

By Senator Dudley

25-1118-98

See HB 3319

1 A bill to be entitled

2 An act relating to liens; amending s. 255.05,

3 F.S.; revising provisions with respect to the

4 bond of a contractor constructing public

5 buildings; providing an expedited time period

6 for certain claims; providing for protection

7 for contractors and surety under certain

8 circumstances; providing for written statements

9 to the contractor with respect to the nature of

10 labor or services performed under certain

11 circumstances; amending s. 713.06, F.S.;

12 revising provisions with respect to liens of

13 persons not in privity; providing for

14 protection of contractors and surety under

15 certain circumstances; amending s. 713.16,

16 F.S.; authorizing the contractor to serve a

17 demand for copy of contract and statements of

18 account under certain circumstances; amending

19 s. 713.20, F.S.; revising the waiver or release

20 of liens form; amending s. 713.23, F.S.;

21 providing for a shortened timeframe for the

22 commencement of certain actions to enforce a

23 claim against the payment bond; providing a

24 form; providing for discharge; creating s.

25 713.235, F.S.; providing for waivers of right

26 to claim against a payment bond; providing

27 forms; providing an effective date.

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29 Be It Enacted by the Legislature of the State of Florida:

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1 Section 1. Paragraphs (a), (b), and (c) of subsection
2 (2) of section 255.05, Florida Statutes, are amended, and
3 subsections (8) and (9) are added to that section, to read:

4 255.05 Bond of contractor constructing public
5 buildings; form; action by materialmen.--

6 (2)(a)1. A contractor or the contractor's agent or
7 attorney may elect to shorten the time prescribed in this
8 paragraph within which an action to enforce any claim against
9 a payment bond provided pursuant to s. 255.05 may be commenced
10 by serving on the affected claimant a notice in substantially
11 the following form:

12
13 NOTICE OF CONTEST OF CLAIM AGAINST PAYMENT BOND

14 To: ...(Name and address of claimant)...

15 You are notified that the undersigned contests your
16 notice of nonpayment, dated _____, _____, and served on the
17 undersigned on _____, _____, and that the time within which
18 you may file suit to enforce your claim is limited to 60 days
19 from the date of service of this notice.

20 DATED on _____, _____.

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

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23 The claim of any claimant upon whom such notice is served and
24 who fails to institute a suit to enforce his or her claim
25 against the payment bond within 60 days after service of such
26 notice shall be extinguished automatically. The clerk shall
27 mail a copy of the notice of contest to the claimant at the
28 address shown in the notice of nonpayment and shall certify to
29 such service on the face of the notice of contest and record
30 the notice. Service shall be deemed complete upon mailing.

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1 2. A claim against a payment bond provided pursuant to
2 this section may be discharged by an order of the circuit
3 court of the county where the property is located in the
4 following manner: upon filing a complaint therefor by any
5 interested party, the clerk shall issue a summons to the
6 claimant to show cause within 20 days why his or her claim
7 against the payment bond should not be enforced by action or
8 extinguished. Upon failure of the claimant to show cause why
9 his or her claim against the payment bond should not be
10 enforced or upon the claimant's failure to commence such
11 action before the return date of the summons, the court shall
12 issue an order extinguishing the claim.

13 3. A claimant, except a laborer, who is not in privity
14 with the contractor shall, before commencing or not later than
15 45 days after commencing to furnish labor, materials, or
16 supplies for the prosecution of the work, furnish the
17 contractor with a notice that he or she intends to look to the
18 bond for protection. A claimant who is not in privity with
19 the contractor and who has not received payment for his or her
20 labor, materials, or supplies shall deliver to the contractor
21 and to the surety written notice of the performance of the
22 labor or delivery of the materials or supplies and of the
23 nonpayment. The notice of nonpayment may be served at any time
24 during the progress of the work or thereafter but not before
25 45 days after the first furnishing of labor, services, or
26 materials, and not later than 90 days after the final
27 furnishing of the labor, services, or materials by the
28 claimant or, with respect to rental equipment, not later than
29 90 days after the date that the rental equipment was last on
30 the job site available for use. No action for the labor,
31 materials, or supplies may be instituted against the

