

By 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; requiring a claimant to attach certain
6 documents to a notice of nonpayment; providing that a
7 claimant who serves a fraudulent notice of nonpayment
8 shall be deprived of his or her rights under a bond;
9 requiring a notice of nonpayment to be in a prescribed
10 form; amending s. 627.756, F.S.; providing that a
11 provision relating to attorney fees applies to certain
12 suits brought by contractors; deeming contractors to
13 be insureds or beneficiaries for certain purposes;
14 reenacting s. 627.428, F.S., relating to attorney
15 fees; amending s. 713.23, F.S.; requiring a lienor to
16 serve a verified notice of nonpayment to specified
17 entities during a certain period of time; requiring a
18 notice of nonpayment to contain certain statements;
19 requiring a lienor to attach certain documents to a
20 notice of nonpayment; providing that a lienor who
21 serves a fraudulent notice of nonpayment is deprived
22 of his or her rights under the bond; requiring a
23 notice of nonpayment to be in a prescribed form;
24 amending s. 713.245, F.S.; providing that a contractor
25 may record a notice identifying a project bond as a
26 conditional payment bond before project commencement
27 to make the duty of a surety to pay lienors
28 coextensive with the contractor's duty to pay;
29 providing that failure to list or record a bond as a

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30 conditional payment bond does not convert such a bond
 31 into a common law bond or a bond furnished under a
 32 specified provision; revising the statement that must
 33 be included on a conditional payment bond; providing
 34 applicability; providing an effective date.

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

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38 Section 1. Paragraph (a) of subsection (2) of section
 39 255.05, Florida Statutes, is amended to read:

40 255.05 Bond of contractor constructing public buildings;
 41 form; action by claimants.-

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

48

49 NOTICE OF CONTEST OF CLAIM
 50 AGAINST PAYMENT BOND

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

53

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

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DATED on,

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

The claim of a 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 is ~~shall be~~ extinguished automatically. The contractor or the contractor's attorney shall serve 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 the notice and record the notice.

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, services, or materials for the prosecution of the work, serve ~~furnish~~ the contractor with a written notice that he or she intends to look to the bond for protection. A claimant who is not in privity with the contractor and who has not received payment for furnishing his or her labor, services, or materials shall serve a written notice of nonpayment on ~~deliver to~~ the contractor and on ~~to~~ the surety ~~written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment.~~ The notice of nonpayment shall be verified in accordance with s. 92.525 and served during the progress of the work or thereafter but may not be served earlier than 45 days after the first furnishing of labor, services, or materials by the claimant or later than 90 days after the final furnishing of the labor,

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88 services, or materials by the claimant or, with respect to
89 rental equipment, ~~not~~ later than 90 days after the date that the
90 rental equipment was last on the job site available for use. The
91 notice of nonpayment must state, as of the date of the notice,
92 the nature of the labor or services performed; the nature of the
93 labor or services to be performed, if known; the materials
94 furnished; the materials to be furnished, if known; the amount
95 paid on account to date; the amount due; and the amount to
96 become due, if known. Any notice of nonpayment served by a
97 claimant who is not in privity with the contractor which
98 includes sums for retainage must specify the portion of the
99 amount claimed for retainage. The claimant shall also include,
100 as attachments to the notice of nonpayment, copies of the
101 following documents to substantiate the amount claimed as unpaid
102 in the notice, if such documents exist: the claimant's contract
103 or purchase order and any amendments or change orders directed
104 thereto; invoices, pay requests, bills of lading, delivery
105 receipts, or similar documents, as applicable; and a statement
106 of account reflecting all payments requested and received for
107 the labor, services, or materials. An action for the labor,
108 materials, or supplies may not be instituted against the
109 contractor or the surety unless the notice to the contractor and
110 notice of nonpayment have been served, if required by this
111 section. Notices required or permitted under this section must
112 ~~shall~~ be served in accordance with s. 713.18. A claimant may not
113 waive in advance his or her right to bring an action under the
114 bond against the surety. In any action brought to enforce a
115 claim against a payment bond under this section, the prevailing
116 party is entitled to recover a reasonable fee for the services

