

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 verified; providing notice of nonpayment requirements;
5 requiring a claimant to attach certain documents to a
6 notice of nonpayment; providing that a claimant who
7 serves a fraudulent notice of nonpayment shall be
8 deprived of his or her rights under a bond; requiring
9 a 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 for certain purposes;
14 republishing s. 627.428, F.S., relating to attorney
15 fees; amending s. 713.23, F.S.; requiring a lienor to
16 serve a verified notice of nonpayment to specified
17 entities during a certain period; providing notice of
18 nonpayment requirements; requiring a lienor to attach
19 certain documents to a notice of nonpayment; providing
20 that a lienor who serves a fraudulent notice of
21 nonpayment is deprived of his or her rights under the
22 bond; requiring a notice of nonpayment to be in a
23 prescribed form; amending s. 713.245, F.S.; providing
24 that a contractor may record a notice identifying a
25 project bond as a conditional payment bond before

26 project commencement in order for the duty of a surety
 27 to pay lienors to be coextensive with the contractor's
 28 duty to pay in certain circumstances; providing that
 29 failure to list or record a bond as a conditional
 30 payment bond does not convert such a bond into a
 31 common law bond or a bond furnished under a specified
 32 provision; providing applicability; providing an
 33 effective date.

34

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

36

37 Section 1. Paragraph (a) of subsection (2) of section
 38 255.05, Florida Statutes, is amended to read:

39 255.05 Bond of contractor constructing public buildings;
 40 form; action by claimants.—

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

47 NOTICE OF CONTEST OF CLAIM
 48 AGAINST PAYMENT BOND

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

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.

55 DATED on,

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

57

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

66 2. A claimant, except a laborer, who is not in privity
 67 with the contractor shall, before commencing or not later than
 68 45 days after commencing to furnish labor, services, or
 69 materials for the prosecution of the work, serve ~~furnish~~ the
 70 contractor with a written notice that he or she intends to look
 71 to the bond for protection. A claimant who is not in privity
 72 with the contractor and who has not received payment for
 73 furnishing his or her labor, services, or materials shall serve
 74 a written notice of nonpayment ~~deliver~~ to the contractor and to
 75 the surety ~~written notice of the performance of the labor or~~

76 | ~~delivery of the materials or supplies and of the nonpayment.~~ The
77 | notice of nonpayment shall be verified in accordance with s.
78 | 92.525 and served during the progress of the work or thereafter
79 | but may not be served earlier than 45 days after the first
80 | furnishing of labor, services, or materials by the claimant or
81 | later than 90 days after the final furnishing of the labor,
82 | services, or materials by the claimant or, with respect to
83 | rental equipment, ~~not~~ later than 90 days after the date that the
84 | rental equipment was last on the job site available for use. The
85 | notice of nonpayment shall state, as of the date of the notice,
86 | the nature of the labor or services performed; the nature of the
87 | labor or services to be performed, if known; the materials
88 | furnished; the materials to be furnished, if known; the amount
89 | paid on account to date; the amount due; and the amount to
90 | become due, if known. Any notice of nonpayment served by a
91 | claimant who is not in privity with the contractor which
92 | includes sums for retainage must specify the portion of the
93 | amount claimed for retainage. The claimant shall also include,
94 | as attachments to the notice of nonpayment, copies of the
95 | following documents to substantiate the amount claimed as unpaid
96 | in the notice, if such documents exist: the claimant's contract
97 | or purchase order and any amendments or change orders directed
98 | thereto; invoices, pay requests, bills of lading, delivery
99 | receipts, or similar documents, as applicable; and a statement
100 | of account reflecting all payments requested and received for

101 the labor, services, or materials. An action for the labor,
102 materials, or supplies may not be instituted against the
103 contractor or the surety unless the notice to the contractor and
104 notice of nonpayment have been served, if required by this
105 section. Notices required or permitted under this section shall
106 be served in accordance with s. 713.18. A claimant may not waive
107 in advance his or her right to bring an action under the bond
108 against the surety. In any action brought to enforce a claim
109 against a payment bond under this section, the prevailing party
110 is entitled to recover a reasonable fee for the services of his
111 or her attorney for trial and appeal or for arbitration, in an
112 amount to be determined by the court, which fee must be taxed as
113 part of the prevailing party's costs, as allowed in equitable
114 actions. The time periods for service of a notice of nonpayment
115 or for bringing an action against a contractor or a surety shall
116 be measured from the last day of furnishing labor, services, or
117 materials by the claimant and may not be measured by other
118 standards, such as the issuance of a certificate of occupancy or
119 the issuance of a certificate of substantial completion. A
120 claimant who serves a fraudulent notice of nonpayment shall be
121 deprived of his or her rights under the bond. A notice of
122 nonpayment is fraudulent if the claimant has willfully
123 exaggerated the amount due, willfully included a claim for work
124 not performed or materials not furnished for the subject
125 improvement, or prepared the notice with such willful and gross

126 | negligence as to amount to a willful exaggeration. However, a
 127 | minor mistake or error in a notice of nonpayment, or a good
 128 | faith dispute as to the amount due, does not constitute a
 129 | willful exaggeration that operates to defeat an otherwise valid
 130 | claim against the bond. The service of a fraudulent notice of
 131 | nonpayment is a complete defense to the claimant's claim against
 132 | the bond, entitling the prevailing party to attorney fees under
 133 | this subparagraph. The notice of nonpayment under this
 134 | subparagraph must be in substantially the following form:

135 |
 136 | NOTICE OF NONPAYMENT
 137 |

138 | To:...(name of contractor and address)...
 139 | ...(name of surety and address)...

