

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Regulated Industries Committee

BILL: SB 878

INTRODUCER: Senator Thrasher

SUBJECT: Construction Contracting

DATE: February 16, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harrington	Imhof	RI	Favorable
2.	_____	_____	CA	_____
3.	_____	_____	JU	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill requires subcontractors and suppliers that have not received payment for labor, services or material to notify the contractor and provide certain information regarding the nonpayment on bonded construction projects. The subcontractors and suppliers must indicate the nature of the labor or services performed; the material furnished; the amount paid on the account, the amount due, and the amount to become due; and the portion of the amount claimed for retainage. The notice of nonpayment must also include certain specified documents to substantiate the claim.

The bill provides that a subcontractor claimant who files a false notice may not recover under the payment bond.

The bill provides an effective date of July 1, 2010.

This bill substantially amends the following sections of the Florida Statutes: 255.05, 337.18, and 713.23.

II. Present Situation:

Surety

In Florida, “surety insurance” is defined to include payment and performance bonds.¹ Such bonds are contracts where a surety company that is paid a premium by a principal, e.g., a general

¹ Section 624.606(1)(a), F.S.

contractor, agrees to stand in the place of the principal in the event that the principal defaults either as to performance of the contract or as to payment of its subcontractors/suppliers.²

Unlike a customary insurance agreement in which there is a two-party relationship, i.e., the insurer and the insured, a surety is a tripartite agreement consisting of:

1. The obligee, who may be either the person purchasing the performance from the contractor in the case of a performance bond, or the subcontractor/supplier expecting payment from the contractor in the case of a payment bond;
2. A principal, e.g., the contractor; and
3. The surety that provides the bond to protect against the principal's default.

According to the Association of General Contractors, the general contractor provides a payment bond to guarantee the payment of the subcontractors, sub-subcontractors and suppliers for their work and materials on virtually all public construction projects and most large private projects. The general contractors stated that a major problem for the general contractor occurs when a subcontractor defaults on its obligations and fails to pay the sub-subcontractors and suppliers. In this situation, the subcontractors and suppliers can make a claim against the general contractor's payment bond.

Payment Bonds for Public Projects

Section 255.05(1)(a), F.S., provides that any person who enters into a formal contract with the state or any county, city, or political subdivision thereof, or other public authority for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work is required to deliver to the public owner a payment and performance bond with a state authorized surety insurer. A payment bond guarantees that the contractor will pay certain subcontractors, laborers, and material suppliers associated with the project. A performance bond protects the owner from financial loss should the contractor fail to perform the contract in accordance with its terms and conditions.

The payment and performance bond must state on its front page:

- The name, principal business address, and phone number of the contractor, the surety, the owner of the property being improved, and, if different from the owner, the contracting public entity;
- The contract number assigned by the contracting public entity; and
- A description of the project sufficient to identify it, such as a legal description or the street address of the property being improved, and a general description of the improvement.³

A construction lien is an equitable device, designed to protect those enhancing an owner's property who are not in direct privity with the owner,⁴ such as laborers and suppliers of material,

² See, Toomey, Daniel and McNulty, Tamara, *Surety Bonds: A Basic User's Guide for Payment Bond Claimants and Obligees*, Construction Lawyer, Winter, 2002.

³ Section 255.05(1)(a), F.S.

who remain unpaid while the owner pays the contractor directly.⁵ Under current law, contractors cannot place a lien on public or state owned lands or buildings to secure payments for construction performed on the public buildings or public lands. Section 255.05, F.S., provides for payment or performance bonds as an alternative to filing a lien to secure payment for work done by contractors on publicly owned land. A payment bond is required for a state project that is more than \$100,000 unless the project is between \$100,000 and \$200,000, and then a state agency can exempt the contractor from the bond requirement.⁶

Section 255.05(2), F.S., provides procedures for subcontractors and suppliers to make claims against a payment bond. This section also provides an outline for a notice form, deadlines for action, and consequences for improper notice or failure to act within specified guidelines. Section 255.05(2)(a)2., F.S., provides that a claimant on a payment bond must give a contractor notice that he or she intends to make a claim against the bond for payment. A claimant who is not in privity with the contractor and who has not received payment for his or her labor, services, or materials must give the contractor and surety written notice of the performance and of the nonpayment.⁷ The statute does not require any specific information to be included in the notice of nonpayment.

Florida Department of Transportation Contracts

Section 337.11, Florida Statutes, requires the Florida Department of Transportation (FDOT) to advertise in a local newspaper of general circulation, the request for bids on all construction projects with a contract price of \$250,000 or less. Contracts in excess of \$250,000 may only be bid upon by contractors meeting certain prequalification requirements and are advertised by invitations to bid. Upon winning a bid for a contract, a contractor must post a surety or performance bond equal to 100 percent of the contract price to enable FDOT to complete the project should the contractor fail to carry out the terms of the contract.⁸ The requirement for a surety bond may be waived by FDOT on projects \$250,000 or less if the project is of a noncritical nature and nonperformance by the contractor will not endanger the public health, safety, or property.⁹ Prior to making a claim against the bond for nonpayment, a claimant must provide a notice of nonpayment to the contractor.¹⁰ The statute is silent as to what information should be included in the notice of nonpayment.

