

By Senator Stargel

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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; specifying that a  
7       claimant who serves a fraudulent notice of nonpayment  
8       forfeits his or her rights under a bond; providing  
9       that the service of a fraudulent notice of nonpayment  
10      is a complete defense to the claimant's claim against  
11      the bond and entitles the prevailing party to attorney  
12      fees; requiring a notice of nonpayment to be in a  
13      prescribed form; amending s. 627.756, F.S.; providing  
14      that a provision relating to attorney fees applies to  
15      certain suits brought by contractors; deeming  
16      contractors to be insureds or beneficiaries in  
17      relation to bonds for construction contracts;  
18      reenacting s. 627.428, F.S., relating to attorney  
19      fees; amending s. 713.23, F.S.; requiring a lienor to  
20      serve a verified notice of nonpayment to specified  
21      entities during a certain period of time; requiring a  
22      notice of nonpayment to contain certain statements;  
23      requiring a lienor to attach certain documents to a  
24      notice of nonpayment; specifying that a lienor who  
25      serves a fraudulent notice of nonpayment forfeits his  
26      or her rights under the bond; providing that the  
27      service of a fraudulent notice of nonpayment is a  
28      complete defense to the lienor's claim against the  
29      bond and entitles the prevailing party to attorney

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30 fees; requiring a notice of nonpayment to be in a  
 31 prescribed form; amending s. 713.245, F.S.; providing  
 32 that a contractor may record a notice identifying a  
 33 project bond as a conditional payment bond before  
 34 project commencement to make the duty of a surety to  
 35 pay lienors coextensive with the contractor's duty to  
 36 pay; providing that failure to list or record a bond  
 37 as a conditional payment bond does not convert such a  
 38 bond into a common law bond or a bond furnished under  
 39 a specified provision; revising the statement that  
 40 must be included on a conditional payment bond;  
 41 providing applicability; providing an effective date.

42  
 43 Be It Enacted by the Legislature of the State of Florida:

44  
 45 Section 1. Paragraph (a) of subsection (2) of section  
 46 255.05, Florida Statutes, is amended to read:

47 255.05 Bond of contractor constructing public buildings;  
 48 form; action by claimants.—

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

55  
 56 NOTICE OF CONTEST OF CLAIM  
 57 AGAINST PAYMENT BOND  
 58

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

60

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

66

67 DATED on ....., .....

68

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

70

71 The claim of a claimant upon whom such notice is served and who  
72 fails to institute a suit to enforce his or her claim against  
73 the payment bond within 60 days after service of such notice is  
74 ~~shall be~~ extinguished automatically. The contractor or the  
75 contractor's attorney shall serve a copy of the notice of  
76 contest to the claimant at the address shown in the notice of  
77 nonpayment or most recent amendment thereto and shall certify to  
78 such service on the face of the notice and record the notice.

79 2. A claimant, except a laborer, who is not in privity with  
80 the contractor shall, before commencing or not later than 45  
81 days after commencing to furnish labor, services, or materials  
82 for the prosecution of the work, serve ~~furnish~~ the contractor  
83 with a written notice that he or she intends to look to the bond  
84 for protection. A claimant who is not in privity with the  
85 contractor and who has not received payment for furnishing his  
86 or her labor, services, or materials shall serve a written  
87 notice of nonpayment on ~~deliver to~~ the contractor and on ~~to~~ the

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88 ~~surety written notice of the performance of the labor or~~  
89 ~~delivery of the materials or supplies and of the nonpayment.~~ The  
90 notice of nonpayment shall be verified in accordance with s.  
91 92.525 and served during the progress of the work or thereafter  
92 but may not be served earlier than 45 days after the first  
93 furnishing of labor, services, or materials by the claimant or  
94 later than 90 days after the final furnishing of the labor,  
95 services, or materials by the claimant or, with respect to  
96 rental equipment, ~~not~~ later than 90 days after the date that the  
97 rental equipment was last on the job site available for use. The  
98 notice of nonpayment must state the nature of the labor or  
99 services performed; the nature of the labor or services to be  
100 performed, if known; the materials furnished; the materials to  
101 be furnished, if known; the amount paid on account to date; the  
102 amount due; and the amount to become due, if known. All such  
103 information given must be current as of the stated date of the  
104 notice. Any notice of nonpayment served by a claimant who is not  
105 in privity with the contractor which includes sums for retainage  
106 must specify the portion of the amount claimed for retainage.  
107 The claimant shall also include, as attachments to the notice of  
108 nonpayment, copies of the following documents to substantiate  
109 the amount claimed as unpaid in the notice, if such documents  
110 exist: the claimant's contract or purchase order and any  
111 amendments or change orders directed thereto; invoices, pay  
112 requests, bills of lading, delivery receipts, or similar  
113 documents, as applicable; and a statement of account reflecting  
114 all payments requested and received for the labor, services, or  
115 materials. An action for the labor, materials, or supplies may  
116 not be instituted against the contractor or the surety unless

