

By Representative Ross

1 A bill to be entitled
2 An act relating to construction contracts;
3 amending s. 255.05, F.S.; clarifying criteria
4 for performance of bonds; clarifying provisions
5 relating to notice of claim against a bond;
6 amending s. 713.06, F.S.; clarifying provisions
7 relating to notice of claim against a lien;
8 amending s. 713.18, F.S.; revising provisions
9 relating to manner of serving notices and
10 certain instruments; providing for service of
11 notice on corporations or business entities;
12 amending s. 713.23, F.S.; including certain
13 unpaid finance charges under a written notice
14 of nonpayment of a payment bond; correcting a
15 cross reference, to conform; repealing s.
16 713.245, F.S., relating to conditional payment
17 bonds; amending s. 713.235, F.S.; correcting a
18 cross reference, to conform; providing an
19 effective date.

20
21 Be It Enacted by the Legislature of the State of Florida:

22
23 Section 1. Paragraph (a) of subsection (1) and
24 paragraph (a) of subsection (2) of section 255.05, Florida
25 Statutes, are amended to read:

26 255.05 Bond of contractor constructing public
27 buildings; form; action by materialmen.--

28 (1)(a) Any person entering into a formal contract with
29 the state or any county, city, or political subdivision
30 thereof, or other public authority, for the construction of a
31 public building, for the prosecution and completion of a

1 public work, or for repairs upon a public building or public
2 work shall be required, before commencing the work or before
3 recommencing the work after a default or abandonment, to
4 execute, deliver to the public owner, and record in the public
5 records of the county where the improvement is located, a
6 payment and performance bond with a surety insurer authorized
7 to do business in this state as surety. The bond must state on
8 its front page: the name, principal business address, and
9 phone number of the contractor, the surety, the owner of the
10 property being improved, and, if different from the owner, the
11 contracting public entity; the contract number assigned by the
12 contracting public entity; and a description of the project
13 sufficient to identify it, such as ~~including, if applicable,~~ a
14 legal description or ~~and~~ the street address of the property
15 being improved, and a general description of the improvement.
16 Such bond shall be conditioned upon the contractor's
17 performance of the construction work ~~that the contractor~~
18 ~~perform the contract~~ in the time and manner prescribed in the
19 contract and the contractor's prompt payment ~~promptly make~~
20 payments to all persons defined in s. 713.01 who furnish
21 labor, services, or materials for ~~whose claims derive directly~~
22 ~~or indirectly from~~ the prosecution of the work provided for in
23 the contract. Any claimant may apply to the governmental
24 entity having charge of the work for copies of the contract
25 and bond and shall thereupon be furnished with a certified
26 copy of the contract and bond. The claimant shall have a right
27 of action against the contractor and surety for the amount due
28 him or her, including unpaid finance charges due under the
29 claimant's contract. Such action shall not involve the public
30 authority in any expense. When such work is done for the
31 state and the contract is for \$100,000 or less, no payment and

1 performance bond shall be required. At the discretion of the
2 official or board awarding such contract when such work is
3 done for any county, city, political subdivision, or public
4 authority, any person entering into such a contract which is
5 for \$200,000 or less may be exempted from executing the
6 payment and performance bond. When such work is done for the
7 state, the Secretary of the Department of Management Services
8 may delegate to state agencies the authority to exempt any
9 person entering into such a contract amounting to more than
10 \$100,000 but less than \$200,000 from executing the payment and
11 performance bond. In the event such exemption is granted, the
12 officer or officials shall not be personally liable to persons
13 suffering loss because of granting such exemption. The
14 Department of Management Services shall maintain information
15 on the number of requests by state agencies for delegation of
16 authority to waive the bond requirements by agency and project
17 number and whether any request for delegation was denied and
18 the justification for the denial.

19
20 The state shall not be held liable to any laborer,
21 materialman, or subcontractor for any amounts greater than the
22 pro rata share as determined under this section.

