

By the Committee on Judiciary; and Senator Stargel

590-03469-19

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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 under oath; requiring the notice to contain certain
5 statements; specifying that certain negligent
6 inclusions or omissions do not constitute a default
7 that operates to default an otherwise valid bond
8 claim; specifying that a claimant who serves a
9 fraudulent notice of nonpayment forfeits his or her
10 rights under a bond; providing that the service of a
11 fraudulent notice of nonpayment is a complete defense
12 to the claimant's claim against the bond; requiring a
13 notice of nonpayment to be in a prescribed form;
14 amending s. 627.756, F.S.; providing that a provision
15 relating to attorney fees applies to certain suits
16 brought by contractors; deeming contractors to be
17 insureds or beneficiaries in relation to bonds for
18 construction contracts; reenacting s. 627.428, F.S.,
19 relating to attorney fees; amending s. 713.23, F.S.;
20 requiring a lienor to serve a notice of nonpayment
21 under oath to specified entities during a certain
22 period of time; requiring a notice of nonpayment to
23 contain certain statements; specifying that certain
24 negligent inclusions or omissions do not constitute a
25 default that operates to default an otherwise valid
26 bond claim; specifying that a lienor who serves a
27 fraudulent notice of nonpayment forfeits his or her
28 rights under the bond; providing that the service of a
29 fraudulent notice of nonpayment is a complete defense

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30 to the lienor's claim against the bond; requiring a
31 notice of nonpayment to be in a prescribed form;
32 providing applicability; providing an effective date.
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34 Be It Enacted by the Legislature of the State of Florida:
35

36 Section 1. Paragraph (a) of subsection (2) of section
37 255.05, Florida Statutes, is amended to read:

38 255.05 Bond of contractor constructing public buildings;
39 form; action by claimants.-

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

47 NOTICE OF CONTEST OF CLAIM
48 AGAINST PAYMENT BOND
49

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

51
52 You are notified that the undersigned contests your notice
53 of nonpayment, dated,, and served on the
54 undersigned on,, and that the time within
55 which you may file suit to enforce your claim is limited to 60
56 days after the date of service of this notice.
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58 DATED on,

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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 under oath 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, services, or materials by the claimant or, with respect to rental equipment, ~~not~~ later than 90 days after the date that the rental equipment was last on the job

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88 site available for use. The notice of nonpayment must state the
89 nature of the labor or services performed; the nature of the
90 labor or services to be performed, if known; the materials
91 furnished; the materials to be furnished, if known; the amount
92 paid on account to date; the amount due; and the amount to
93 become due, if known. All such information given must be current
94 as of the stated date of the notice. Any notice of nonpayment
95 served by a claimant who is not in privity with the contractor
96 which includes sums for retainage must specify the portion of
97 the amount claimed for retainage. An action for the labor,
98 services, or materials, ~~or supplies~~ may not be instituted
99 against the contractor or the surety unless the notice to the
100 contractor and notice of nonpayment have been served, if
101 required by this section. Notices required or permitted under
102 this section must ~~shall~~ be served in accordance with s. 713.18.
103 A claimant may not waive in advance his or her right to bring an
104 action under the bond against the surety. In any action brought
105 to enforce a claim against a payment bond under this section,
106 the prevailing party is entitled to recover a reasonable fee for
107 the services of his or her attorney for trial and appeal or for
108 arbitration, in an amount to be determined by the court, which
109 fee must be taxed as part of the prevailing party's costs, as
110 allowed in equitable actions. The time periods for service of a
111 notice of nonpayment or for bringing an action against a
112 contractor or a surety shall be measured from the last day of
113 furnishing labor, services, or materials by the claimant and may
114 not be measured by other standards, such as the issuance of a
115 certificate of occupancy or the issuance of a certificate of
116 substantial completion. The negligent inclusion or omission of