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117 of his or her attorney for trial and appeal or for arbitration,
118 in an amount to be determined by the court, which fee must be
119 taxed as part of the prevailing party's costs, as allowed in
120 equitable actions. The time periods for service of a notice of
121 nonpayment or for bringing an action against a contractor or a
122 surety shall be measured from the last day of furnishing labor,
123 services, or materials by the claimant and may not be measured
124 by other standards, such as the issuance of a certificate of
125 occupancy or the issuance of a certificate of substantial
126 completion. A claimant who serves a fraudulent notice of
127 nonpayment shall be deprived of his or her rights under the
128 bond. A notice of nonpayment is fraudulent if the claimant has
129 willfully exaggerated the amount due, willfully included a claim
130 for work not performed or materials not furnished for the
131 subject improvement, or prepared the notice with such willful
132 and gross negligence as to amount to a willful exaggeration.
133 However, a minor mistake or error in a notice of nonpayment, or
134 a good faith dispute as to the amount due, does not constitute a
135 willful exaggeration that operates to defeat an otherwise valid
136 claim against the bond. The service of a fraudulent notice of
137 nonpayment is a complete defense to the claimant's claim against
138 the bond, entitling the prevailing party to attorney fees under
139 this subparagraph. The notice of nonpayment under this
140 subparagraph must be in substantially the following form:

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142 NOTICE OF NONPAYMENT
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144 To: ... (name of contractor and address) ...

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

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146 The undersigned claimant notifies you that:

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

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

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

158
 159 Under penalties of perjury, I declare that I have read the
 160 foregoing Notice of Nonpayment and that the facts stated in it
 161 are true.

162
 163 ...(signature and address of claimant)...

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

166 627.756 Bonds for construction contracts; attorney fees in
 167 case of suit.-

168 (1) Section 627.428 applies to suits brought by owners,
 169 contractors, subcontractors, laborers, and materialmen against a
 170 surety insurer under payment or performance bonds written by the
 171 insurer under the laws of this state to indemnify against
 172 pecuniary loss by breach of a building or construction contract.
 173 Owners, contractors, subcontractors, laborers, and materialmen
 174 shall be deemed to be insureds or beneficiaries for the purposes

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175 of this section.

176 Section 3. Section 627.428, Florida Statutes, is reenacted
177 to read:

178 627.428 Attorney's fee.—

179 (1) Upon the rendition of a judgment or decree by any of
180 the courts of this state against an insurer and in favor of any
181 named or omnibus insured or the named beneficiary under a policy
182 or contract executed by the insurer, the trial court or, in the
183 event of an appeal in which the insured or beneficiary prevails,
184 the appellate court shall adjudge or decree against the insurer
185 and in favor of the insured or beneficiary a reasonable sum as
186 fees or compensation for the insured's or beneficiary's attorney
187 prosecuting the suit in which the recovery is had.

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

193 (3) When so awarded, compensation or fees of the attorney
194 shall be included in the judgment or decree rendered in the
195 case.

196 Section 4. Paragraph (d) of subsection (1) of section
197 713.23, Florida Statutes, is amended to read:

198 713.23 Payment bond.—

199 (1)

200 (d) In addition, a lienor who has not received payment for
201 furnishing his or her labor, services, or materials must ~~is~~
202 required, as a condition precedent to recovery under the bond,
203 ~~to~~ serve a written notice of nonpayment to the contractor and

