

By Senator Thrasher

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1 A bill to be entitled
2 An act relating to notices of nonpayment in
3 construction contracting; amending ss. 255.05, 337.18,
4 and 713.23, F.S.; requiring a claimant to verify a
5 notice of nonpayment submitted to a contractor or
6 surety; specifying the information that must be
7 included in a notice of nonpayment; prohibiting a
8 person who furnishes a false or fraudulent notice of
9 nonpayment from recovering under the surety bond;
10 specifying the manner in which certain notices
11 relating to construction contracting must be served;
12 prohibiting a claimant from initiating an action for
13 payment against a contractor or surety unless the
14 claimant furnishes a notice that the claimant intends
15 to look to the bond for protection and a notice of
16 nonpayment in compliance with specified requirements;
17 providing an effective date.

18
19 Be It Enacted by the Legislature of the State of Florida:

20
21 Section 1. Subsection (1) and paragraph (a) of subsection
22 (2) of section 255.05, Florida Statutes, are amended to read:
23 255.05 Bond of contractor constructing public buildings;
24 form; action by materialmen.—

25 (1)~~(a)~~ Any person entering into a formal contract with the
26 state or any county, municipality ~~city~~, or political subdivision
27 thereof, or other public authority or private entity, for the
28 construction of a public building, for the prosecution and
29 completion of a public work, or for repairs upon a public

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30 building or public work shall ~~be required~~, before commencing the
31 work or before recommencing the work after a default or
32 abandonment, ~~to~~ execute and, deliver to the public owner, and
33 record in the public records of the county where the improvement
34 is located, a payment and performance bond with a surety insurer
35 authorized to do business in this state as surety.

36 (a) A public entity may not require a contractor to secure
37 a surety bond under this section from a specific agent or
38 bonding company.

39 (b) The bond must state on its front page: the name,
40 principal business address, and phone number of the contractor,
41 the surety, the owner of the property being improved, and, if
42 different from the owner, the contracting public entity; the
43 contract number assigned by the contracting public entity; and a
44 description of the project sufficient to identify it, such as a
45 legal description or the street address of the property being
46 improved, and a general description of the improvement.

47 (c) Such bond shall be conditioned upon the contractor's
48 performance of the construction work in the time and manner
49 prescribed in the contract and promptly making payments to all
50 persons defined in s. 713.01 who furnish labor, services, or
51 materials for the prosecution of the work provided for in the
52 contract.

53 (d) Any claimant may apply to the governmental entity
54 having charge of the work for copies of the contract and bond
55 and shall thereupon be furnished with a certified copy of the
56 contract and bond. The claimant has ~~shall have~~ a right of action
57 against the contractor and surety for the amount due him or her,
58 including unpaid finance charges due under the claimant's

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59 contract. Such action shall not involve the public authority in
60 any expense.

61 (e)1. A payment and performance bond is not required for a
62 contract with the state for \$100,000 or less. ~~When such work is~~
63 ~~done for the state and the contract is for \$100,000 or less, no~~
64 ~~payment and performance bond shall be required.~~

65 2. ~~At the discretion of~~ The official or board awarding a
66 such contract ~~when such work is done for a~~ any county,
67 municipality ~~city~~, political subdivision, or public authority
68 may exempt a contract, any person entering into such a contract
69 which is for \$200,000 or less from the requirement for a ~~may be~~
70 ~~exempted from executing the~~ payment and performance bond.

71 3. ~~When such work is done for the state,~~ The Secretary of
72 Management Services may delegate to a state agency ~~agencies~~ the
73 authority to exempt any person entering into such a contract for
74 amounting to more than \$100,000 but less than \$200,000 from the
75 requirement for a ~~executing the~~ payment and performance bond. If
76 ~~In the event~~ such exemption is granted, the officer or officials
77 are ~~shall~~ not be personally liable to persons suffering loss
78 because of granting such exemption. The Department of Management
79 Services shall maintain information on the number of requests by
80 state agencies for delegation of authority to waive the bond
81 requirements by agency and project number and whether any
82 request for delegation was denied and the justification for the
83 denial.

84 (f) Any provision in a payment bond furnished for public
85 work contracts as provided by this subsection which restricts
86 the classes of persons as defined in s. 713.01 protected by the
87 bond or the venue of any proceeding relating to such bond is

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88 unenforceable.

89 (g)~~(b)~~ The Department of Management Services shall adopt
90 rules with respect to all contracts for \$200,000 or less, to
91 provide:

92 1. Procedures for retaining up to 10 percent of each
93 request for payment submitted by a contractor and procedures for
94 determining disbursements from the amount retained on a pro rata
95 basis to laborers, materialmen, and subcontractors, as defined
96 in s. 713.01.

97 2. Procedures for requiring certification from laborers,
98 materialmen, and subcontractors, as defined in s. 713.01, prior
99 to final payment to the contractor that such laborers,
100 materialmen, and subcontractors have no claims against the
101 contractor resulting from the completion of the work provided
102 for in the contract.

103
104 The state is ~~shall~~ not ~~be held~~ liable to any laborer,
105 materialman, or subcontractor for any amounts greater than the
106 pro rata share as determined under this section.

