

By Senator Dyer

14-524A-01

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; conforming a
15 cross-reference; repealing s. 713.245, F.S.,
16 relating to conditional payment bonds; amending
17 s. 713.235, F.S.; conforming a cross-reference;
18 providing an effective date.

19

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

21

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

25 255.05 Bond of contractor constructing public
26 buildings; form; action by materialmen.--

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

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

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

18
19 The state shall not be held liable to any laborer,
20 materialman, or subcontractor for any amounts greater than the
21 pro rata share as determined under this section.

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

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30 NOTICE OF CONTEST OF CLAIM
31 AGAINST PAYMENT BOND

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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, or not later than 45 days after, commencing to furnish labor,

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

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

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

28 713.06 Liens of persons not in privity; proper
29 payments.--

30 (2)(a) All lienors under this section, except
31 laborers, as a prerequisite to perfecting a lien under this

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

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

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

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

29 Section 3. Section 713.18, Florida Statutes, is
30 amended to read:

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1 713.18 Manner of serving notices and other
2 instruments.--

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

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

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

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

30 2. If an instrument served pursuant to this section
31 paragraph to the last address shown in the notice of

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

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

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

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

22 (3) Unless an address is specified in a recorded
23 notice of commencement or a building permit application for
24 the project in question, service on any corporation or
25 business entity registered with the Secretary of State may be
26 made to the principal office of that corporation or business
27 entity as shown in the records of the Secretary of State or to
28 the last known address for the corporation or business entity.
29 ~~Service of notices or copies thereof, permitted or required~~
30 ~~under this part, may be made by facsimile transmission when~~
31 ~~the person being served has listed that person's facsimile~~

1 ~~phone number in the Notice of Commencement. The lienor's~~
2 ~~facsimile confirmation sheet with the correct facsimile phone~~
3 ~~number shall be proof of the date and time the notice was~~
4 ~~served.~~

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

7 713.23 Payment bond.--

8 (1)

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

30
31 NOTICE OF NONPAYMENT

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

3
4 ...(name of surety and address)...

5
6 The undersigned notifies you that he or she has furnished
7 ...(describe labor, services, or materials)... for the
8 improvement of the real property identified as ...(property
9 description).... The amount now due and unpaid is \$.....

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

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

30
31 NOTICE OF CONTEST OF CLAIM

1 provided pursuant to s. 713.23 ~~or s. 713.245~~, in exchange for,
2 or to induce payment of, a progress payment, the waiver may be
3 in substantially the following form:

4
5 WAIVER OF RIGHT TO CLAIM
6 AGAINST THE PAYMENT BOND
7 (PROGRESS PAYMENT)
8

9 The undersigned, in consideration of the sum of \$....
10 hereby waives its right to claim against the payment bond for
11 labor, services, or materials furnished through ...(insert
12 date)..., to ...(insert the name of your customer)... on the
13 job of ...(insert the name of the owner)..., for improvements
14 to the following described project:

15
16 (description of project)
17

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

20 DATED on

21 ...(Lienor)...

22 By:.....
23

24 (2) When a person is required to execute a waiver of
25 his or her right to make a claim against a payment bond
26 provided pursuant to s. 713.23 ~~or s. 713.245~~, in exchange for,
27 or to induce payment of, the final payment, the waiver may be
28 in substantially the following form:

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30 WAIVER OF RIGHT TO CLAIM
31 AGAINST THE PAYMENT BOND

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(FINAL PAYMENT)

The undersigned, in consideration of the final payment in the amount of \$...., hereby waives its right to claim against the payment bond 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)

DATED on

...(Lienor)...

By:.....

Section 7. This act shall take effect October 1, 2001.

LEGISLATIVE SUMMARY

Revises provisions relating to construction liens and bonds. (See bill for details.)