

By the Committee on Judiciary; and Senator Steube

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1 A bill to be entitled
2 An act relating to construction bonds; amending s.
3 255.05, F.S.; requiring a notice of nonpayment to be
4 verified; requiring the notice to contain certain
5 statements; providing that a claimant who serves a
6 fraudulent notice of nonpayment shall be deprived of
7 his or her rights under a bond; requiring a notice of
8 nonpayment to be in a prescribed form; amending s.
9 627.756, F.S.; providing that a provision relating to
10 attorney fees applies to certain suits brought by
11 contractors; deeming contractors to be insureds or
12 beneficiaries for certain purposes; reenacting s.
13 627.428, F.S., relating to attorney fees; amending s.
14 713.23, F.S.; requiring a lienor to serve a verified
15 notice of nonpayment to specified entities during a
16 certain period of time; requiring a notice of
17 nonpayment to contain certain statements; providing
18 that a lienor who serves a fraudulent notice of
19 nonpayment is deprived of his or her rights under the
20 bond; requiring a notice of nonpayment to be in a
21 prescribed form; amending s. 713.245, F.S.; providing
22 that a contractor may record a notice identifying a
23 project bond as a conditional payment bond before
24 project commencement to make the duty of a surety to
25 pay lienors coextensive with the contractor's duty to
26 pay; providing that failure to list or record a bond
27 as a conditional payment bond does not convert such a
28 bond into a common law bond or a bond furnished under
29 a specified provision; revising the statement that

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30 must be included on a conditional payment bond;
31 providing applicability; providing an effective date.
32

33 Be It Enacted by the Legislature of the State of Florida:
34

35 Section 1. Paragraph (a) of subsection (2) of section
36 255.05, Florida Statutes, is amended to read:

37 255.05 Bond of contractor constructing public buildings;
38 form; action by claimants.-

39 (2) (a) 1. If a claimant is no longer furnishing labor,
40 services, or materials on a project, a contractor or the
41 contractor's agent or attorney may elect to shorten the time
42 within which an action to enforce any claim against a payment
43 bond must be commenced by recording in the clerk's office a
44 notice in substantially the following form:
45

46 NOTICE OF CONTEST OF CLAIM
47 AGAINST PAYMENT BOND
48

49 To: ...(Name and address of claimant)...
50

51 You are notified that the undersigned contests your notice
52 of nonpayment, dated,, and served on the
53 undersigned on,, and that the time within
54 which you may file suit to enforce your claim is limited to 60
55 days after the date of service of this notice.
56

57 DATED on,
58

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

60
61 The claim of a claimant upon whom such notice is served and who
62 fails to institute a suit to enforce his or her claim against
63 the payment bond within 60 days after service of such notice is
64 ~~shall be~~ extinguished automatically. The contractor or the
65 contractor's attorney shall serve a copy of the notice of
66 contest to the claimant at the address shown in the notice of
67 nonpayment or most recent amendment thereto and shall certify to
68 such service on the face of the notice and record the notice.

69 2. A claimant, except a laborer, who is not in privity with
70 the contractor shall, before commencing or not later than 45
71 days after commencing to furnish labor, services, or materials
72 for the prosecution of the work, serve ~~furnish~~ the contractor
73 with a written notice that he or she intends to look to the bond
74 for protection. A claimant who is not in privity with the
75 contractor and who has not received payment for furnishing his
76 or her labor, services, or materials shall serve a written
77 notice of nonpayment on ~~deliver to~~ the contractor and on ~~to~~ the
78 surety ~~written notice of the performance of the labor or~~
79 ~~delivery of the materials or supplies and of the nonpayment.~~ The
80 notice of nonpayment shall be verified in accordance with s.
81 92.525 and served during the progress of the work or thereafter
82 but may not be served earlier than 45 days after the first
83 furnishing of labor, services, or materials by the claimant or
84 later than 90 days after the final furnishing of the labor,
85 services, or materials by the claimant or, with respect to
86 rental equipment, ~~not~~ later than 90 days after the date that the
87 rental equipment was last on the job site available for use. The

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88 notice of nonpayment must state, as of the date of the notice,
89 the nature of the labor or services performed; the nature of the
90 labor or services to be performed, if known; the materials
91 furnished; the materials to be furnished, if known; the amount
92 paid on account to date; the amount due; and the amount to
93 become due, if known. Any notice of nonpayment served by a
94 claimant who is not in privity with the contractor which
95 includes sums for retainage must specify the portion of the
96 amount claimed for retainage. An action for the labor,
97 materials, or supplies may not be instituted against the
98 contractor or the surety unless the notice to the contractor and
99 notice of nonpayment have been served, if required by this
100 section. Notices required or permitted under this section must
101 ~~shall~~ be served in accordance with s. 713.18. A claimant may not
102 waive in advance his or her right to bring an action under the
103 bond against the surety. In any action brought to enforce a
104 claim against a payment bond under this section, the prevailing
105 party is entitled to recover a reasonable fee for the services
106 of his or her attorney for trial and appeal or for arbitration,
107 in an amount to be determined by the court, which fee must be
108 taxed as part of the prevailing party's costs, as allowed in
109 equitable actions. The time periods for service of a notice of
110 nonpayment or for bringing an action against a contractor or a
111 surety shall be measured from the last day of furnishing labor,
112 services, or materials by the claimant and may not be measured
113 by other standards, such as the issuance of a certificate of
114 occupancy or the issuance of a certificate of substantial
115 completion. A claimant who serves a fraudulent notice of
116 nonpayment shall be deprived of his or her rights under the

