien. The change makes clear that work to correct one's own work is not a day of work that extends the time within which to record the claim of lien. The 90 days starts to run as of the last date that work was performed by the lienor under the contract, which work was not correction of the lienor's errors. (This change is simply a codification of what most understood the existing law to be.)
4. Clarification of lien period for rental equipment. The amendment provides that delivery of rental equipment to the site is prima facie evidence of the first date of the period of actual use (lienable period). Note that prima facie evidence may be rebutted if it can be shown that the equipment was not available for use. Current law says that the lienable period is the period through the last date that the equipment was available for use. The amendment takes away complete control over leaving equipment on site to increase the lien period by

the rental equipment lienor. Under the amendment either the owner or the lessee of the rental equipment may give the rental equipment lessor a written notice to pick up the equipment. The date of last available use is defined as either the last date actually available for use, **or** two days after the written notice to pick up is received by the rental equipment lessor, whichever occurs first.

5. Notices required to be in writing. Most notices and requests in the lien law are required to be in writing. This amendment is a “catch-all” to insure that **all** requests, notices, and demands under the lien law (except for the designation of materials account under §713.14) must be in writing.
6. Contract lien warning/notice for residential construction clarified. Currently there is a requirement for a notice with particular wording to be included on the first page of a contract between a contractor and a residential owner (up to 4 units). There were 3 problems with this warning sought to be solved by the amendment. First, the notice is huge and takes up almost a whole page. Second, the lien law recognizes oral contracts. How do you put the warning on the first page of an oral contract? Third, it was not clear what the effect was of failure to comply with the provision.
The changes made with respect to the residential warning are:
 - a) The type size is reduced from a required 14 point type to a 12 point type.
 - b) The law now says that the warning must be on either the first page of a written contract, or on a separate page signed and dated by the owner for an oral contract, referencing the contract.
 - c) The wording of the warning was slightly changed.
 - d) The amendment makes clear that the failure to comply with this warning section does not bar the lien against a person who has not been adversely affected. Under current law (before the amendment) the argument existed that if you failed to comply with the lien law you did not get a lien, i.e., the defense acted as a bar. Now the defense is not a bar unless the owner can show adverse effect, e.g. If the warning was there I would have
7. Clarification on Notice of Recommencement. §713.07 provides for an affidavit of abandonment and a notice of recommencement when construction ceases before completion and the owner wishes to complete the work with another contractor. The amendment adds “or the contract is terminated” to the existing predicate: “if construction ceases”.
8. Clarification of who may prepare claim of lien. This amendment makes clear that only the lienor or the lienor’s employee or attorney may prepare a claim of lien. Other persons are not authorized by the statute to prepare claims of lien. Thus non-lawyer service bureaus are not empowered to prepare a claim of lien and to do so would likely be the unlicensed practice of law. (Whether the lien would be considered invalid remains to be seen.)
9. Formality of lien execution. Before July 1, 2007 a lien was required to be “verified.” A “verified” document *may* be one that is sworn to. It may also be a document that says that

under penalties of perjury the signer has read the document and that the statements are true (without a notary). After July 1, 2007 the claim of lien must be sworn to or affirmed.

10. Time within which to record lien. Most people are aware that a lien must be recorded within 90 days of last work or delivery by the lienor. The law also says that the lien must be recorded within 90 days of the default of the prime contractor, even if shorter than 90 days from the lienor's last work or delivery. The term "default" was problematic since a default could be undeclared or could be waived. The amendment changes prime contractor "default" to prime contractor "termination" such that a lien must be recorded within the earliest of 90 days from lienor's last work or delivery; or within 90 days from prime contractor termination.
11. Tax folio number to be included in Notice of Commencement. The amendment adds the tax folio number as an item of description of the real property in the Notice of Commencement. It is not mandatory, but says that it should be included. A tax folio number is a method to assist in defining the real property. The place for the tax folio number is at the top of the notice of commencement next to the place for the permit number.
12. Notice of commencement is to be verified on information and belief, not sworn to or affirmed. The formality of execution of a notice of commencement has been changed from a requirement of sworn to or affirmed, to personal verification upon information and belief. Accordingly, the form was changed to reflect this form of execution.
13. Clarification on amendment of Notice of Commencement. Specific authority is given after July 1, 2007 to allow for amendment of a notice of commencement to change the effective period, to change information, or to add information. However a change of contractor requires a new notice of commencement, or notice of re-commencement, since prime contracts are supposed to be in sync with notices of commencement because the application of the proper payments defense is affected. There two new further requirements for an amended notice of commencement: a) the amended notice of commencement must identify the official records book and page of the original notice of commencement being amended, and b) a copy of the amended notice of commencement must be served by the owner on the contractor, and on each lienor who has served notice.
14. Change in language on permit card. The lien warning on the building permit card has been changed. It will now only be required to be in 14 point type, rather than 18 point type. It will also state that "A notice of commencement must be recorded and posted on the job site before the first inspection." (Some building departments have been improperly requiring a recorded notice of commencement as a condition to applying for permit.)
15. Clarification of sworn statement pursuant to §713.16. We know that an owner may request in writing a sworn statement of account from a lienor. The amendment simply makes clear that the sworn statement of account to be furnished in response to such a request must be "under oath."

16. Change in lienor's request for sworn statement from owner. We know that a lienor who has recorded a lien may request a sworn statement of account from the owner, which can result in the inability of the owner to recover prevailing party attorney fees for the lien enforcement action if the owner does not timely furnish the requested sworn statement. This change in the statute clarifies the information to be furnished in the sworn statement so that the information may have greater relevance to the lienor by restricting the sworn statement information to the direct contract under which the lien is claimed.
17. Service on limited liability companies. The lien law provides the method for service of documents on individuals, corporate entities, and partnerships. It did not address service on limited liability companies. After July 1, 2007 the lien law provides that service on limited liability companies should be made to a member or manager thereof.
18. Duration of amended claim of lien. Case law had said that a lien lasts for one year from the recording of the original claim of lien, regardless of an amended claim of lien. After July 1, 2007 if the amended claim of lien reflects a later date of final furnishing, then the lien lasts for one year from the amended claim of lien.
19. Prevailing party attorney fees on fraudulent lien claim. The lien law has long provided that the prevailing party in an action to enforce a lien should recover attorney fees for that endeavor. After July 1, 2007 when there is a claim of a fraudulent lien made, prevailing party attorney fees apply to that claim of fraudulent lien as well. Prior to July 1, 2007 only an owner could recover attorney fees as an element of damages in securing the discharge of the lien if the owner was successful on the fraudulent lien claim.

Any questions feel free to call us.

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