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CS/CS/HB 1247, Engrossed 1

2019 Legislature

1  
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 a claimant who serves a  
5 fraudulent notice of nonpayment forfeits his or her  
6 rights under a bond; providing that the service of a  
7 fraudulent notice of nonpayment is a complete defense  
8 to the claimant's claim against the bond; requiring a  
9 notice of nonpayment to be in a prescribed form;  
10 amending s. 627.756, F.S.; providing that a provision  
11 relating to attorney fees applies to certain suits  
12 brought by contractors; deeming contractors to be  
13 insureds or beneficiaries in relation to bonds for  
14 construction contracts; amending s. 627.428, F.S.;  
15 revising terminology; amending s. 713.23, F.S.;  
16 requiring a notice of nonpayment to be under oath;  
17 specifying that a lienor who serves a fraudulent  
18 notice of nonpayment forfeits his or her rights under  
19 a bond; providing that the service of a fraudulent  
20 notice of nonpayment is a complete defense to the  
21 lienor's claim against the bond; requiring a notice of  
22 nonpayment to be in a prescribed form; providing  
23 applicability; providing an effective date.

24  
25 Be It Enacted by the Legislature of the State of Florida:

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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.

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

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

52

53 The claim of a claimant upon whom such notice is served and who  
54 fails to institute a suit to enforce his or her claim against  
55 the payment bond within 60 days after service of such notice is  
56 ~~shall be~~ extinguished automatically. The contractor or the  
57 contractor's attorney shall serve a copy of the notice of  
58 contest to the claimant at the address shown in the notice of  
59 nonpayment or most recent amendment thereto and shall certify to  
60 such service on the face of the notice and record the notice.

61 2. A claimant, except a laborer, who is not in privity  
62 with the contractor shall, before commencing or not later than  
63 45 days after commencing to furnish labor, services, or  
64 materials for the prosecution of the work, serve ~~furnish~~ the  
65 contractor with a written notice that he or she intends to look  
66 to the bond for protection. A claimant who is not in privity  
67 with the contractor and who has not received payment for  
68 furnishing his or her labor, services, or materials shall serve  
69 a written notice of nonpayment on ~~deliver to~~ the contractor and  
70 on ~~to~~ the surety ~~written notice of the performance of the labor~~  
71 ~~or delivery of the materials or supplies and of the nonpayment.~~  
72 The notice of nonpayment shall be under oath and served during  
73 the progress of the work or thereafter but may not be served  
74 earlier than 45 days after the first furnishing of labor,  
75 services, or materials by the claimant or later than 90 days

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76 | after the final furnishing of the labor, services, or materials  
77 | by the claimant or, with respect to rental equipment, ~~not~~ later  
78 | than 90 days after the date that the rental equipment was last  
79 | on the job site available for use. Any notice of nonpayment  
80 | served by a claimant who is not in privity with the contractor  
81 | which includes sums for retainage must specify the portion of  
82 | the amount claimed for retainage. An action for the labor,  
83 | services, or materials, ~~or supplies~~ may not be instituted  
84 | against the contractor or the surety unless the notice to the  
85 | contractor and notice of nonpayment have been served, if  
86 | required by this section. Notices required or permitted under  
87 | this section must ~~shall~~ be served in accordance with s. 713.18.  
88 | A claimant may not waive in advance his or her right to bring an  
89 | action under the bond against the surety. In any action brought  
90 | to enforce a claim against a payment bond under this section,  
91 | the prevailing party is entitled to recover a reasonable fee for  
92 | the services of his or her attorney for trial and appeal or for  
93 | arbitration, in an amount to be determined by the court, which  
94 | fee must be taxed as part of the prevailing party's costs, as  
95 | allowed in equitable actions. The time periods for service of a  
96 | notice of nonpayment or for bringing an action against a  
97 | contractor or a surety shall be measured from the last day of  
98 | furnishing labor, services, or materials by the claimant and may  
99 | not be measured by other standards, such as the issuance of a  
100 | certificate of occupancy or the issuance of a certificate of