23 (2)(a)1. If a claimant is no longer furnishing labor,
24 services, or materials on a project, a contractor or the
25 contractor's agent or attorney may elect to shorten the
26 prescribed time in this paragraph within which an action to
27 enforce any claim against a payment bond provided pursuant to
28 this section may be commenced by recording in the clerk's
29 office a notice in substantially the following form:

30
31

NOTICE OF CONTEST OF CLAIM

AGAINST PAYMENT BOND

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

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

DATED on,

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

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

2. A claimant, except a laborer, who is not in privity with the contractor shall, ~~before commencing or not later than 45 days after commencing to furnish labor, materials, or supplies for the prosecution of the work,~~ furnish the contractor with a notice that he or she intends to look to the bond for protection. If the claimant serves the notice before,

1 or not later than 45 days after, commencing to furnish labor,
2 services, or materials, a claim against the bond may include
3 amounts due to the claimant for all labor, services, or
4 materials furnished on the project and any unpaid finance
5 charges due under the claimant's contract. If the claimant
6 serves the notice later than 45 days after commencing to
7 furnish labor, services, or materials, the claimant's claim
8 against the bond may only include amounts due to the claimant
9 for labor, services, or materials furnished on the project on
10 or after the date the notice is mailed or otherwise served in
11 accordance with s. 713.18 and any unpaid finance charges due
12 under the claimant's contract for such labor, services, or
13 materials. A claimant who is not in privity with the
14 contractor and who has not received payment for his or her
15 labor, materials, or supplies shall deliver to the contractor
16 and to the surety written notice of the performance of the
17 labor or delivery of the materials or supplies and of the
18 nonpayment. The notice of nonpayment may be served at any time
19 during the progress of the work or thereafter but ~~not before~~
20 ~~45 days after the first furnishing of labor, services, or~~
21 ~~materials, and~~ not later than 90 days after the final
22 furnishing of the labor, services, or materials by the
23 claimant or, with respect to rental equipment, not later than
24 90 days after the date that the rental equipment was last on
25 the job site available for use. No action for the labor,
26 materials, or supplies may be instituted against the
27 contractor or the surety unless both notices have been given.
28 Notices required or permitted under this section may be served
29 in accordance with s. 713.18. An action, except for an action
30 exclusively for recovery of retainage, must be instituted
31 against the contractor or the surety on the payment bond or

1 the payment provisions of a combined payment and performance
2 bond within 1 year after the performance of the labor or
3 completion of delivery of the materials or supplies. An action
4 exclusively for recovery of retainage must be instituted
5 against the contractor or the surety within 1 year after the
6 performance of the labor or completion of delivery of the
7 materials or supplies, or within 90 days after ~~the~~
8 ~~contractor's~~ receipt of final payment (or the payment estimate
9 containing the owner's final reconciliation of quantities if
10 no further payment is earned and due as a result of deductive
11 adjustments) by the contractor or surety, whichever comes
12 last. A claimant may not waive in advance his or her right to
13 bring an action under the bond against the surety. In any
14 action brought to enforce a claim against a payment bond under
15 this section, the prevailing party is entitled to recover a
16 reasonable fee for the services of his or her attorney for
17 trial and appeal or for arbitration, in an amount to be
18 determined by the court, which fee must be taxed as part of
19 the prevailing party's costs, as allowed in equitable actions.
20 The time periods for service of a notice of nonpayment or for
21 bringing an action against a contractor or a surety shall be
22 measured from the last day of furnishing labor, services, or
23 materials by the claimant and shall not be measured by other
24 standards, such as the issuance of a certificate of occupancy
25 or the issuance of a certificate of substantial completion.

26 Section 2. Paragraph (a) of subsection (2) and
27 paragraph (h) of subsection (3) of section 713.06, Florida
28 Statutes, are amended to read:

29 713.06 Liens of persons not in privity; proper
30 payments.--
31

1 (2)(a) All lienors under this section, except
2 laborers, as a prerequisite to perfecting a lien under this
3 chapter and recording a claim of lien, must serve a notice on
4 the owner setting forth the lienor's name and address, a
5 description sufficient for identification of the real
6 property, and the nature of the services or materials
7 furnished or to be furnished. A sub-subcontractor or a
8 materialman to a subcontractor must serve a copy of the notice
9 on the contractor as a prerequisite to perfecting a lien under
10 this chapter and recording a claim of lien. A materialman to a
11 sub-subcontractor must serve a copy of the notice to owner on
12 the contractor as a prerequisite to perfecting a lien under
13 this chapter and recording a claim of lien. A materialman to a
14 sub-subcontractor shall serve the notice to owner on the
15 subcontractor if the materialman knows the name and address of
16 the subcontractor. If the lienor serves the notice before, or
17 not later than 45 days after, commencing to furnish labor,
18 services, or materials, the lienor's claim of lien may include
19 amounts due to the lienor for all labor, services, or
20 materials furnished on the project and any unpaid finance
21 charges due under the lienor's contract. If the lienor serves
22 the notice later than 45 days after commencing to furnish
23 labor, services, or materials, the lienor's claim of lien may
24 only include amounts due to the lienor for labor, services, or
25 materials furnished on the project on or after the date the
26 notice is mailed or otherwise served in accordance with s.
27 713.18 and any unpaid finance charges due under the lienor's
28 contract for such labor, services, or materials.~~The notice~~
29 ~~must be served before commencing, or not later than 45 days~~
30 ~~after commencing, to furnish his or her labor, services, or~~
31 ~~materials, but,~~In any event, the notice shall be served