1 contractor or the surety unless both notices have been given.
2 No action shall be instituted against the contractor or the
3 surety on the payment bond or the payment provisions of a
4 combined payment and performance bond after 1 year from the
5 performance of the labor or completion of delivery of the
6 materials or supplies. A claimant may not waive in advance
7 his or her right to bring an action under the bond against the
8 surety. In any action brought to enforce a claim against a
9 payment bond under this section, the prevailing party is
10 entitled to recover a reasonable fee for the services of his
11 or her attorney for trial and appeal or for arbitration, in an
12 amount to be determined by the court, which fee must be taxed
13 as part of the prevailing party's costs, as allowed in
14 equitable actions.

15 (b) When a person is required to execute a waiver of
16 his or her right to make a claim against the payment bond in
17 exchange for, or to induce payment of, a progress payment, the
18 waiver may be in substantially the following form:

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WAIVER OF RIGHT TO CLAIM
AGAINST THE PAYMENT BOND
(PROGRESS PAYMENT)

24 The undersigned, in consideration of the sum of \$....,
25 hereby waives its right to claim against the payment bond
26 provided pursuant to s. 255.05, Florida Statutes, for labor,
27 services, or materials furnished through ...(insert date)...
28 to ...(insert the name of your customer)... on the job of
29 ...(insert the name of the owner)..., for improvements to the
30 following described project:

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(description of project)

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

Released Parties:

Contractor:..... Surety:.....

DATED ON, 19....

...(Claimant)...

By:.....

(c) When a person is required to execute a waiver of
his or her right to make a claim against the payment bond, in
exchange for, or to induce payment of, the final payment, the
waiver may be in substantially the following form:

WAIVER OF RIGHT TO CLAIM
AGAINST THE PAYMENT BOND (FINAL PAYMENT)

The undersigned, in consideration of the final payment
in the amount of \$...., hereby waives its right to claim
against the payment bond provided pursuant to s. 255.05,
Florida Statutes, for labor, services, or materials furnished
to ...(insert the name of your customer)... on the job of
...(insert the name of the owner)..., for improvements to the
following described project:

(description of project)

Released Parties:

Contractor:..... Surety:.....

1 fraudulent statement, of his or her rights under the bond. If
2 the contractor serves more than one demand for statement of
3 account on a claimant and none of the information regarding
4 the account has changed since the claimant's last response to
5 a demand, the failure or refusal to furnish such statement
6 does not deprive the claimant of his or her rights under the
7 bond. The negligent inclusion or omission of any information
8 deprives the person of his or her rights under the bond to the
9 extent the contractor can demonstrate prejudice from such act
10 or omission by the claimant. The failure to furnish a response
11 to a demand for statement of account does not affect the
12 validity of any claim on the bond being enforced in a lawsuit
13 filed prior to the date the demand for statement of account is
14 received by the claimant.

15 Section 2. Paragraph (d) of subsection (3) of section
16 713.06, Florida Statutes, is amended, and subsection (5) is
17 added to that section, to read:

18 713.06 Liens of persons not in privity; proper
19 payments.--

20 (3) The owner may make proper payments on the direct
21 contract as to lienors under this section, in the following
22 manner:

23 (d) When the final payment under a direct contract
24 becomes due the contractor:

25 1. The contractor shall give to the owner an affidavit
26 stating, if that be the fact, that all lienors having valid
27 lien rights pursuant to this part under his or her direct
28 contract have been paid in full or, if the fact be otherwise,
29 showing the name of each lienor who has not been paid in full
30 and the amount due or to become due each for labor, services,
31 or materials furnished. The contractor shall have no lien or

1 right of action against the owner for labor, services, or
2 materials furnished under the direct contract while in default
3 for not giving the owner the affidavit; however, a mistake or
4 error in the affidavit which has not prejudiced the owner will
5 not constitute a default that operates to defeat an otherwise
6 valid lien. The contractor shall execute the affidavit and
7 deliver it to the owner at least 5 days before instituting an
8 action as a prerequisite to the institution of any action to
9 enforce his or her lien under this chapter, even if the final
10 payment has not become due because the contract is terminated
11 for a reason other than completion and regardless of whether
12 the contractor has any lienors working under him or her or
13 not.