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101 substantial completion. The negligent inclusion or omission of  
 102 any information in the notice of nonpayment that has not  
 103 prejudiced the contractor or surety does not constitute a  
 104 default that operates to defeat an otherwise valid bond claim. A  
 105 claimant who serves a fraudulent notice of nonpayment forfeits  
 106 his or her rights under the bond. A notice of nonpayment is  
 107 fraudulent if the claimant has willfully exaggerated the amount  
 108 unpaid, willfully included a claim for work not performed or  
 109 materials not furnished for the subject improvement, or prepared  
 110 the notice with such willful and gross negligence as to amount  
 111 to a willful exaggeration. However, a minor mistake or error in  
 112 a notice of nonpayment, or a good faith dispute as to the amount  
 113 unpaid, does not constitute a willful exaggeration that operates  
 114 to defeat an otherwise valid claim against the bond. The service  
 115 of a fraudulent notice of nonpayment is a complete defense to  
 116 the claimant's claim against the bond. The notice of nonpayment  
 117 under this subparagraph must include the following information,  
 118 current as of the date of the notice, and must be in  
 119 substantially the following form:

120  
 121 NOTICE OF NONPAYMENT

122  
 123 To: ... (name of contractor and address) ...

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

125 The undersigned claimant notifies you that:

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126 1. Claimant has furnished ...(describe labor, services, or  
127 materials)... for the improvement of the real property  
128 identified as ...(property description)... The corresponding  
129 amount unpaid to date is \$ ....., of which \$ ..... is unpaid  
130 retainage.

131 2. Claimant has been paid to date the amount of \$ ..... for  
132 previously furnishing ...(describe labor, services, or  
133 materials)... for this improvement.

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

138  
139 I declare that I have read the foregoing Notice of Nonpayment  
140 and that the facts stated in it are true to the best of my  
141 knowledge and belief.

142  
143 DATED on ....., .....

144  
145 ...(signature and address of claimant)...

146  
147 STATE OF FLORIDA

148 COUNTY OF

149  
150 The foregoing instrument was sworn to (or affirmed) and

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151 subscribed before me this.....day of...., ...(year)..., by  
 152 ...(name of signatory)....

153 (Signature of Notary Public-State of Florida)  
 154 (Print, Type, or Stamp Commissioned Name of Notary Public)

155  
 156 Personally Known.....OR Produced Identification.....

157  
 158 Type of Identification Produced.....

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

161 627.756 Bonds for construction contracts; attorney fees in  
 162 case of suit.—

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

171 Section 3. Section 627.428, Florida Statutes, is amended  
 172 to read:

173 627.428 Attorney fees ~~Attorney's fee~~.—

174 (1) Upon the rendition of a judgment or decree by any of  
 175 the courts of this state against an insurer and in favor of any

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176 | named or omnibus insured or the named beneficiary under a policy  
 177 | or contract executed by the insurer, the trial court or, in the  
 178 | event of an appeal in which the insured or beneficiary prevails,  
 179 | the appellate court shall adjudge or decree against the insurer  
 180 | and in favor of the insured or beneficiary a reasonable sum as  
 181 | fees or compensation for the insured's or beneficiary's attorney  
 182 | prosecuting the suit in which the recovery is had.

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

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

191 |       Section 4. Paragraph (d) of subsection (1) of section  
 192 | 713.23, Florida Statutes, is amended to read:

193 |       713.23 Payment bond.—

194 |       (1)

195 |       (d) In addition, a lienor who has not received payment for  
 196 | furnishing his or her labor, services, or materials must ~~is~~  
 197 | required, as a condition precedent to recovery under the bond,  
 198 | ~~to~~ serve a written notice of nonpayment to the contractor and  
 199 | the surety. The notice must be under oath and served during the  
 200 | progress of the work or thereafter, but may not be served ~~not~~