Florida Construction Lien Law

A construction lien¹¹ is an equitable device designed to protect subcontractors, sub-subcontractors, laborers and suppliers of material who remain unpaid after the owner has paid

⁴ *Hiers v. Thomas*, 458 So.2d 322 (Fla. 2nd DCA 1984).

⁵ *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623 (Fla. 1995).

⁶ The authority to exempt is delegated to the state agency by the Secretary of the Department of Management Services. Section 255.05(1)(a), F.S.

⁷ Section 255.05(2)(a)2., F.S.

⁸ Section 337.18(1)(a), F.S.

⁹ *Id.*

¹⁰ Section 337.18(1)(c), F.S.

¹¹ Lien is not defined in ch. 713, F.S., but can be found elsewhere in the Florida Statutes to mean “a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by

the contractor directly.¹² The lien law protects subcontractors, sub-subcontractors, laborers, and suppliers of materials by allowing them to place a lien to ensure payment on the property receiving their services. Another purpose of lien law is to protect owners by requiring subcontractors to provide a notice of possible liens, thereby preventing double payments to contractors and subcontractors, material suppliers, or laborers for the same services or materials.

If an owner and a contractor wish to exempt out of the lien law provisions, s. 713.02(6), F.S., provides that an owner can require that a contractor furnish a payment bond instead. Section 713.23(1)(a), F.S., provides that the payment bond must be furnished by the contractor and a copy of the bond must be attached to the notice of commencement¹³ when the notice of commencement is recorded. Prior to commencing an action against the bond, a lienor is required to serve a written notice of nonpayment to the contractor and the surety stating that materials or services were furnished and a specific amount remains unpaid.¹⁴ The notice of nonpayment does not require any additional information.

The general contractors maintain that when a notice of non-payment is received, documentation supporting the claim is frequently not supplied and must be obtained through filing a lawsuit.

III. Effect of Proposed Changes:

The bill adds additional requirements for notices of nonpayment for bonded construction contracts.

The bill provides that the notice of nonpayment for bonded construction contracts with the state or any county, municipality, or political subdivision thereof for construction of a public building, contracts for the construction or maintenance of public roads, and contracts exempt from lien law must include:

- The nature of the labor or services performed and to be performed, if any;
- The materials furnished and to be furnished, if known;
- The amount paid on account, the amount due, and the amount to become due, if known; and
- The portion of the amount claimed for retainage, if any.

The notice of nonpayment must also include the following attachments to substantiate the amount claimed as unpaid:

- The claimant's contract or purchase order and any amendments or change orders;

agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.” Sections 726.102(8) and 727.103(9), F.S.

¹² *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623 (Fla. 1995).

¹³ Section 713.13, F.S., provides that the recording of a Notice of Commencement gives constructive notice that claims of lien may be recorded and will have priority over any conveyance, encumbrance, or demand not recorded against the real property prior to the time the notice is recorded. A notice of commencement must be recorded in the clerk's office before a contractor actually begins an improvement to real property or recommences completion of any improvement after default or abandonment.

¹⁴ Section 713.23(1)(d), F.S.

- 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 Florida Surety Association indicated that requiring additional information to be included in the notice of nonpayment may not be necessary. According to the Florida Surety Association, the notice of nonpayment is merely a vehicle used to notify the contractor that the subcontractor has not paid its debt. Requiring additional information or other supporting documents would provide an additional opportunity to litigate over whether the notice has complied with the statutory requirements.

The bill requires the notice of nonpayment to be verified. The bill specifies that a claimant who provides a false or fraudulent notice of nonpayment may not recover under the bond. It also provides that an action to recover for labor, materials, or supplies cannot be instituted against the contractor or the surety unless the required notices are given in full compliance with the new provisions.

The bill provides a timeframe for when a lienor may serve notice of nonpayment for construction contracts that are exempt from lien law. The bill provides that the lienor may serve notice of nonpayment at any time during the progress of the construction project but not before 45 days after the first furnishing of services, labor, or materials. The notice must be served prior to 90 days after the final furnishing of labor, services, or materials. The bill specifies that an action for nonpayment may not be commenced unless the lienor has complied with the notice of nonpayment provisions.

The bill also contains amendments to conform the provisions to current bill drafting conventions.

The bill shall take effect on July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill adds additional requirements for the statutory notice of nonpayment for claims against construction bonds. According to the Association of General Contractors, the additional requirements will provide more information to the contractor who in turn should be able to more efficiently determine the validity of nonpayment claims. The Association of General Contractors indicated that payments on valid claims should be made to sub-subcontractors and suppliers more quickly with the additional information and result in less litigation and legal fees.

Representatives of the sub-subcontractors and suppliers raised concerns that the additional notice and compliance requirements would preclude their ability to recover on the payments bonds.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.