14 2. If the contractor's affidavit required in this
15 subsection recites any outstanding bills for labor, services,
16 or materials, the owner may, after giving the contractor at
17 least 10 days' written notice, pay such bills in full direct
18 to the person or firm to which they are due, if the balance
19 due on a direct contract at the time the affidavit is given is
20 sufficient to pay them and lienors giving notice, and shall
21 deduct the amounts so paid from the balance due the
22 contractor. Lienors listed in said affidavit not giving
23 notice, whose 45-day notice time has not expired, shall be
24 paid in full or pro rata, as appropriate, from any balance
25 then remaining due the contractor; but no lienor whose notice
26 time has expired shall be paid by the owner or by any other
27 person except the person with whom that lienor has a contract.

28 3. If the balance due is not sufficient to pay in full
29 all lienors listed in the affidavit and entitled to payment
30 from the owner under this part and other lienors giving
31 notice, the owner shall pay no money to anyone until such time

1 as the contractor has furnished him or her with the
2 difference; however, if the contractor fails to furnish the
3 difference within 10 days from delivery of the affidavit or
4 notice from the owner to the contractor to furnish the
5 affidavit, the owner shall determine the amount due each
6 lienor and shall disburse to them the amounts due from him or
7 her on a direct contract in accordance with the procedure
8 established by subsection (4).

9 4. The owner shall have the right to rely on the
10 contractor's affidavit given under this paragraph in making
11 the final payment, unless there are lienors giving notice who
12 are not listed in the affidavit. If there are lienors giving
13 notice who are not so listed, the owner may pay such lienors
14 and any persons listed in the affidavit that are entitled to
15 be paid by the owner under subparagraph (d)2. and shall
16 thereupon be discharged of any further responsibility under
17 the direct contract, except for any balance that may be due to
18 the contractor.

19 5. The owner shall retain the final payment due under
20 the direct contract that shall not be disbursed until the
21 contractor's affidavit under subparagraph (d)1. has been
22 furnished to the owner.

23 6. When final payment has become due to the contractor
24 and the owner fails to withhold as required by subparagraph
25 (d)5., the property improved shall be subject to the full
26 amount of all valid liens of which the owner has notice at the
27 time the contractor furnishes his or her affidavit.

28 (5) When a contractor furnishes a payment bond
29 pursuant to s. 713.23 or s. 713.245 and follows the proper
30 payment procedure set forth in this section, the contractor

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1 and surety are entitled to the same protections as are
2 afforded to an owner under this section.

3 Section 3. Subsection (2) of section 713.16, Florida
4 Statutes, is amended to read:

5 713.16 Demand for copy of contract and statements of
6 account; form.--

7 (2) The owner or contractor may serve in writing a
8 demand of any lienor for a written statement under oath of his
9 or her account showing the nature of the labor or services
10 performed and to be performed, if any, the materials
11 furnished, the materials to be furnished, if known, the amount
12 paid on account to date, the amount due, and the amount to
13 become due, if known, as of the date of the statement by the
14 lienor. Any such demand to a lienor must be served on the
15 lienor at the address and to the attention of any person who
16 is designated to receive the demand in the notice to owner or
17 notice to contractor served by such lienor. The failure or
18 refusal to furnish the statement does not deprive the lienor
19 of his or her lien or rights under a payment bond provided
20 under this part if the demand is not served at the address of
21 the lienor or directed to the attention of the person
22 designated to receive the demand in the notice to owner or
23 notice to contractor. The failure or refusal to furnish the
24 statement within 30 days after the demand, or the furnishing
25 of a false or fraudulent statement, deprives the person so
26 failing or refusing to furnish such statement of his or her
27 lien or rights under a payment bond provided under this part.
28 If the owner or contractor serves more than one demand for
29 statement of account on a lienor and none of the information
30 regarding the account has changed since the lienor's last
31 response to a demand, the failure or refusal to furnish such

1 statement does not deprive the lienor of his or her lien or
2 rights under a payment bond provided under this part. The
3 negligent inclusion or omission of any information deprives
4 the person of his or her lien or rights under a payment bond
5 provided under this part to the extent the owner or contractor
6 can demonstrate prejudice from such act or omission by the
7 lienor. The failure to furnish a response to a demand for
8 statement of account does not affect the validity of any claim
9 of lien or claim under a payment bond provided under this part
10 being enforced in a lawsuit ~~through a foreclosure case~~ filed
11 prior to the date the demand for statement of account is
12 received by the lienor.