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201 later than 90 days after the final furnishing of labor,  
202 services, or materials by the lienor, or, with respect to rental  
203 equipment, later than 90 days after the date the rental  
204 equipment was on the job site and available for use. A notice of  
205 nonpayment that includes sums for retainage must specify the  
206 portion of the amount claimed for retainage. The required. ~~A~~  
207 ~~written~~ notice satisfies this condition precedent with respect  
208 to the payment described in the notice of nonpayment, including  
209 unpaid finance charges due under the lienor's contract, and with  
210 respect to any other payments which become due to the lienor  
211 after the date of the notice of nonpayment. The time period for  
212 serving a ~~written~~ notice of nonpayment shall be measured from  
213 the last day of furnishing labor, services, or materials by the  
214 lienor and may ~~shall~~ not be measured by other standards, such as  
215 the issuance of a certificate of occupancy or the issuance of a  
216 certificate of substantial completion. The failure of a lienor  
217 to receive retainage sums not in excess of 10 percent of the  
218 value of labor, services, or materials furnished by the lienor  
219 is not considered a nonpayment requiring the service of the  
220 notice provided under this paragraph. If the payment bond is not  
221 recorded before commencement of construction, the time period  
222 for the lienor to serve a notice of nonpayment may at the option  
223 of the lienor be calculated from the date specified in this  
224 section or the date the lienor is served a copy of the bond.  
225 However, the limitation period for commencement of an action on

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226 | the payment bond as established in paragraph (e) may not be  
 227 | expanded. The negligent inclusion or omission of any information  
 228 | in the notice of nonpayment that has not prejudiced the  
 229 | contractor or surety does not constitute a default that operates  
 230 | to defeat an otherwise valid bond claim. A lienor who serves a  
 231 | fraudulent notice of nonpayment forfeits his or her rights under  
 232 | the bond. A notice of nonpayment is fraudulent if the lienor has  
 233 | willfully exaggerated the amount unpaid, willfully included a  
 234 | claim for work not performed or materials not furnished for the  
 235 | subject improvement, or prepared the notice with such willful  
 236 | and gross negligence as to amount to a willful exaggeration.  
 237 | However, a minor mistake or error in a notice of nonpayment, or  
 238 | a good faith dispute as to the amount unpaid, does not  
 239 | constitute a willful exaggeration that operates to defeat an  
 240 | otherwise valid claim against the bond. The service of a  
 241 | fraudulent notice of nonpayment is a complete defense to the  
 242 | lienor's claim against the bond. The notice under this paragraph  
 243 | must include the following information, current as of the date  
 244 | of the notice, and must ~~may~~ be in substantially the following  
 245 | form:

247 | NOTICE OF NONPAYMENT

248 |  
 249 | To ... (name of contractor and address) ...  
 250 | ... (name of surety and address) ...

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251 The undersigned lienor notifies you that:

252 1. The lienor ~~he or she~~ has furnished ...(describe labor,  
253 services, or materials)...for the improvement of the real  
254 property identified as ...(property description).... The  
255 corresponding amount now due and unpaid to date is \$...., of  
256 which \$.... is unpaid retainage.

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

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

264  
265 I declare that I have read the foregoing Notice of Nonpayment  
266 and that the facts stated in it are true to the best of my  
267 knowledge and belief.

268  
269 DATED on ....., .....

270  
271 ...(signature and address of lienor)...

272  
273 STATE OF FLORIDA

274 COUNTY OF

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276 | The foregoing instrument was sworn to (or affirmed) and  
277 | subscribed before me this.....day of....., ...(year)...., by  
278 | ...(name of signatory)....  
279 | (Signature of Notary Public-State of Florida)  
280 | (Print, Type, or Stamp Commissioned Name of Notary Public)  
281 |  
282 | Personally Known.....OR Produced Identification.....  
283 |  
284 | Type of Identification Produced.....  
285 | Section 5. The amendment made by this act to s. 627.756,  
286 | Florida Statutes, applies only to payment or performance bonds  
287 | issued on or after October 1, 2019.  
288 | Section 6. This act shall take effect October 1, 2019.