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117 bond. A notice of nonpayment is fraudulent if the claimant has
 118 willfully exaggerated the amount due, willfully included a claim
 119 for work not performed or materials not furnished for the
 120 subject improvement, or prepared the notice with such willful
 121 and gross negligence as to amount to a willful exaggeration.
 122 However, a minor mistake or error in a notice of nonpayment, or
 123 a good faith dispute as to the amount due, does not constitute a
 124 willful exaggeration that operates to defeat an otherwise valid
 125 claim against the bond. The service of a fraudulent notice of
 126 nonpayment is a complete defense to the claimant's claim against
 127 the bond, entitling the prevailing party to attorney fees under
 128 this subparagraph. The notice of nonpayment under this
 129 subparagraph must be in substantially the following form:

130
 131 NOTICE OF NONPAYMENT

132
 133 To: ...(name of contractor and address)...

134 ...(name of surety and address)...

135 The undersigned claimant notifies you that:

136 1. Claimant has furnished ...(describe labor, services, or
 137 materials)... for the improvement of the real property
 138 identified as ...(property description)... The corresponding
 139 amount now due and unpaid is \$

140 2. Claimant has been paid on account to date the amount of
 141 \$ for previously furnishing ...(describe labor, service, or
 142 materials)... for this improvement.

143 3. Claimant expects to furnish ...(describe labor, service,
 144 or materials)...for this improvement in the future (if known),
 145 and the corresponding amount expected to become due is \$

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146 (if known).

147
148 Under penalties of perjury, I declare that I have read the
149 foregoing Notice of Nonpayment and that the facts stated in it
150 are true.

151
152 ...(signature and address of claimant)...

153 Section 2. Subsection (1) of section 627.756, Florida
154 Statutes, is amended to read:

155 627.756 Bonds for construction contracts; attorney fees in
156 case of suit.—

157 (1) Section 627.428 applies to suits brought by owners,
158 contractors, subcontractors, laborers, and materialmen against a
159 surety insurer under payment or performance bonds written by the
160 insurer under the laws of this state to indemnify against
161 pecuniary loss by breach of a building or construction contract.
162 Owners, contractors, subcontractors, laborers, and materialmen
163 shall be deemed to be insureds or beneficiaries for the purposes
164 of this section.

165 Section 3. Section 627.428, Florida Statutes, is reenacted
166 to read:

167 627.428 Attorney's fee.—

168 (1) Upon the rendition of a judgment or decree by any of
169 the courts of this state against an insurer and in favor of any
170 named or omnibus insured or the named beneficiary under a policy
171 or contract executed by the insurer, the trial court or, in the
172 event of an appeal in which the insured or beneficiary prevails,
173 the appellate court shall adjudge or decree against the insurer
174 and in favor of the insured or beneficiary a reasonable sum as

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175 fees or compensation for the insured's or beneficiary's attorney
176 prosecuting the suit in which the recovery is had.

177 (2) As to suits based on claims arising under life
178 insurance policies or annuity contracts, no such attorney's fee
179 shall be allowed if such suit was commenced prior to expiration
180 of 60 days after proof of the claim was duly filed with the
181 insurer.

182 (3) When so awarded, compensation or fees of the attorney
183 shall be included in the judgment or decree rendered in the
184 case.

185 Section 4. Paragraph (d) of subsection (1) of section
186 713.23, Florida Statutes, is amended to read:

187 713.23 Payment bond.—

188 (1)

189 (d) In addition, a lienor who has not received payment for
190 furnishing his or her labor, services, or materials must ~~is~~
191 required, as a condition precedent to recovery under the bond,
192 ~~to~~ serve a written notice of nonpayment to the contractor and
193 the surety. The notice must be verified in accordance with s.
194 92.525 and must be served during the progress of the work or
195 thereafter, but may not be served earlier than 45 days after the
196 first furnishing of labor, services, or materials by the lienor
197 or ~~not~~ later than 90 days after the final furnishing of labor,
198 services, or materials by the lienor, or, with respect to rental
199 equipment, later than 90 days after the date the rental
200 equipment was on the job site and available for use. The notice
201 of nonpayment must state, as of the date of the notice, the
202 nature of the labor or services performed; the nature of the
203 labor or services to be performed, if known; the materials