1 before the date of the owner's disbursement of the final
2 payment after the contractor has furnished the affidavit under
3 subparagraph (3)(d)1. The notice must be served regardless of
4 the method of payments by the owner, whether proper or
5 improper, and does not give to the lienor serving the notice
6 any priority over other lienors in the same category; and the
7 failure to serve the notice, or to timely serve it, is a
8 complete defense to enforcement of a lien by any person. The
9 serving of the notice does not dispense with recording the
10 claim of lien. The notice is not a lien, cloud, or encumbrance
11 on the real property nor actual or constructive notice of any
12 of them.

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

16 (h) When the owner has properly retained all sums
17 required in this section to be retained but has otherwise made
18 improper payments, the owner's real property shall be liable
19 to all laborers, subcontractors, sub-subcontractors, and
20 materialmen complying with this chapter only to the extent of
21 the retentions and the improper payments, notwithstanding the
22 other provisions of this subsection. Any money paid by the
23 owner on a direct contract, the payment of which is proved to
24 have caused no detriment to any certain lienor, shall be held
25 properly paid as to the lienor, and if any of the money shall
26 be held not properly paid as to any other lienors, the entire
27 benefit of its being held not properly paid as to them shall
28 go to the lienors. An owner is not entitled to a proper
29 payment defense to the extent of improper payments made by the
30 owner at any time during the project.

31

1 Section 3. Section 713.18, Florida Statutes, is
2 amended to read:

3 713.18 Manner of serving notices and other
4 instruments.--

5 (1) Service of notices, claims of lien, affidavits,
6 assignments, and other instruments permitted or required under
7 this part, or copies thereof when so permitted or required,
8 unless otherwise specifically provided in this part, must be
9 made by one of the following methods:

10 (a) By actual delivery to the person to be served; ~~or,~~
11 ~~if a partnership, to one of the partners; or, if a~~
12 ~~corporation, to an officer, director, managing agent, or~~
13 ~~business agent thereof.~~

14 (b) By sending mailing the same, ~~postage prepaid,~~ by
15 registered or certified mail, with postage prepaid, or by
16 overnight or second-day delivery with ~~to the person to be~~
17 ~~served at her or his last known address and evidence of~~
18 delivery.

19 1. If a notice to owner, ~~or~~ a notice to contractor
20 under s. 713.23, or a preliminary notice under s. 255.05 is
21 mailed by registered or certified mail with postage prepaid to
22 the person to be served at any of the addresses set forth in
23 subparagraph 2. ~~pursuant to this paragraph~~ within 40 days
24 after the date the lienor first furnishes labor, services, or
25 materials, service of that notice is effective as of the date
26 of mailing if the person who served the notice maintains a
27 registered or certified mail log that shows ~~the date the~~
28 ~~notice was served,~~ the registered or certified mail number
29 issued by the United States Postal Service, the name and
30 address of the person served, and the date stamp of the United
31 States Postal Service confirming the date of mailing.

1 2. If an instrument served pursuant to this section
2 ~~paragraph~~ to the last address shown in the notice of
3 commencement or any amendment thereto or, in the absence of a
4 notice of commencement, to the last address shown in the
5 building permit application, or to the last known address of
6 the person to be served, is not received, but is returned ~~by~~
7 ~~the United States Postal Service~~ as being "refused," "moved,
8 not forwardable," or "unclaimed," or is otherwise not
9 delivered or deliverable through no fault of the person
10 serving the item, then service is effective on the date the
11 notice was sent; ~~as of the date of mailing.~~

12 (c) By facsimile transmission if the person being
13 served has listed that person's facsimile phone number in the
14 notice of commencement. The lienor's facsimile confirmation
15 sheet with the correct facsimile phone number shall be proof
16 of the date and time the notice was served; or

17 (d) ~~(c)~~ If none ~~neither~~ of the foregoing methods can be
18 accomplished, by posting on the premises.