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117 the notice to the contractor and notice of nonpayment have been  
118 served, if required by this section. Notices required or  
119 permitted under this section must ~~shall~~ be served in accordance  
120 with s. 713.18. A claimant may not waive in advance his or her  
121 right to bring an action under the bond against the surety. In  
122 any action brought to enforce a claim against a payment bond  
123 under this section, the prevailing party is entitled to recover  
124 a reasonable fee for the services of his or her attorney for  
125 trial and appeal or for arbitration, in an amount to be  
126 determined by the court, which fee must be taxed as part of the  
127 prevailing party's costs, as allowed in equitable actions. The  
128 time periods for service of a notice of nonpayment or for  
129 bringing an action against a contractor or a surety shall be  
130 measured from the last day of furnishing labor, services, or  
131 materials by the claimant and may not be measured by other  
132 standards, such as the issuance of a certificate of occupancy or  
133 the issuance of a certificate of substantial completion. A  
134 claimant who serves a fraudulent notice of nonpayment forfeits  
135 his or her rights under the bond. A notice of nonpayment is  
136 fraudulent if the claimant has willfully exaggerated the amount  
137 due, willfully included a claim for work not performed or  
138 materials not furnished for the subject improvement, or prepared  
139 the notice with such willful and gross negligence as to amount  
140 to a willful exaggeration. However, a minor mistake or error in  
141 a notice of nonpayment, or a good faith dispute as to the amount  
142 due, does not constitute a willful exaggeration that operates to  
143 defeat an otherwise valid claim against the bond. The service of  
144 a fraudulent notice of nonpayment is a complete defense to the  
145 claimant's claim against the bond, entitling the prevailing

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146 party to attorney fees under this subparagraph. The notice of  
147 nonpayment under this subparagraph must be in substantially the  
148 following form:

149  
150 NOTICE OF NONPAYMENT

151  
152 To: ...(name of contractor and address)...

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

154 The undersigned claimant notifies you that:

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

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

162 3. Claimant expects to furnish ...(describe labor, service,  
163 or materials)... for this improvement in the future (if known),  
164 and the corresponding amount expected to become due is \$ ....  
165 (if known).

166  
167 Under penalties of perjury, I declare that I have read the  
168 foregoing Notice of Nonpayment and that the facts stated in it  
169 are true.

170  
171 DATED on ....., .....

172  
173 ...(signature and address of claimant)...

174 Section 2. Subsection (1) of section 627.756, Florida

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175 Statutes, is amended to read:

176 627.756 Bonds for construction contracts; attorney fees in  
177 case of suit.—

178 (1) Section 627.428 applies to suits brought by owners,  
179 contractors, subcontractors, laborers, and materialmen against a  
180 surety insurer under payment or performance bonds written by the  
181 insurer under the laws of this state to indemnify against  
182 pecuniary loss by breach of a building or construction contract.  
183 Owners, contractors, subcontractors, laborers, and materialmen  
184 shall be deemed to be insureds or beneficiaries for the purposes  
185 of this section.

186 Section 3. Section 627.428, Florida Statutes, is reenacted  
187 to read:

188 627.428 Attorney's fee.—

189 (1) Upon the rendition of a judgment or decree by any of  
190 the courts of this state against an insurer and in favor of any  
191 named or omnibus insured or the named beneficiary under a policy  
192 or contract executed by the insurer, the trial court or, in the  
193 event of an appeal in which the insured or beneficiary prevails,  
194 the appellate court shall adjudge or decree against the insurer  
195 and in favor of the insured or beneficiary a reasonable sum as  
196 fees or compensation for the insured's or beneficiary's attorney  
197 prosecuting the suit in which the recovery is had.

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

203 (3) When so awarded, compensation or fees of the attorney

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204 shall be included in the judgment or decree rendered in the  
 205 case.

