**WHITE PAPER**

*SB 1200 and HB 1247 – Construction Law Committee’s Position*

1. **SUMMARY**

The Construction Law Committee requests that the RPPTL Section take a formal position to oppose SB 1200 and HB 1247 in their entirety with the exception of the proposed changes adding contractors to the list of parties that may be awarded attorney fees under section 627.756, Fla. Stat. for claims on performance and payment bonds. The Construction Law Committee supports changes to Florida law to allow contractors to collect reasonable attorney fees for claims on payment and performance bonds; however, it vehemently opposes changes to Florida law that imposes increased requirements for claimants to perfect a payment bond claim for unpaid construction work, including opposing the changes proposed to Sections 255.05 and 713.23, Fla. Stat. contained with HB 1247 and SB 1200.

1. **CURRENT SITUATION**

The proposed changes and additions to SB 1200 and HB 1247 seek to require significantly greater hurdles for claimants on statutory payment bonds under Sections 255.05, Fla. Stat. and 713.23, Fla. Stat. Currently, a claimant may submit a Notice of Non-Payment on a statutory payment bond (1) without verifying the claim, and (2) without listing numerous items of work performed, contract amount, amounts paid, and amounts due. Prior to the proposed changes in these bills, the purpose of a Notice of Non-Payment to the contractor and surety was to provide notice of and security for a claim of non-payment, much like a claim of lien under Florida’s Construction Lien Law, which is also a simple statutory form.

Under Section 255.05(2)(a)2., Fla. Stat., a claimant who is not in privity with the contractor must only provide a Notice of Non-Payment within 90 days of final furnishing of work, labor, or supplies on the project. There is no requirement that the claimant provide any detail on the work performed or unperformed. The only exception is retainage, which must be set forth separately in the Notice.

Under Section713.23(1)(d), Fla. Stat. a claimant perfects its payment bond rights in the same way as under 255.05(2)(a)2., Fla. Stat., but does not have to specific set out retainage being withheld. Section 713.23(1)(d), Fla. Stat. does, however, provide a form of Notice of Non-Payment in the following form:

NOTICE OF NONPAYMENT

To (name of contractor and address)

(name of surety and address)

The undersigned notifies you that he or she has furnished (describe labor, services, or materials) for the improvement of the real property identified as (property description) . The amount now due and unpaid is $ .

(signature and address of lienor)

Additionally, in Sections 255.05(8) and 713.23(16)(4), Fla. Stat. already provide a statutory procedure for obtaining the information that SB 1200 and HB 1247 want to add into Sections 255.05(2)(a)2. and 713.23(1)(d), Fla. Stat. That procedure is called a Sworn Statement of Account and it carries with it significant penalties for failure to provide the information, including the loss of lien or bond rights.

1. **EFFECT OF PROPOSED CHANGES**
2. **Changes to Section 255.05, Fla. Stat.**
   1. Primarily, the proposed changes to 255.05, Fla. Stat. in both SB 1200 and HB 1247 will require that a Notice of Non-Payment on a statutory payment bond on public works project list the following:
      1. (a) the nature of the labor or services performed;
      2. (b) the materials furnished;
      3. (c) the materials to be furnished, if known;
      4. (d) the amount paid on account to date;
      5. (e) the amount due; and
      6. (f) the amount to become due.
   2. If the claimant negligently includes wrong information in the Notice of Non-Payment, it does not operate to defeat a valid bond claim **so long as** the information does not prejudice the contractor. Any gross negligence or willful overstatement will be grounds to defeat the bond claim, including any information that was negligently included or not included.
   3. First, the proposed requirements to be set forth in the Notice of Non-Payment are akin to requiring a claimant to submit a Sworn Statement of Account pursuant to Section 255.05(8), Fla. Stat. **The procedure for seeking a Sworn Statement of Account exists. The proposed changes would be duplicative and unnecessary**. This is significant because if the claimant does not comply with each item required in the proposed requirements, then it could be grounds to attack the validity of the bond claim. The proposed requirements will make it vastly more difficult for a claimant to perfect a bond claim. Indeed, the proposed requirements will make submitting a payment bond claim more onerous than a claim of lien, which clouds title to real property.
   4. Second, the proposed requirements will inevitably create an abundance of litigation as to whether a Notice of Non-Payment was properly prepared and served in order to perfect a bond claim.
   5. Lastly, the contractor’s right to argue that it is prejudiced by the negligent inclusion of wrong information will give contractors and surety many new grounds to argue that subcontractors and other claimants have submitted a wrongful claim, refuse to pay the claimant, and promote litigation.
3. **Changes to 627.756, Fla. Stat.**
   1. The Construction Law Committee agrees with the changes proposed to Section 627.756, Fla. Stat. seeking to allow contractors to collect reasonable attorney fees for claims on payment and performance bonds. This would be a welcome change to the current disparate treatment of contractors with respect to attorney fees and bond claims.
4. **Changes to 713.23, Fla. Stat.**
   1. The same analysis provided for Section 255.05, Fla. Stat. above applies equally here, with the exception that the applicable statute for Sworn Statement of Account is located at Section 713.16(4), Fla. Stat.
5. **FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

None that the Construction Law Committee is aware of as bonds are provided because public lands are not subject to lien claims.

1. **DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

The Legislative analysis of both bills is as follows:

Unknown. It is unclear if the additional provisions required in order to serve a notice of nonpayment will have an effect on the private sector. **The new provisions may make it more difficult for a subcontractor to file a notice of non-payment**. Other provisions may make it easier for a prevailing contractor to collect attorney fees in a claim against the surety insurer.

The Construction Law Committee’s position is as follows:

The proposed changes to 255.05 and 713.23 will make it significantly more difficult for bond claimants to secure a payment claim on projects where the property is not subject to liens. As a result, many potential bond claimants in the construction industry may be without any secure recourse for payment on jobs. **This could have a considerable impact on the construction industry, including many business failures in the construction industry** **and potentially increasing unemployment.**

1. **CONSTITUTIONAL ISSUES**

None that the Construction Law Committee is aware of at this time.

1. **OTHER INTERESTED PARTIES**

The contractor and surety lobbies will certainly want these bills passed; however, the overall impact of these bills would be adverse to the construction industry as a whole.

1. **EXPEDITED REVIEW AND VOTE**

The Construction Law Committee requests that the RPPTL Section expedite review and vote in opposition to SB 1200 and HB1247 because it is soon to be voted on the floor of the house and is being scheduled for its final committee in the Senate.