13 Section 4. Subsections (4) and (5) of section 713.20,
14 Florida Statutes, are amended to read:

15 713.20 Waiver or release of liens.--

16 (4) When a lienor is required to execute a waiver or
17 release of lien in exchange for, or to induce payment of, a
18 progress payment, the waiver or release may be in
19 substantially the following form:

20

21 WAIVER AND RELEASE OF LIEN

22 UPON PROGRESS PAYMENT

23

24 The undersigned lienor, in consideration of the sum of
25 \$...., hereby waives and releases its lien and right to claim
26 a lien for labor, services, or materials furnished through
27 ...(insert date)... to ...(insert the name of your
28 customer)... on the job of ...(insert the name of the
29 owner)... to the following property:

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31 ...(description of property)...

1
2 This waiver and release extends to any claim or right to claim
3 against any payment bond furnished pursuant to s. 713.23 or s.
4 713.245, Florida Statutes.This waiver and release does not
5 cover any retention or labor, services, or materials furnished
6 after the date specified.

7 Released Parties:
8 Owner:..... Contractor:.....
9 Surety:.....(if applicable)....
10 DATED on, ~~19~~..... ...(Lienor)...
11 By:

12
13 (5) When a lienor is required to execute a waiver or
14 release of lien in exchange for, or to induce payment of, the
15 final payment, the waiver and release may be in substantially
16 the following form:

17
18 WAIVER AND RELEASE OF LIEN
19 UPON FINAL PAYMENT
20

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

27
28 ...(description of property)...
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1 This waiver and release extends to any claim or right to claim
2 against any payment bond furnished pursuant to s. 713.23 or s.
3 713.245, Florida Statutes.

4 Released Parties:

5 Owner:.....

Contractor:.....

6 Surety:.....(if applicable)....

7
8 DATED on, ~~19~~.....

...(Lienor)...

9 By:

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11 Section 5. Paragraph (e) of subsection (1) of section
12 713.23, Florida Statutes, is amended to read:

13 713.23 Payment bond.--

14 (1)

15 (e) No action for the labor or materials or supplies
16 may be instituted or prosecuted against the contractor or
17 surety unless both notices have been given. No action shall
18 be instituted or prosecuted against the contractor or against
19 the surety on the bond under this section after 1 year from
20 the performance of the labor or completion of delivery of the
21 materials and supplies. A contractor or the contractor's agent
22 or attorney may elect to shorten the prescribed time within
23 which an action to enforce any claim against a payment bond
24 provided pursuant to s. 713.23 may be commenced by serving on
25 the affected lienor a notice in substantially the following
26 form:

27 NOTICE OF CONTEST OF CLAIM AGAINST PAYMENT BOND

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29 TO: (Name and address of lienor)

30 You are notified that the undersigned contests your
31 notice of nonpayment, dated _____, _____, and served on

1 the undersigned on _____, _____, and that the time within
2 which you may file suit to enforce your claim is limited to 60
3 days from the date of service of this notice.

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5 DATED on _____, _____,

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

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9 The claim of any lienor upon whom such notice is served and
10 who fails to institute a suit to enforce his or her claim
11 against the payment bond within 60 days after service of such
12 notice shall be extinguished automatically. The clerk shall
13 mail a copy of the notice of contest to the claimant at the
14 address shown in the notice of nonpayment and shall certify to
15 such service on the face of the notice of contest and record
16 the notice. Service shall be deemed complete upon mailing.

