

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

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30 providing applicability; providing an effective date.

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

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34 Section 1. Paragraph (a) of subsection (2) of section
35 255.05, Florida Statutes, is amended to read:

36 255.05 Bond of contractor constructing public buildings;
37 form; action by claimants.-

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

44

45 NOTICE OF CONTEST OF CLAIM
46 AGAINST PAYMENT BOND

47

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

49

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

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56 DATED on,

57

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

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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 site available for use. Any notice of nonpayment served by a claimant who is not in privity with the contractor which includes sums

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88 for retainage must specify the portion of the amount claimed for
89 retainage. An action for the labor, services, or materials,~~or~~
90 ~~supplies~~ may not be instituted against the contractor or the
91 surety unless the notice to the contractor and notice of
92 nonpayment have been served, if required by this section.
93 Notices required or permitted under this section must ~~shall~~ be
94 served in accordance with s. 713.18. A claimant may not waive in
95 advance his or her right to bring an action under the bond
96 against the surety. In any action brought to enforce a claim
97 against a payment bond under this section, the prevailing party
98 is entitled to recover a reasonable fee for the services of his
99 or her attorney for trial and appeal or for arbitration, in an
100 amount to be determined by the court, which fee must be taxed as
101 part of the prevailing party's costs, as allowed in equitable
102 actions. The time periods for service of a notice of nonpayment
103 or for bringing an action against a contractor or a surety shall
104 be measured from the last day of furnishing labor, services, or
105 materials by the claimant and may not be measured by other
106 standards, such as the issuance of a certificate of occupancy or
107 the issuance of a certificate of substantial completion. The
108 negligent inclusion or omission of any information in the notice
109 of nonpayment that has not prejudiced the contractor or surety
110 does not constitute a default that operates to defeat an
111 otherwise valid bond claim. A claimant who serves a fraudulent
112 notice of nonpayment forfeits his or her rights under the bond.
113 A notice of nonpayment is fraudulent if the claimant has
114 willfully exaggerated the amount unpaid, willfully included a
115 claim for work not performed or materials not furnished for the
116 subject improvement, or prepared the notice with such willful

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117 and gross negligence as to amount to a willful exaggeration.
118 However, a minor mistake or error in a notice of nonpayment, or
119 a good faith dispute as to the amount unpaid, does not
120 constitute a willful exaggeration that operates to defeat an
121 otherwise valid claim against the bond. The service of a
122 fraudulent notice of nonpayment is a complete defense to the
123 claimant's claim against the bond. The notice of nonpayment
124 under this subparagraph must supply the following information,
125 current as of the date of the notice, and must be in
126 substantially the following form:

127
128 NOTICE OF NONPAYMENT

129
130 To: ...(name of contractor and address)...

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

132 The undersigned claimant notifies you that:

133 1. Claimant has furnished ...(describe labor, services, or
134 materials)... for the improvement of the real property
135 identified as ...(property description).... The corresponding
136 amount unpaid to date is \$, of which \$ is unpaid
137 retainage.

138 2. Claimant has been paid to date the amount of \$ for
139 previously furnishing ...(describe labor, service, or
140 materials)... for this improvement.

141 3. Claimant expects to furnish ...(describe labor, service,
142 or materials)... for this improvement in the future (if known),
143 and the corresponding amount expected to become due is \$
144 (if known).

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146 I declare that I have read the foregoing Notice of Nonpayment
147 and that the facts stated in it are true to the best of my
148 knowledge and belief.

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150 DATED on,

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152 ...(signature and address of claimant)...

153
154 STATE OF FLORIDA
155 COUNTY OF

156
157 The foregoing instrument was sworn to (or affirmed) and
158 subscribed before me this day of, ...(year)...., by
159 ...(name of signatory)....

160 ...(Signature of Notary Public - State of Florida)...
161 ...(Print, Type, or Stamp Commissioned Name of Notary
162 Public)...

163
164 Personally Known OR Produced Identification
165 Type of Identification Produced.....

166
167 Section 2. Subsection (1) of section 627.756, Florida
168 Statutes, is amended to read:

169 627.756 Bonds for construction contracts; attorney fees in
170 case of suit.-

171 (1) Section 627.428 applies to suits brought by owners,
172 contractors, subcontractors, laborers, and materialmen against a
173 surety insurer under payment or performance bonds written by the
174 insurer under the laws of this state to indemnify against

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175 pecuniary loss by breach of a building or construction contract.
176 Owners, contractors, subcontractors, laborers, and materialmen
177 shall be deemed to be insureds or beneficiaries for the purposes
178 of this section.