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204 furnished; the materials to be furnished, if known; the amount
205 paid on account to date; the amount due; and the amount to
206 become due, if known. A notice of nonpayment that includes sums
207 for retainage must specify the portion of the amount claimed for
208 retainage. The required. ~~A written~~ notice satisfies this
209 condition precedent with respect to the payment described in the
210 notice of nonpayment, including unpaid finance charges due under
211 the lienor's contract, and with respect to any other payments
212 which become due to the lienor after the date of the notice of
213 nonpayment. The time period for serving a ~~written~~ notice of
214 nonpayment shall be measured from the last day of furnishing
215 labor, services, or materials by the lienor and shall not be
216 measured by other standards, such as the issuance of a
217 certificate of occupancy or the issuance of a certificate of
218 substantial completion. The failure of a lienor to receive
219 retainage sums not in excess of 10 percent of the value of
220 labor, services, or materials furnished by the lienor is not
221 considered a nonpayment requiring the service of the notice
222 provided under this paragraph. If the payment bond is not
223 recorded before commencement of construction, the time period
224 for the lienor to serve a notice of nonpayment may at the option
225 of the lienor be calculated from the date specified in this
226 section or the date the lienor is served a copy of the bond.
227 However, the limitation period for commencement of an action on
228 the payment bond as established in paragraph (e) may not be
229 expanded. A lienor who serves a fraudulent notice of nonpayment
230 shall be deprived of his or her rights under the bond. A notice
231 of nonpayment is fraudulent if the lienor has willfully
232 exaggerated the amount due, willfully included a claim for work

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233 not performed or materials not furnished for the subject
234 improvement, or prepared the notice with such willful and gross
235 negligence as to amount to a willful exaggeration. However, a
236 minor mistake or error in a notice of nonpayment, or a good
237 faith dispute as to the amount due, does not constitute a
238 willful exaggeration that operates to defeat an otherwise valid
239 claim against the bond. The service of a fraudulent notice of
240 nonpayment is a complete defense to the lienor's claim against
241 the bond, entitling the prevailing party to attorney fees under
242 s. 713.29. The notice under this paragraph must ~~may~~ be in
243 substantially the following form:

NOTICE OF NONPAYMENT

244
245
246
247 To ...(name of contractor and address)...

248 ...(name of surety and address)...

249 The undersigned lienor notifies you that:

250 1. The lienor ~~he or she~~ has furnished ... (describe labor,
251 services, or materials) ... for the improvement of the real
252 property identified as ... (property description) ... The
253 corresponding amount now due and unpaid is \$.....

254 2. The lienor has been paid on account to date the amount
255 of \$... for previously furnishing ... (describe labor, services,
256 or materials) ... for this improvement.

257 3. The lienor expects to furnish ... (describe labor,
258 service, or materials) ... for this improvement in the future (if
259 known), and the corresponding amount expected to become due is \$
260 (if known).

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262 Under penalties of perjury, I declare that I have read the
263 foregoing Notice of Nonpayment and that the facts stated in it
264 are true.

265 ... (signature and address of lienor) ...

266 Section 5. Subsection (1) of section 713.245, Florida
267 Statutes, is amended to read:

268 713.245 Conditional payment bond.—

269 (1) Notwithstanding any provisions of ss. 713.23 and 713.24
270 to the contrary, if the contractor's written contractual
271 obligation to pay lienors is expressly conditioned upon and
272 limited to the payments made by the owner to the contractor, the
273 duty of the surety to pay lienors will be coextensive with the
274 duty of the contractor to pay, if the following provisions are
275 complied with:

276 (a) The bond is listed in the notice of commencement for
277 the project as a conditional payment bond and is recorded
278 together with the notice of commencement for the project before
279 ~~prior to~~ commencement of the project, or the contractor records
280 a notice identifying the bond for the project as a conditional
281 payment bond, with the bond attached, before commencement of the
282 project. Failure to comply with this paragraph does not convert
283 a conditional payment bond into a common law bond or into a bond
284 furnished under s. 713.23.

285 (b) The words "conditional payment bond" are contained in
286 the title of the bond at the top of the front page.

287 (c) The bond contains on the front page, capitalized and in
288 at least 10-point type, the statement: "THIS BOND ONLY COVERS
289 CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND
290 LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE

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291 LABOR, SERVICES, OR MATERIALS PROVIDED BY SUCH PERSONS. THIS
292 BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR
293 FILING A CLAIM OF LIEN ON THIS PROJECT.”

294 Section 6. The amendments made by this act to ss. 627.756
295 and 713.245, Florida Statutes, apply only to payment or
296 performance bonds issued on or after October 1, 2018.

297 Section 7. This act shall take effect October 1, 2018.