

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 1200

INTRODUCER: Senator Stargel

SUBJECT: Construction Bonds

DATE: March 22, 2019

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Cibula	JU	<b>Pre-meeting</b>
2.			CA	
3.			RC	

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**I. Summary:**

SB 1200 increases the amount of information that a subcontractor must provide to a contractor through a Notice of Nonpayment before the subcontractor may initiate a lawsuit for payment from the contractor's payment bond. These notices must further be declared to be true under the penalty of perjury.

The bill also gives contractors additional flexibility in recording notices of the existence of a conditional payment bond for a construction project with the clerk of court. These are bonds that make payments from the surety to subcontractors conditional on the contractor's receipt of payments from the owner.

Finally, the bill adds contractors to the list of individuals or entities who are entitled to the benefits of a one-way attorney fee statute for prevailing in litigation against a surety that issues a payment or performance bond for a construction project.

**II. Present Situation:**

In a construction project, the owner of the property to be improved has an interest in ensuring that the contractor performs the construction work in the time and manner described in the construction contract. Contractors and subcontractors have an interest in receiving payment for their work. Mechanisms that address these interests of property owners and subcontractors are set forth in the construction lien laws in part I of chapter 713, F.S., for private construction contracts and in s. 255.05, F.S., for public construction contracts.

These mechanisms are especially important where many subcontractors who are not in privity with the owner perform work on a construction project. A subcontractor not in privity with the owner has a contract with the contractor or another subcontractor, but no direct contractual relationship with the owner. As a result, a subcontractor's identity, work, and charges for

services might be unknown to the owner or contractor unless he or she complies with the notice requirements of the lien laws.

### **Payment Bonds**

Under the construction lien laws, a subcontractor may record a lien against the property improved as a means of securing payment of any amounts owed by the owner of the property. However, if the contractor provides a payment bond to secure the payment of subcontractors, the subcontractors must make claims against the bond instead of enforcing liens against the improved property.<sup>1</sup>

A payment bond is generally required for public construction contracts and is an option for private construction contracts. These bonds are conditioned on the contractor promptly paying all subcontractors including sub-subcontractors, laborers, and material suppliers who furnish labor, services, or materials under the contractor's contract.

### ***Notices of Commencement***

Payment bonds must be recorded in the official records with the clerk of court along with the Notice of Commencement for the construction project. These documents serve a purpose of informing subcontractors of the identity of the contractor responsible for the construction project and the identity of the surety that issued the payment bond.

### ***Notices to Contractor***

A Notice to Contractor serves a purpose of informing a contractor of the identity of a subcontractor who is not in privity with the contractor. Providing a Notice to Contractor is the first step that a subcontractor must take to preserve rights to make a claim against a payment bond to make its identity and work known to the contractor.

A Notice to Contractor must include a general description of the materials or services that the subcontractor has furnished or will furnish for the construction project and the subcontractor's name and address and a statement that the subcontractor intends to look to the payment bond to secure payment.<sup>2</sup> The notice may be served before the subcontractor begins or within 45 days after beginning to furnish labor, materials, or supplies.

### ***Notices of Nonpayment***

As a next step to preserve rights to make a claim against a payment bond, the subcontractor must serve a Notice of Nonpayment on the contractor and the surety.<sup>3</sup> With respect to public construction contracts, a subcontractor must serve the notice no earlier than 45 days after the first furnishing of labor, services, or materials.<sup>4</sup> With respect to private contracts, a subcontractor is not required to wait any period of time or wait until a payment is delinquent before serving a

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<sup>1</sup> Sections 255.05(1)(c), F.S.; s. 713.23(1)(a), F.S.

<sup>2</sup> Section 255.05(2)(a)2., F.S.; s. 713.23(1)(c), F.S.

<sup>3</sup> Section 255.05(2)(a)2., F.S.; s. 713.23(1)(d), F.S.

<sup>4</sup> Section 255.05(2)(a)2., F.S.

notice of nonpayment, but the notice must be served no later than 90 days after the final furnishing of labor, services, or materials.<sup>5</sup>

The statute relating to payment bonds for private contracts requires a subcontractor to include in a Notice of Nonpayment a description of the labor, services, and materials furnished and the amounts due and unpaid by the contractor.<sup>6</sup> However, the statute relating to payment bonds for public construction projects does not identify any specific information that must be included in a Notice of Nonpayment.