179 Section 3. For the purpose of incorporating the amendment
180 made by this act to section 627.756, Florida Statutes, in a
181 reference thereto, section 627.428, Florida Statutes, is
182 reenacted to read:

183 627.428 Attorney's fee.—

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

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

198 (3) When so awarded, compensation or fees of the attorney
199 shall be included in the judgment or decree rendered in the
200 case.

201 Section 4. Paragraph (d) of subsection (1) of section
202 713.23, Florida Statutes, is amended to read:

203 713.23 Payment bond.—

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204 (1)

205 (d) In addition, a lienor who has not received payment for
206 furnishing his or her labor, services, or materials must ~~is~~
207 required, as a condition precedent to recovery under the bond,
208 ~~to~~ serve a written notice of nonpayment to the contractor and
209 the surety. The notice must be under oath and served during the
210 progress of the work or thereafter, but may not be served ~~not~~
211 later than 90 days after the final furnishing of labor,
212 services, or materials by the lienor, or, with respect to rental
213 equipment, later than 90 days after the date the rental
214 equipment was on the job site and available for use. A notice of
215 nonpayment that includes sums for retainage must specify the
216 portion of the amount claimed for retainage. The ~~required~~. A
217 ~~written~~ notice satisfies this condition precedent with respect
218 to the payment described in the notice of nonpayment, including
219 unpaid finance charges due under the lienor's contract, and with
220 respect to any other payments which become due to the lienor
221 after the date of the notice of nonpayment. The time period for
222 serving a ~~written~~ notice of nonpayment shall be measured from
223 the last day of furnishing labor, services, or materials by the
224 lienor and may ~~shall~~ not be measured by other standards, such as
225 the issuance of a certificate of occupancy or the issuance of a
226 certificate of substantial completion. The failure of a lienor
227 to receive retainage sums not in excess of 10 percent of the
228 value of labor, services, or materials furnished by the lienor
229 is not considered a nonpayment requiring the service of the
230 notice provided under this paragraph. If the payment bond is not
231 recorded before commencement of construction, the time period
232 for the lienor to serve a notice of nonpayment may at the option

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233 of the lienor be calculated from the date specified in this
234 section or the date the lienor is served a copy of the bond.
235 However, the limitation period for commencement of an action on
236 the payment bond as established in paragraph (e) may not be
237 expanded. The negligent inclusion or omission of any information
238 in the notice of nonpayment that has not prejudiced the
239 contractor or surety does not constitute a default that operates
240 to defeat an otherwise valid bond claim. A lienor who serves a
241 fraudulent notice of nonpayment forfeits his or her rights under
242 the bond. A notice of nonpayment is fraudulent if the lienor has
243 willfully exaggerated the amount unpaid, willfully included a
244 claim for work not performed or materials not furnished for the
245 subject improvement, or prepared the notice with such willful
246 and gross negligence as to amount to a willful exaggeration.
247 However, a minor mistake or error in a notice of nonpayment, or
248 a good faith dispute as to the amount unpaid, does not
249 constitute a willful exaggeration that operates to defeat an
250 otherwise valid claim against the bond. The service of a
251 fraudulent notice of nonpayment is a complete defense to the
252 lienor's claim against the bond. The notice under this paragraph
253 must supply the following information, current as of the date of
254 the notice, and must ~~may~~ be in substantially the following form:

NOTICE OF NONPAYMENT

257
258 To ... (name of contractor and address)...

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

260 The undersigned lienor notifies you that:

261 1. The lienor ~~he or she~~ has furnished ... (describe labor,

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262 services, or materials)...for the improvement of the real
263 property identified as ...(property description).... The
264 corresponding amount ~~now due and unpaid to date~~ is \$...., of
265 which \$ is unpaid retainage.

266 2. The lienor has been paid to date the amount of \$.... for
267 previously furnishing ...(describe labor, services, or
268 materials)... for this improvement.

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

273
274 I declare that I have read the foregoing Notice of Nonpayment
275 and that the facts stated in it are true to the best of my
276 knowledge and belief.

277
278 DATED on,

279
280 ...(signature and address of lienor)...

281
282 STATE OF FLORIDA

283 COUNTY OF

284
285 The foregoing instrument was sworn to (or affirmed) and
286 subscribed before me this day of, ...(year)...., by
287 ...(name of signatory)....

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

289 ...(Print, Type, or Stamp Commissioned Name of Notary
290 Public)...

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Personally Known OR Produced Identification

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Type of Identification Produced.....

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Section 5. The amendments made by this act to s. 627.756,

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Florida Statutes, apply only to payment or performance bonds

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issued on or after October 1, 2019.

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