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117 any information in the notice of nonpayment that has not
118 prejudiced the contractor or surety does not constitute a
119 default that operates to defeat an otherwise valid bond claim. A
120 claimant who serves a fraudulent notice of nonpayment forfeits
121 his or her rights under the bond. A notice of nonpayment is
122 fraudulent if the claimant has willfully exaggerated the amount
123 due, willfully included a claim for work not performed or
124 materials not furnished for the subject improvement, or prepared
125 the notice with such willful and gross negligence as to amount
126 to a willful exaggeration. However, a minor mistake or error in
127 a notice of nonpayment, or a good faith dispute as to the amount
128 due, does not constitute a willful exaggeration that operates to
129 defeat an otherwise valid claim against the bond. The service of
130 a fraudulent notice of nonpayment is a complete defense to the
131 claimant's claim against the bond. The notice of nonpayment
132 under this subparagraph must be in substantially the following
133 form:

134
135 NOTICE OF NONPAYMENT
136

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

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

139 The undersigned claimant notifies you that:

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

144 2. Claimant has been paid on account to date the amount of
145 \$ for previously furnishing ... (describe labor, service, or

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146 materials)... for this improvement.

147 3. Claimant expects to furnish ...(describe labor, service,
148 or materials)... for this improvement in the future (if known),
149 and the corresponding amount expected to become due is \$
150 (if known).

151
152 I declare that I have read the foregoing Notice of Nonpayment
153 and that the facts stated in it are true to the best of my
154 knowledge and belief.

155
156 DATED on,

157
158 ...(signature and address of claimant)...

159
160 STATE OF FLORIDA

161 COUNTY OF

162
163 The foregoing instrument was sworn to (or affirmed) and
164 subscribed before me this day of, ...(year)..., by
165 ...(name of signatory)....

166 ...(Signature of Notary Public - State of Florida)...

167 ...(Print, Type, or Stamp Commissioned Name of Notary
168 Public)...

169
170 Personally Known OR Produced Identification

171 Type of Identification Produced.....

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

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175 627.756 Bonds for construction contracts; attorney fees in
176 case of suit.-

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

185 Section 3. For the purpose of incorporating the amendment
186 made by this act to section 627.756, Florida Statutes, in a
187 reference thereto, section 627.428, Florida Statutes, is
188 reenacted to read:

189 627.428 Attorney's fee.-

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

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

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204 (3) When so awarded, compensation or fees of the attorney
205 shall be included in the judgment or decree rendered in the
206 case.

207 Section 4. Paragraph (d) of subsection (1) of section
208 713.23, Florida Statutes, is amended to read:

209 713.23 Payment bond.—

210 (1)

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

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

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262 willful exaggeration that operates to defeat an otherwise valid
 263 claim against the bond. The service of a fraudulent notice of
 264 nonpayment is a complete defense to the lienor's claim against
 265 the bond. The notice under this paragraph must ~~may~~ be in
 266 substantially the following form:

268 NOTICE OF NONPAYMENT

270 To ...(name of contractor and address)...
 271 ...(name of surety and address)...

272 The undersigned notifies you that:

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

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

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

285 I declare that I have read the foregoing Notice of Nonpayment
 286 and that the facts stated in it are true to the best of my
 287 knowledge and belief.

289 DATED on,
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291 ... (signature and address of lienor)...

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293 STATE OF FLORIDA

294 COUNTY OF

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296 The foregoing instrument was sworn to (or affirmed) and
297 subscribed before me this day of, ... (year)...., by
298 ... (name of signatory)....

299 ... (Signature of Notary Public - State of Florida)...

300 ... (Print, Type, or Stamp Commissioned Name of Notary
301 Public)...

302

303 Personally Known OR Produced Identification

304 Type of Identification Produced.....

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306 Section 5. The amendments made by this act to s. 627.756,
307 Florida Statutes, apply only to payment or performance bonds
308 issued on or after October 1, 2019.

309 Section 6. This act shall take effect October 1, 2019.