206 Section 4. Paragraph (d) of subsection (1) of section  
 207 713.23, Florida Statutes, is amended to read:

208 713.23 Payment bond.—

209 (1)

210 (d) In addition, a lienor who has not received payment for  
 211 furnishing his or her labor, services, or materials must ~~is~~  
 212 required, as a condition precedent to recovery under the bond,  
 213 ~~to~~ serve a written notice of nonpayment to the contractor and  
 214 the surety. The notice must be verified in accordance with s.  
 215 92.525 and must be served during the progress of the work or  
 216 thereafter, but may not be served earlier than 45 days after the  
 217 first furnishing of labor, services, or materials by the lienor  
 218 or ~~not~~ later than 90 days after the final furnishing of labor,  
 219 services, or materials by the lienor, or, with respect to rental  
 220 equipment, later than 90 days after the date the rental  
 221 equipment was last on the job site and available for use. The  
 222 notice of nonpayment must state the nature of the labor or  
 223 services performed; the nature of the labor or services to be  
 224 performed, if known; the materials furnished; the materials to  
 225 be furnished, if known; the amount paid on account to date; the  
 226 amount due; and the amount to become due, if known. All such  
 227 information given must be current as of the stated date of the  
 228 notice. A notice of nonpayment that includes sums for retainage  
 229 must specify the portion of the amount claimed for retainage.  
 230 The lienor must also include, as attachments to the notice of  
 231 nonpayment, copies of the following documents to substantiate  
 232 the amount claimed as unpaid in the notice, if such documents



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233 exist: the lienor's contract or purchase order and any  
234 amendments or change orders directed thereto; invoices, pay  
235 requests, bills of lading, delivery receipts, or similar  
236 documents, as applicable; and a statement of account reflecting  
237 all payments requested and received for the labor, services, or  
238 materials. The required. ~~A written~~ notice satisfies this  
239 condition precedent with respect to the payment described in the  
240 notice of nonpayment, including unpaid finance charges due under  
241 the lienor's contract, and with respect to any other payments  
242 which become due to the lienor after the date of the notice of  
243 nonpayment. The time period for serving a ~~written~~ notice of  
244 nonpayment shall be measured from the last day of furnishing  
245 labor, services, or materials by the lienor and may ~~shall~~ not be  
246 measured by other standards, such as the issuance of a  
247 certificate of occupancy or the issuance of a certificate of  
248 substantial completion. The failure of a lienor to receive  
249 retainage sums not in excess of 10 percent of the value of  
250 labor, services, or materials furnished by the lienor is not  
251 considered a nonpayment requiring the service of the notice  
252 provided under this paragraph. If the payment bond is not  
253 recorded before commencement of construction, the time period  
254 for the lienor to serve a notice of nonpayment may at the option  
255 of the lienor be calculated from the date specified in this  
256 section or the date the lienor is served a copy of the bond.  
257 However, the limitation period for commencement of an action on  
258 the payment bond as established in paragraph (e) may not be  
259 expanded. A lienor who serves a fraudulent notice of nonpayment  
260 forfeits his or her rights under the bond. A notice of  
261 nonpayment is fraudulent if the lienor has willfully exaggerated

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262 the amount due, willfully included a claim for work not  
 263 performed or materials not furnished for the subject  
 264 improvement, or prepared the notice with such willful and gross  
 265 negligence as to amount to a willful exaggeration. However, a  
 266 minor mistake or error in a notice of nonpayment, or a good  
 267 faith dispute as to the amount due, does not constitute a  
 268 willful exaggeration that operates to defeat an otherwise valid  
 269 claim against the bond. The service of a fraudulent notice of  
 270 nonpayment is a complete defense to the lienor's claim against  
 271 the bond, entitling the prevailing party to attorney fees under  
 272 s. 713.29. The notice under this paragraph ~~must~~ may be in  
 273 substantially the following form:

274  
 275 NOTICE OF NONPAYMENT

276  
 277 To ... (name of contractor and address) ...  
 278 ... (name of surety and address) ...

279 The undersigned lienor notifies you that:

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

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

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

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

DATED on ....., .....

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

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

713.245 Conditional payment bond.—

(1) Notwithstanding any provisions of ss. 713.23 and 713.24 to the contrary, if the contractor's written contractual obligation to pay lienors is expressly conditioned upon and limited to the payments made by the owner to the contractor, the duty of the surety to pay lienors will be coextensive with the duty of the contractor to pay, if the following provisions are complied with:

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

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

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

327 Section 6. The amendments made by this act to ss. 627.756  
328 and 713.245, Florida Statutes, apply only to payment or  
329 performance bonds issued on or after October 1, 2019.

330 Section 7. This act shall take effect October 1, 2019.