140 | The undersigned claimant notifies you that:

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

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

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

151 ... (if known).

152

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

156

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

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

160 627.756 Bonds for construction contracts; attorney fees in
 161 case of suit.—

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

170 Section 3. Section 627.428, Florida Statutes, is
 171 republished to read:

172 627.428 Attorney's fee.—

173 (1) Upon the rendition of a judgment or decree by any of
 174 the courts of this state against an insurer and in favor of any
 175 named or omnibus insured or the named beneficiary under a policy

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

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

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

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

192 713.23 Payment bond.—

193 (1)

194 (d) In addition, a lienor who has not received payment for
 195 furnishing his or her labor, services, or materials must ~~is~~
 196 required, as a condition precedent to recovery under the bond,
 197 ~~to~~ serve a written notice of nonpayment to the contractor and
 198 the surety. The notice must be verified in accordance with s.
 199 92.525 and must be served during the progress of the work or
 200 thereafter, but may not be served earlier than 45 days after the

201 first furnishing of labor, services, or materials by the lienor
202 or ~~not~~ later than 90 days after the final furnishing of labor,
203 services, or materials by the lienor or, with respect to rental
204 equipment, later than 90 days after the date the rental
205 equipment was on the job site and available for use. The notice
206 of nonpayment must state, as of the date of the notice, the
207 nature of the labor or services performed; the nature of the
208 labor or services to be performed, if known; the materials
209 furnished; the materials to be furnished, if known; the amount
210 paid on account to date; the amount due; and the amount to
211 become due, if known. A notice of nonpayment that includes sums
212 for retainage must specify the portion of the amount claimed for
213 retainage. The lienor must also include, as attachments to the
214 notice of nonpayment, copies of the following documents to
215 substantiate the amount claimed as unpaid in the notice, if such
216 documents exist: the lienor's contract or purchase order and any
217 amendments or change orders directed thereto; invoices, pay
218 requests, bills of lading, delivery receipts, or similar
219 documents, as applicable; and a statement of account reflecting
220 all payments requested and received for the labor, services, or
221 materials. The required. ~~A written~~ notice satisfies this
222 condition precedent with respect to the payment described in the
223 notice of nonpayment, including unpaid finance charges due under
224 the lienor's contract, and with respect to any other payments
225 which become due to the lienor after the date of the notice of

226 nonpayment. The time period for serving a ~~written~~ notice of
227 nonpayment shall be measured from the last day of furnishing
228 labor, services, or materials by the lienor and shall not be
229 measured by other standards, such as the issuance of a
230 certificate of occupancy or the issuance of a certificate of
231 substantial completion. The failure of a lienor to receive
232 retainage sums not in excess of 10 percent of the value of
233 labor, services, or materials furnished by the lienor is not
234 considered a nonpayment requiring the service of the notice
235 provided under this paragraph. If the payment bond is not
236 recorded before commencement of construction, the time period
237 for the lienor to serve a notice of nonpayment may at the option
238 of the lienor be calculated from the date specified in this
239 section or the date the lienor is served a copy of the bond.
240 However, the limitation period for commencement of an action on
241 the payment bond as established in paragraph (e) may not be
242 expanded. A lienor who serves a fraudulent notice of nonpayment
243 shall be deprived of his or her rights under the bond. A notice
244 of nonpayment is fraudulent if the lienor has willfully
245 exaggerated the amount due, willfully included a claim for work
246 not performed or materials not furnished for the subject
247 improvement, or prepared the notice with such willful and gross
248 negligence as to amount to a willful exaggeration. However, a
249 minor mistake or error in a notice of nonpayment, or a good
250 faith dispute as to the amount due, does not constitute a

251 willful exaggeration that operates to defeat an otherwise valid
 252 claim against the bond. The service of a fraudulent notice of
 253 nonpayment is a complete defense to the lienor's claim against
 254 the bond, entitling the prevailing party to attorney fees under
 255 s. 713.29. The notice under this paragraph must ~~may~~ be in
 256 substantially the following form:

257 NOTICE OF NONPAYMENT

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

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

260 The undersigned lienor notifies you that:

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

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

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

272
 273 Under penalties of perjury, I declare that I have read the
 274 foregoing Notice of Nonpayment and that the facts stated in it
 275 are true.

276 ... (signature and address of lienor)...

277 Section 5. Subsection (1) of section 713.245, Florida
 278 Statutes, is amended to read:

279 713.245 Conditional payment bond.—

280 (1) Notwithstanding any provisions of ss. 713.23 and
 281 713.24 to the contrary, if the contractor's written contractual
 282 obligation to pay lienors is expressly conditioned upon and
 283 limited to the payments made by the owner to the contractor, the
 284 duty of the surety to pay lienors will be coextensive with the
 285 duty of the contractor to pay, if the following provisions are
 286 complied with:

287 (a) The bond is listed in the notice of commencement for
 288 the project as a conditional payment bond and is recorded
 289 together with the notice of commencement for the project before
 290 ~~prior to~~ commencement of the project, or the contractor records
 291 a notice identifying the bond for the project as a conditional
 292 payment bond, with the bond attached, before commencement of the
 293 project. Failure to comply with this paragraph does not convert
 294 a conditional payment bond into a common law bond or into a bond
 295 furnished under s. 713.23.

296 (b) The words "conditional payment bond" are contained in
 297 the title of the bond at the top of the front page.

298 (c) The bond contains on the front page, in at least 10-
 299 point type, the statement: THIS BOND ONLY COVERS CLAIMS OF
 300 SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND LABORERS TO

HB 723

2018

301 THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES,
302 OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT
303 PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF
304 LIEN ON THIS PROJECT.

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

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