

By Senator Steube

23-00879-18

2018908__

A bill to be entitled

An act relating to construction bonds; amending s. 255.05, F.S.; requiring a notice of nonpayment to be verified; requiring the notice to contain certain statements; requiring a claimant to attach certain documents to a notice of nonpayment; providing that a claimant who serves a fraudulent notice of nonpayment shall be deprived of his or her rights under a bond; requiring a notice of nonpayment to be in a prescribed form; amending s. 627.756, F.S.; providing that a provision relating to attorney fees applies to certain suits brought by contractors; deeming contractors to be insureds or beneficiaries for certain purposes; reenacting s. 627.428, F.S., relating to attorney fees; amending s. 713.23, F.S.; requiring a lienor to serve a verified notice of nonpayment to specified entities during a certain period of time; requiring a notice of nonpayment to contain certain statements; requiring a lienor to attach certain documents to a notice of nonpayment; providing that a lienor who serves a fraudulent notice of nonpayment is deprived of his or her rights under the bond; requiring a notice of nonpayment to be in a prescribed form; amending s. 713.245, F.S.; providing that a contractor may record a notice identifying a project bond as a conditional payment bond before project commencement to make the duty of a surety to pay lienors coextensive with the contractor's duty to pay; providing that failure to list or record a bond as a

23-00879-18

2018908__

conditional payment bond does not convert such a bond into a common law bond or a bond furnished under a specified provision; revising the statement that must be included on a conditional payment bond; providing applicability; providing an effective date.

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

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

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

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

NOTICE OF CONTEST OF CLAIM
AGAINST PAYMENT BOND

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

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

23-00879-18

2018908__

DATED on,

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 verified in accordance with s. 92.525 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,

23-00879-18

2018908__

88 services, or materials by the claimant or, with respect to
89 rental equipment, ~~not~~ later than 90 days after the date that the
90 rental equipment was last on the job site available for use. The
91 notice of nonpayment must state, as of the date of the notice,
92 the nature of the labor or services performed; the nature of the
93 labor or services to be performed, if known; the materials
94 furnished; the materials to be furnished, if known; the amount
95 paid on account to date; the amount due; and the amount to
96 become due, if known. Any notice of nonpayment served by a
97 claimant who is not in privity with the contractor which
98 includes sums for retainage must specify the portion of the
99 amount claimed for retainage. The claimant shall also include,
100 as attachments to the notice of nonpayment, copies of the
101 following documents to substantiate the amount claimed as unpaid
102 in the notice, if such documents exist: the claimant's contract
103 or purchase order and any amendments or change orders directed
104 thereto; invoices, pay requests, bills of lading, delivery
105 receipts, or similar documents, as applicable; and a statement
106 of account reflecting all payments requested and received for
107 the labor, services, or materials. An action for the labor,
108 materials, or supplies may not be instituted against the
109 contractor or the surety unless the notice to the contractor and
110 notice of nonpayment have been served, if required by this
111 section. Notices required or permitted under this section must
112 ~~shall~~ be served in accordance with s. 713.18. A claimant may not
113 waive in advance his or her right to bring an action under the
114 bond against the surety. In any action brought to enforce a
115 claim against a payment bond under this section, the prevailing
116 party is entitled to recover a reasonable fee for the services

23-00879-18

2018908__

of his or her attorney for trial and appeal or for arbitration, in an amount to be determined by the court, which fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions. The time periods for service of a notice of nonpayment or for bringing an action against a contractor or a surety shall be measured from the last day of furnishing labor, services, or materials by the claimant and may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. A claimant who serves a fraudulent notice of nonpayment shall be deprived of his or her rights under the bond. A notice of nonpayment is fraudulent if the claimant has willfully exaggerated the amount due, willfully included a claim for work not performed or materials not furnished for the subject improvement, or prepared the notice with such willful and gross negligence as to amount to a willful exaggeration. However, a minor mistake or error in a notice of nonpayment, or a good faith dispute as to the amount due, does not constitute a willful exaggeration that operates to defeat an otherwise valid claim against the bond. The service of a fraudulent notice of nonpayment is a complete defense to the claimant's claim against the bond, entitling the prevailing party to attorney fees under this subparagraph. The notice of nonpayment under this subparagraph must be in substantially the following form:

NOTICE OF NONPAYMENT

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

23-00879-18

2018908__

The undersigned claimant notifies you that:

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

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

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

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

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

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

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

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

23-00879-18

2018908__

of this section.

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

627.428 Attorney's fee.—

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

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

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

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

713.23 Payment bond.—

(1)

(d) In addition, a lienor who has not received payment for furnishing his or her labor, services, or materials must ~~is~~ ~~required~~, as a condition precedent to recovery under the bond, ~~to~~ serve a written notice of nonpayment to the contractor and

23-00879-18

2018908__

the surety. The notice must be verified in accordance with s.
92.525 and must be 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 lienor
or ~~not~~ later than 90 days after the final furnishing of labor,
services, or materials by the lienor, or, with respect to rental
equipment, later than 90 days after the date the rental
equipment was on the job site and available for use. The notice
of nonpayment must state, as of the date of the notice, the
nature of the labor or services performed; the nature of the
labor or services to be performed, if known; 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. A notice of nonpayment that includes sums
for retainage must specify the portion of the amount claimed for
retainage. The lienor must also include, as attachments to the
notice of nonpayment, copies of the following documents to
substantiate the amount claimed as unpaid in the notice, if such
documents exist: the lienor'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. The required. ~~A written~~ notice satisfies this
condition precedent with respect to the payment described in the
notice of nonpayment, including unpaid finance charges due under
the lienor's contract, and with respect to any other payments
which become due to the lienor after the date of the notice of
nonpayment. The time period for serving a ~~written~~ notice of

23-00879-18

2018908__

nonpayment shall be measured from the last day of furnishing labor, services, or materials by the lienor and shall not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. The failure of a lienor to receive retainage sums not in excess of 10 percent of the value of labor, services, or materials furnished by the lienor is not considered a nonpayment requiring the service of the notice provided under this paragraph. If the payment bond is not recorded before commencement of construction, the time period for the lienor to serve a notice of nonpayment may at the option of the lienor be calculated from the date specified in this section or the date the lienor is served a copy of the bond. However, the limitation period for commencement of an action on the payment bond as established in paragraph (e) may not be expanded. A lienor who serves a fraudulent notice of nonpayment shall be deprived of his or her rights under the bond. A notice of nonpayment is fraudulent if the lienor has willfully exaggerated the amount due, willfully included a claim for work not performed or materials not furnished for the subject improvement, or prepared the notice with such willful and gross negligence as to amount to a willful exaggeration. However, a minor mistake or error in a notice of nonpayment, or a good faith dispute as to the amount due, does not constitute a willful exaggeration that operates to defeat an otherwise valid claim against the bond. The service of a fraudulent notice of nonpayment is a complete defense to the lienor's claim against the bond, entitling the prevailing party to attorney fees under s. 713.29. The notice under this paragraph must ~~may~~ be in

23-00879-18

2018908__

substantially the following form:

NOTICE OF NONPAYMENT

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

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

The undersigned lienor notifies you that:

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

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

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

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

...(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

23-00879-18

2018908__

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.

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

Section 6. The amendments made by this act to ss. 627.756 and 713.245, Florida Statutes, apply only to payment or performance bonds issued on or after October 1, 2018.

Section 7. This act shall take effect October 1, 2018.