107 (h)~~(e)~~ 1. The amount of the bond shall equal the contract
108 price, except that for a contract in excess of \$250 million, if
109 the state, county, municipality, political subdivision, or other
110 public entity finds that a bond in the amount of the contract
111 price is not reasonably available, the public owner shall set
112 the amount of the bond at the largest amount reasonably
113 available, but not less than \$250 million.

114 2. For construction-management or design-build contracts,
115 if the public owner does not include in the bond amount the cost
116 of design or other nonconstruction services, the bond may not be

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117 conditioned on performance of such services or payment to
 118 persons furnishing such services. Notwithstanding paragraph (f)
 119 ~~(a)~~, such a bond may exclude persons furnishing such services
 120 from the classes of persons protected by the bond.

121 (2) (a) 1. If a claimant is no longer furnishing labor,
 122 services, or materials on a project, a contractor or the
 123 contractor's agent or attorney may elect to shorten the
 124 ~~prescribed time in this paragraph~~ within which an action to
 125 enforce any claim against a payment bond must ~~provided pursuant~~
 126 ~~to this section may~~ be commenced by recording in the clerk's
 127 office a notice in substantially the following form:

128
 129 NOTICE OF CONTEST OF CLAIM
 130 AGAINST PAYMENT BOND

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

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

137 DATED on,

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

139
 140 The claim of any claimant upon whom such notice is served and
 141 who fails to institute a suit to enforce his or her claim
 142 against the payment bond within 60 days after service of such
 143 notice shall be extinguished automatically. The clerk shall mail
 144 a copy of the notice of contest to the claimant at the address
 145 shown in the notice of nonpayment or most recent amendment

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146 thereto and shall certify to such service on the face of such
147 notice and record the notice. Service is complete upon mailing.

148 2.a. A claimant, except a laborer, who is not in privity
149 with the contractor shall, before commencing or not later than
150 45 days after commencing to furnish labor, services, or
151 materials for the prosecution of the work, furnish the
152 contractor with a written notice that he or she intends to look
153 to the bond for protection.

154 b. A claimant who is not in privity with the contractor and
155 who has not received payment for his or her labor, services, or
156 materials shall deliver to the contractor and to the surety
157 written notice of the performance of the labor or services or
158 delivery of the materials ~~or supplies~~ and of the nonpayment. The
159 notice of nonpayment shall be verified and may be served at any
160 time during the progress of the work or thereafter but not
161 before 45 days after the first furnishing of labor, services, or
162 materials, and not later than 90 days after the final furnishing
163 of the labor, services, or materials by the claimant or, with
164 respect to rental equipment, not later than 90 days after the
165 date that the rental equipment was last on the job site
166 available for use.

167 (I) The notice of nonpayment must state, as of the date of
168 the notice:

169 (A) The nature of the labor or services performed and to be
170 performed, if any;

171 (B) The materials furnished and to be furnished, if known;

172 (C) The amount paid on account, the amount due, and the
173 amount to become due, if known; and ~~Any notice of nonpayment~~
174 ~~served by a claimant who is not in privity with the contractor~~

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175 ~~which includes sums for retainage must specify~~

176 (D) The portion of the amount claimed for retainage, if
177 any.

178 (II) The notice of nonpayment must also include as
179 attachments copies of the following documents to substantiate
180 the amount claimed as unpaid:

181 (A) The claimant's contract or purchase order and any
182 amendments or change orders directed thereto;

183 (B) Invoices, pay requests, bills of lading, delivery
184 receipts, or similar documents, as applicable; and

185 (C) A statement of account reflecting all payments
186 requested and received for the labor, services, or materials.

187
188 A claimant who furnishes a false or fraudulent notice of
189 nonpayment may not recover under the bond.

190 (III) An ~~no~~ action for ~~the~~ labor, materials, or supplies
191 may ~~not~~ be instituted against the contractor or the surety
192 unless both notices have been given in full compliance with this
193 subparagraph. Notices required or permitted under this section
194 ~~must may~~ be served in accordance with s. 713.18. A claimant may
195 not waive in advance his or her right to bring an action under
196 the bond against the surety. In an any action brought to enforce
197 a claim against a payment bond under this section, the
198 prevailing party is entitled to recover a reasonable fee for the
199 services of his or her attorney for trial and appeal or for
200 arbitration, in an amount to be determined by the court, which
201 fee must be taxed as part of the prevailing party's costs, as
202 allowed in equitable actions. The time periods for service of a
203 notice of nonpayment or for bringing an action against a

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204 contractor or a surety shall be measured from the last day of
205 furnishing labor, services, or materials by the claimant and may
206 ~~shall~~ not be measured by other standards, such as the issuance
207 of a certificate of occupancy or the issuance of a certificate
208 of substantial completion.