### ***Enforcing and Contesting a Claim Against a Payment Bond***

After serving the Notice of Nonpayment, a subcontractor generally must initiate a lawsuit to enforce a claim against a payment bond within 1 year after the final furnishing of labor, materials, or supplies.<sup>7</sup> However, the contractor may shorten that time period by serving the subcontractor with a Notice of Contest of Claim Against Payment Bond. Once served, the subcontractor must initiate a legal action to enforce the claim against the bond within 60 days.<sup>8</sup>

### **Conditional Payment Bonds**

In addition to payment bonds, ch. 713, F.S., authorizes the use of conditional payment bonds to limit a property owner's risk of liens against a property because of the contractor's failure to pay a subcontractor not in privity with the owner.<sup>9</sup> A conditional payment bond covers the claims of a subcontractor only to the extent that the contractor has been paid for the subcontractor's services.<sup>10</sup> A conditional payment bond must be listed in the notice of commencement for a project as a conditional payment bond and be recorded together with the notice of commencement before commencement of the project.<sup>11</sup>

A conditional payment bond that does not strictly comply with the statutory requirements will be construed as a regular payment bond.<sup>12</sup>

The procedures to make a claim against a conditional payment bond are similar to those required to make a claim against a regular payment bond. However, the various notices required to perfect a claim of lien may be served on the owner.<sup>13</sup>

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<sup>5</sup> Section 713.23(1)(d), F.S.

<sup>6</sup> Section 713.23(1)(d), F.S.

<sup>7</sup> Section 255.05(10), F.S.; s. 713.23(1)(e), F.S.

<sup>8</sup> Section 255.05(2)(a)1., F.S.; s. 713.23(1)(e), F.S.

<sup>9</sup> Section 713.245, F.S.

<sup>10</sup> Section 713.245(1)(a), F.S.

<sup>11</sup> *Id.*

<sup>12</sup> *Goodbys Creek, LLC v. Arch Ins. Co.*, 2008 WL 2950112, \*4 (M.D. Fla. 2008) (citing *Home Elec. Of Dade County, Inc. v. Gonas*, 547 So. 2d 109, 110 (Fla. 1989); *North American Specialty Ins. Co. v. Hughes Supply, Inc.*, 705 So. 2d 616, 618 (Fla. 1998) (explaining that the failure of a contract to contain a "pay when paid" clause converted the conditional payment bond into a regular statutory payment bond under s. 713.23, F.S.).

<sup>13</sup> Section 713.245(1)(c), F.S.

### **Accountings Under Oath**

A contractor who has furnished a payment bond may demand that a subcontractor filing a Notice to Contractor provide a written accounting made under oath. These accountings require a subcontractor to supply more detailed information about its work and charges than it must supply in a Notice to Contractor or a Notice of Nonpayment. Specifically, this accounting must show the

nature of the labor or services performed and to be performed, if any, the materials furnished, the materials to be furnished, if known, the amount paid on account to date, the amount due, and the amount to become due, if known, as of the date of the statement by the [subcontractor].<sup>14</sup>

As a consequence of providing a false accounting or failing to timely provide the accounting, a subcontractor loses the right to make a claim against the payment bond.<sup>15</sup>

### **Effects of Errors or Omissions in Required Lien Law Notices**

The construction lien laws generally do not authorize a penalty or sanction for the negligent inclusion or omission of information in the various notices required to perfect liens which have not prejudiced the owner of an improved property or a contractor.

However, the lien laws describe a fraudulent lien as a lien in which a subcontractor willfully exaggerates the amount of the lien or in which the subcontractor willfully includes a claim for work not performed upon or materials not furnished.<sup>16</sup> A fraudulent lien also includes a lien in which “the lienor has compiled his or her claim with such willful and gross negligence as to amount to a willful exaggeration.”<sup>17</sup> A person who willfully files a fraudulent lien commits a third degree felony.<sup>18</sup> The statute defining and prohibiting fraudulent liens, however, does not appear to apply to similar fraudulent claims against a payment bond.

### **Attorney Fees in Suits Against a Surety**

Section 627.428, F.S., is a one-way attorney fee statute that requires a court to award attorney fees and costs to an insured or beneficiary who prevails in a lawsuit against an insurer. This statute applies to “owners, subcontractors, laborers, and materialmen” who are deemed to be insureds or beneficiaries in suits against a surety under a performance bond for a construction contract.<sup>19</sup> Absent from the list of individuals entitled to the benefits of the one-way attorney fee statute are contractors. A contractor, however, may have an interest in the completion or performance of a construction contract similar to that of an owner if the contractor requires a subcontractor to secure a performance bond.

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<sup>14</sup> Section 713.16(4), F.S. Except for differences in punctuation, provisions of s. 255.05(8), F.S., which relate to bonds for public construction projects, are identical.

<sup>15</sup> Section 713.16(4), F.S.; s. 255.05(8), F.S.

<sup>16</sup> Section 713.31(2)(a), F.S.

<sup>17</sup> *Id.*

<sup>18</sup> Section 713.31(3), F.S.

<sup>19</sup> Section 627.756(1), F.S.

### III. Effect of Proposed Changes:

#### Notices of Nonpayment (Sections 1 & 4)

##### *Requirements for Additional Details and Documentation*

This bill requires subcontractors who are not in privity, meaning those who do not have a contractual relationship, with a contractor to provide additional details and supporting documentation for the work and services they have provided as a prerequisite to filing a claim against a payment bond.