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204 the surety. The notice must be verified in accordance with s.
205 92.525 and must be served during the progress of the work or
206 thereafter, but may not be served earlier than 45 days after the
207 first furnishing of labor, services, or materials by the lienor
208 or ~~not~~ later than 90 days after the final furnishing of labor,
209 services, or materials by the lienor, or, with respect to rental
210 equipment, later than 90 days after the date the rental
211 equipment was on the job site and available for use. The notice
212 of nonpayment must state, as of the date of the notice, the
213 nature of the labor or services performed; the nature of the
214 labor or services to be performed, if known; the materials
215 furnished; the materials to be furnished, if known; the amount
216 paid on account to date; the amount due; and the amount to
217 become due, if known. A notice of nonpayment that includes sums
218 for retainage must specify the portion of the amount claimed for
219 retainage. The lienor must also include, as attachments to the
220 notice of nonpayment, copies of the following documents to
221 substantiate the amount claimed as unpaid in the notice, if such
222 documents exist: the lienor's contract or purchase order and any
223 amendments or change orders directed thereto; invoices, pay
224 requests, bills of lading, delivery receipts, or similar
225 documents, as applicable; and a statement of account reflecting
226 all payments requested and received for the labor, services, or
227 materials. The required. A written notice satisfies this
228 condition precedent with respect to the payment described in the
229 notice of nonpayment, including unpaid finance charges due under
230 the lienor's contract, and with respect to any other payments
231 which become due to the lienor after the date of the notice of
232 nonpayment. The time period for serving a ~~written~~ notice of

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233 nonpayment shall be measured from the last day of furnishing
234 labor, services, or materials by the lienor and shall not be
235 measured by other standards, such as the issuance of a
236 certificate of occupancy or the issuance of a certificate of
237 substantial completion. The failure of a lienor to receive
238 retainage sums not in excess of 10 percent of the value of
239 labor, services, or materials furnished by the lienor is not
240 considered a nonpayment requiring the service of the notice
241 provided under this paragraph. If the payment bond is not
242 recorded before commencement of construction, the time period
243 for the lienor to serve a notice of nonpayment may at the option
244 of the lienor be calculated from the date specified in this
245 section or the date the lienor is served a copy of the bond.
246 However, the limitation period for commencement of an action on
247 the payment bond as established in paragraph (e) may not be
248 expanded. A lienor who serves a fraudulent notice of nonpayment
249 shall be deprived of his or her rights under the bond. A notice
250 of nonpayment is fraudulent if the lienor has willfully
251 exaggerated the amount due, willfully included a claim for work
252 not performed or materials not furnished for the subject
253 improvement, or prepared the notice with such willful and gross
254 negligence as to amount to a willful exaggeration. However, a
255 minor mistake or error in a notice of nonpayment, or a good
256 faith dispute as to the amount due, does not constitute a
257 willful exaggeration that operates to defeat an otherwise valid
258 claim against the bond. The service of a fraudulent notice of
259 nonpayment is a complete defense to the lienor's claim against
260 the bond, entitling the prevailing party to attorney fees under
261 s. 713.29. The notice under this paragraph ~~may~~ must be in

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262 substantially the following form:

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264 NOTICE OF NONPAYMENT

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

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

268 The undersigned lienor notifies you that:

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

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

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

280

281 Under penalties of perjury, I declare that I have read the
 282 foregoing Notice of Nonpayment and that the facts stated in it
 283 are true.

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

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

287 713.245 Conditional payment bond.—

288 (1) Notwithstanding any provisions of ss. 713.23 and 713.24
 289 to the contrary, if the contractor's written contractual
 290 obligation to pay lienors is expressly conditioned upon and

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291 limited to the payments made by the owner to the contractor, the
292 duty of the surety to pay lienors will be coextensive with the
293 duty of the contractor to pay, if the following provisions are
294 complied with:

295 (a) The bond is listed in the notice of commencement for
296 the project as a conditional payment bond and is recorded
297 together with the notice of commencement for the project before
298 ~~prior to~~ commencement of the project, or the contractor records
299 a notice identifying the bond for the project as a conditional
300 payment bond, with the bond attached, before commencement of the
301 project. Failure to comply with this paragraph does not convert
302 a conditional payment bond into a common law bond or into a bond
303 furnished under s. 713.23.

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

306 (c) The bond contains on the front page, capitalized and in
307 at least 10-point type, the statement: "THIS BOND ONLY COVERS
308 CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND
309 LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE
310 LABOR, SERVICES, OR MATERIALS PROVIDED BY SUCH PERSONS. THIS
311 BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR
312 FILING A CLAIM OF LIEN ON THIS PROJECT."

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

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