17 (f) A claim against a payment bond provided pursuant
18 to this section may be discharged by an order of the circuit
19 court of the county where the property is located in the
20 following manner. Upon filing a complaint therefor by any
21 interested party, the clerk shall issue a summons to the
22 lienor to show cause within 20 days why his or her claim
23 against the payment bond should not be enforced by action or
24 extinguished. Upon failure of the lienor to show cause why his
25 or her claim against the payment bond should not be enforced
26 or upon the lienor's failure to commence such action before
27 the return date of the summons, the court shall issue an order
28 extinguishing the claim.

29 (g)~~(f)~~ Any lienor has a direct right of action on the
30 bond against the surety. A bond must not contain any
31 provisions restricting the classes of persons protected

1 thereby or the venue of any proceeding. The surety is not
2 entitled to the defense of pro tanto discharge as against any
3 lienor because of changes or modifications in the contract to
4 which the surety is not a party; but the liability of the
5 surety may not be increased beyond the penal sum of the bond.
6 A lienor may not waive in advance his or her right to bring an
7 action under the bond against the surety.

8 Section 6. Section 713.235, Florida Statutes, is
9 created to read:

10 713.235 Waivers of right to claim against payment
11 bond; forms.--

12 (1) When a person is required to execute a waiver of
13 his or her right to make a claim against a payment bond
14 provided pursuant to s. 713.23 or s. 713.245, in exchange for,
15 or to induce payment of, a progress payment, the waiver may be
16 in substantially the following form:

17 WAIVER OF RIGHT TO CLAIM

18 AGAINST THE PAYMENT BOND

19 PROGRESS PAYMENT

20 The undersigned, in consideration of the sum of
21 \$....., hereby waives its right to claim against the
22 payment bond provided pursuant to s. 713.23 or s. 713.245,
23 Florida Statutes, for labor, services, or materials furnished
24 through(insert date)....to....(insert the name of your
25 customer)....on the job of....(insert the name of the
26 owner)...., for improvements to the following described
27 project:

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29 (description of project)
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1 This waiver does not cover any unpaid retention or labor,
2 services, or materials furnished after the date specified.
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4 Released Parties:
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6 Contractor:..... Surety:.....
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8 DATED on.....
9(Lienor).....
10 by:.....
11 (2) When a person is required to execute a waiver of
12 his or her right to make a claim against a payment bond
13 provided pursuant to s. 713.23 or s. 713.245, in exchange for,
14 or to induce payment of, the final payment, the waiver may be
15 in substantially the following form:
16 WAIVER OF RIGHT TO CLAIM
17 AGAINST THE PAYMENT BOND (FINAL PAYMENT)
18 The undersigned, in consideration of the final payment
19 in the amount of \$....., hereby waives its right to claim
20 against the payment bond provided pursuant to s. 713.23 or s.
21 713.245, Florida Statutes, for all sums due for labor,
22 services, or materials furnished to(insert the name of
23 your customer)....on the job of....(insert the name of the
24 owner)...., for improvements to the following described
25 project:
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27 (description of project)
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29 Released Parties:
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31 Contractor:..... Surety:.....

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DATED on.....
.....(Lienor).....
by:.....
(3) A person may not require a claimant to furnish a
waiver that is different from the forms in subsections (1) and
(2).
(4) A claimant who executes a waiver in exchange for a
check may condition the waiver on payment of the check.
(5) A waiver that is not substantially similar to the
forms in this section is enforceable in accordance with its
terms.

Section 7. This act shall take effect October 1, 1998.

LEGISLATIVE SUMMARY

- Revises provisions of law relating to liens to:
- 1. Provide an expedited procedure for the enforcement of a claim against a payment bond.
 - 2. Provide described protection to a contractor and surety when a contractor properly furnishes a payment bond pursuant to s. 255.05, F.S.
 - 3. Provide for written statement to the contractor with respect to the nature of labor and services personnel.
 - 4. Revise provisions with respect to liens of persons not in privity to provide protection to the contractor and surety when a contractor properly furnishes a payment bond.
 - 5. Authorize the contractor to serve a demand for copy of contrast and statements of account under described circumstances.
 - 6. Revise the waiver of release of liens form.
 - 7. Provide for waivers of right to claim against a payment bond.

See bill for details.