Specifically, when providing a contractor and surety with a notice of nonpayment, which is the final step before enforcing a claim against a bond, the notice must state the:

- Nature of the labor or services performed;
- Nature of the labor or services to be performed, if known;
- Materials furnished; the materials to be furnished, if known;
- Amount paid on account to date; the amount due; and
- Amount to become due, if known.

The supporting documentation that a subcontractor must attach to the notice of nonpayment includes:

- Copies of the following documents to substantiate the amount claimed as unpaid in the notice, if such documents exist: the claimant's contract or purchase order and any amendments or change orders directed thereto;
- Invoices, pay requests, bills of lading, delivery receipts, or similar documents, as applicable; and
- A statement of account reflecting all payments requested and received for the labor, services, or materials.

##### *Form Notices of Nonpayment*

The construction lien laws in chapter 713, F.S., supply a form that subcontractors not in privity with a contractor must use for a notice of nonpayment. However, s. 255.05, F.S., which authorizes notices of nonpayment as a prerequisite to claims against a payment bond for a public construction contract, does not contain a form for the notice. The bill supplies a form consistent with the revised requirements for the notice of nonpayment for public construction contracts and similarly revises the existing form for the notices in chapter 713, F.S.

Additionally, forms are consistent with the bill's requirements that notices of nonpayment be verified with the inclusion of this statement: "Under penalties of perjury, I declare that I have read the foregoing Notice of Nonpayment and that the facts stated in it are true," followed by the signature of the subcontractor's representative. By operation of existing s. 92.525(3), F.S., a person who makes a false statement under penalties of perjury commits a third degree felony.<sup>20</sup>

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<sup>20</sup> A person who is convicted of a third degree felony may be imprisoned for up to 5 years and fined up to \$5,000.

### ***Timing of the Service of a Notice of Nonpayment***

Existing law requires a subcontractor to a public construction project to wait 45 days after first furnishing labor, services, or materials before serving a notice of nonpayment on the contractor and surety. However, with respect to private contracts, current law does not require a subcontractor to wait a minimum time period or wait for a payment to be past due before serving a notice of nonpayment.

The bill provides that the 45-day waiting period that applies to public construction contracts also applies to private contracts.

### ***Fraudulent Notices of Nonpayment***

The bill provides that the service of a fraudulent notice of nonpayment is a complete defense to the claimant's claim against a bond. The bill defines a fraudulent notice of nonpayment as a prerequisite to a claim on a payment bond in a manner similar to how a fraudulent lien is described in the construction lien laws in chapter 713, F.S.<sup>21</sup>

As provided in the bill, a notice of nonpayment is fraudulent if a subcontractor willfully exaggerates the amount due, willfully includes a claim for work not performed or materials not furnished for the subject improvement, or prepares the notice with such willful and gross negligence as to amount to a willful exaggeration. However, a notice is not fraudulent because of minor mistakes or errors or a good faith dispute as to the amount due.

### **Conditional Payment Bonds (Section 5)**

Under existing law, a conditional payment bond must strictly comply with statutory requirements to make subcontractors who consider participating in a construction project aware of the limited nature of the bond. If the contractor or surety fails to comply with the requirements the conditional payment bond will be construed as a regular payment bond, which provides subcontractors with greater rights to payment from the bond.

One of the existing notice requirements is that a conditional payment bond be listed in the notice of commencement for the construction project and be recorded together with the notice of commencement. The bill adds that adequate notice of the existence of the conditional bond may also be accomplished if the contractor "records a notice identifying the bond for the project as a conditional payment bond, with the bond attached." The bill, however, provides that the failure to properly record the conditional payment bond will not convert the bond into a common law bond or a regular payment bond.

### **Suits Against Sureties (Section 2)**

The bill provides that contractors, like owners, subcontractors, laborers, and materialmen under existing law, are entitled to the benefit of the one-way attorney fee statute, s. 627.428, F.S., if they prevail in a lawsuit against a surety under a payment or performance bond.

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<sup>21</sup> For the specific language describing a fraudulent lien, see s. 713.31(2)(a), F.S.

**Effective Date and Application (Section 7)**

The bill takes effect on October 1, 2019, and the changes relating to conditional payment bonds and suits by a contractor against a surety will apply to payment or performance bonds issued after the effective date of the bill.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None identified.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The bill, by requiring subcontractors to supply additional details and documentation to support a potential claim against a payment bond, may help contractors avoid overpayments to subcontractors. On the other hand, the requirement for more specific information and documentation of work and charges will place additional paperwork burdens on subcontractors.

The provision of this bill that gives contractors the benefit of a one-way attorney fee statute in litigation against a surety under a payment or performance bond will help contractors vindicate their rights, but it may encourage additional litigation and result in additional costs to sureties.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 255.05, 627.756, 627.428, 713.23, and 713.245.

This bill reenacts section 627.428 of the Florida Statutes.

**IX. Additional Information:**

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.