209 Section 2. Paragraph (c) of subsection (1) of section
210 337.18, Florida Statutes, is amended to read:

211 337.18 Surety bonds for construction or maintenance
212 contracts; requirement with respect to contract award; bond
213 requirements; defaults; damage assessments.-

214 (1)

215 (c)1. A claimant, except a laborer, who is not in privity
216 with the contractor shall, before commencing or not later than
217 90 days after commencing to furnish labor, materials, or
218 supplies for the prosecution of the work, furnish the contractor
219 with a notice that he or she intends to look to the bond for
220 protection.

221 2. A claimant who is not in privity with the contractor and
222 who has not received payment for his or her labor, materials, or
223 supplies shall deliver to the contractor and to the surety
224 written notice of the performance of the labor or delivery of
225 the materials or supplies and of the nonpayment. The notice of
226 nonpayment shall be verified and may be served at any time
227 during the progress of the work or thereafter but not before 45
228 days after the first furnishing of labor, services, or
229 materials, and not later than 90 days after the final furnishing
230 of the labor, services, or materials by the claimant or, with
231 respect to rental equipment, not later than 90 days after the
232 date that the rental equipment was last on the job site

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233 available for use.

234 a. The notice of nonpayment must state, as of the date of
235 the notice:

236 (I) The nature of the labor performed and to be performed,
237 if any;

238 (II) The materials or supplies furnished and to be
239 furnished, if known;

240 (III) The amount paid on account, the amount due, and the
241 amount to become due, if known; and

242 (IV) The portion of the amount claimed for retainage, if
243 any.

244 b. The notice of nonpayment must also include as
245 attachments copies of the following documents to substantiate
246 the amount claimed as unpaid:

247 (I) The claimant's contract or purchase order and any
248 amendments or change orders directed thereto;

249 (II) Invoices, pay requests, bills of lading, delivery
250 receipts, or similar documents, as applicable; and

251 (III) A statement of account reflecting all payments
252 requested and received for the labor, materials, or supplies.

253
254 A claimant who furnishes a false or fraudulent notice of
255 nonpayment may not recover under the bond.

256 3. An action by a claimant, except a laborer, who is not in
257 privity with the contractor for the labor, materials, or
258 supplies may not be instituted against the contractor or the
259 surety unless both notices have been given in full compliance
260 with this paragraph. Notices required or permitted under this
261 section must ~~may~~ be served in any manner provided in s. 713.18.

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262 Section 3. Paragraph (d) of subsection (1) of section
263 713.23, Florida Statutes, is amended to read:

264 713.23 Payment bond.—

265 (1)

266 (d)1. In addition, a lienor is required, as a condition
267 precedent to recovery under the bond, to serve a written notice
268 of nonpayment to the contractor and the surety ~~not later than 90~~
269 ~~days after the final furnishing of labor, services, or materials~~
270 ~~by the lienor.~~ The notice of nonpayment shall be verified and
271 may be served at any time during the progress of the work or
272 thereafter but not before 45 days after the first furnishing of
273 labor, services, or materials, and not later than 90 days after
274 the final furnishing of the labor, services, or materials by the
275 lienor or, with respect to rental equipment, not later than 90
276 days after the date that the rental equipment was last on the
277 job site available for use.

278 2. The notice of nonpayment must state, as of the date of
279 the notice:

280 a. The nature of the labor or services performed and to be
281 performed, if any;

282 b. The materials furnished and to be furnished, if known;

283 c. The amount paid on account, the amount due, and the
284 amount to become due, if known; and

285 d. The portion of the amount claimed for retainage, if any.

286 3. For any lienor who is not in privity with the
287 contractor, the notice of nonpayment must also include as
288 attachments copies of the following documents to substantiate
289 the amount claimed as unpaid:

290 a. The lienor's contract or purchase order and any

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291 amendments or change orders directed thereto;
 292 b. Invoices, pay requests, bills of lading, delivery
 293 receipts, or similar documents, as applicable; and
 294 c. A statement of account reflecting all payments requested
 295 and received for the labor, services, or materials.

296
 297 A lienor who furnishes a false or fraudulent notice of
 298 nonpayment may not recover under the bond.

299 4. A written notice satisfies the ~~this~~ condition precedent
 300 in this paragraph with respect to the payment described in the
 301 notice of nonpayment, including unpaid finance charges due under
 302 the lienor's contract, and with respect to any other payments
 303 that ~~which~~ become due to the lienor after the date of the notice
 304 of nonpayment. The time period for serving a written notice of
 305 nonpayment shall be measured from the last day of furnishing
 306 labor, services, or materials by the lienor and ~~may shall~~ not be
 307 measured by other standards, such as the issuance of a
 308 certificate of occupancy or the issuance of a certificate of
 309 substantial completion. The failure of a lienor to receive
 310 retainage sums not in excess of 10 percent of the value of
 311 labor, services, or materials furnished by the lienor is not
 312 considered a nonpayment requiring the service of the notice
 313 provided under this paragraph. An action for the labor,
 314 services, or materials may not be instituted against the
 315 contractor or the surety unless the notice of nonpayment has
 316 been given in full compliance with this paragraph. ~~The notice~~
 317 ~~under this paragraph may be in substantially the following form:~~

318 NOTICE OF NONPAYMENT

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329

~~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)...~~

Section 4. This act shall take effect July 1, 2010.