19 (2) If the real property is owned by more than one
20 person or a partnership, a lienor may serve any notices or
21 other papers under this part on any one of such owners or
22 partners, and such notice is deemed notice to all owners and
23 partners.

24 (3) Unless an address is specified in a recorded
25 notice of commencement or a building permit application for
26 the project in question, service on any corporation or
27 business entity registered with the Secretary of State may be
28 made to the principal office of that corporation or business
29 entity as reflected in the records of the Secretary of State
30 or to the last known address for the corporation or business
31 entity. ~~Service of notices or copies thereof, permitted or~~

1 ~~required under this part, may be made by facsimile~~
2 ~~transmission when the person being served has listed that~~
3 ~~person's facsimile phone number in the Notice of Commencement.~~
4 ~~The lienor's facsimile confirmation sheet with the correct~~
5 ~~facsimile phone number shall be proof of the date and time the~~
6 ~~notice was served.~~

7 Section 4. Paragraphs (d) and (e) of subsection (1) of
8 section 713.23, Florida Statutes, are amended to read:

9 713.23 Payment bond.--

10 (1)

11 (d) In addition, a lienor is required, as a condition
12 precedent to recovery under the bond, to serve a written
13 notice of nonpayment to the contractor and the surety not
14 later than 90 days after the final furnishing of labor,
15 services, or materials by the lienor. A written notice
16 satisfies this condition precedent with respect to the payment
17 described in the notice of nonpayment, including unpaid
18 finance charges due under the lienor's contract, and with
19 respect to any other payments which become due to the lienor
20 after the date of the notice of nonpayment. The time period
21 for serving a written notice of nonpayment shall be measured
22 from the last day of furnishing labor, services, or materials
23 by the lienor and shall not be measured by other standards,
24 such as the issuance of a certificate of occupancy or the
25 issuance of a certificate of substantial completion. The
26 failure of a lienor to receive retainage sums not in excess of
27 10 percent of the value of labor, services, or materials
28 furnished by the lienor is not considered a nonpayment
29 requiring the service of the notice provided under this
30 paragraph. The notice under this paragraph may be in
31 substantially the following form:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

NOTICE OF NONPAYMENT

To ...(name of contractor and address)...

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

The undersigned notifies you that he or she 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)...

(e) No action for the labor or materials or supplies
may be instituted or prosecuted against the contractor or
surety unless both notices have been given. No action shall
be instituted or prosecuted against the contractor or against
the surety on the bond under this section after 1 year from
the performance of the labor or completion of delivery of the
materials and supplies. The time period for bringing an action
against the contractor or surety on the bond shall be measured
from the last day of furnishing labor, services, or materials
by the lienor and shall not be measured by other standards,
such as the issuance of a certificate of occupancy or the
issuance of a certificate of substantial completion. A
contractor or the contractor's agent or attorney may elect to
shorten the prescribed time within which an action to enforce
any claim against a payment bond provided pursuant to this
section ~~or s. 713.245~~ may be commenced by recording in the
clerk's office a notice in substantially the following form:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

NOTICE OF CONTEST OF CLAIM
AGAINST PAYMENT BOND

To: ...(Name and address of lienor)...

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

DATED on,

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

The claim of any lienor upon whom such notice is served and who fails to institute a suit to enforce his or her claim against the payment bond within 60 days after service of such notice shall be extinguished automatically. The clerk shall mail a copy of the notice of contest to the lienor at the address shown in the notice of nonpayment or most recent amendment thereto and shall certify to such service on the face of such notice and record the notice. Service is complete upon mailing.

Section 5. Section 713.245, Florida Statutes, is repealed.

Section 6. Subsections (1) and (2) of section 713.235, Florida Statutes, are amended to read:

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

1 WAIVER OF RIGHT TO CLAIM
2 AGAINST THE PAYMENT BOND
3 (FINAL PAYMENT)
4
5 The undersigned, in consideration of the final payment
6 in the amount of \$...., hereby waives its right to claim
7 against the payment bond for labor, services, or materials
8 furnished to ... (insert the name of your customer)... on the
9 job of ... (insert the name of the owner)..., for improvements
10 to the following described project:
11
12 (description of project)
13 DATED on
14 ... (Lienor) ...
15 By:
16
17 Section 7. This act shall take effect October 1, 2001.
18
19 *****
20 HOUSE SUMMARY
21 Revises and clarifies provisions relating to construction
22 liens and bonds. See bill for details.
23
24
25
26
27
28
29
30
31