

## CHAPTER 2019-94

### Committee Substitute for Committee Substitute for House Bill No. 1247

An act relating to construction bonds; amending s. 255.05, F.S.; requiring a notice of nonpayment to be under oath; specifying that a claimant who serves a fraudulent notice of nonpayment forfeits his or her rights under a bond; providing that the service of a fraudulent notice of nonpayment is a complete defense to the claimant's claim against the 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 in relation to bonds for construction contracts; amending s. 627.428, F.S.; revising terminology; amending s. 713.23, F.S.; requiring a notice of nonpayment to be under oath; specifying that a lienor who serves a fraudulent notice of nonpayment forfeits his or her rights under a bond; providing that the service of a fraudulent notice of nonpayment is a complete defense to the lienor's claim against the bond; requiring a notice of nonpayment to be in a prescribed form; 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.

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 under oath 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, services, or materials by the claimant or, with respect to rental equipment, ~~not~~ later than 90 days after the date that the rental equipment was last on the job site available for use. Any notice of nonpayment served by a claimant who is not in privity with the contractor which includes sums for retainage must specify the portion of the amount claimed for retainage. An action for the labor, services, or materials, ~~or supplies~~ may not be instituted against the contractor or the surety unless the notice to the contractor and notice of nonpayment have been served, if required by this section. Notices required or permitted under this section must shall be served in accordance with s. 713.18. A claimant may not waive in advance his or her right to bring an action under the bond against the surety. In any action brought to enforce a claim against a payment bond under this section, the prevailing party is entitled to recover a reasonable fee for the services 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. The negligent inclusion or omission of any information in the notice of nonpayment that has not prejudiced the contractor or surety does not constitute a default that operates to defeat an otherwise valid bond claim. A claimant who serves a

fraudulent notice of nonpayment forfeits his or her rights under the bond. A notice of nonpayment is fraudulent if the claimant has willfully exaggerated the amount unpaid, 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 unpaid, 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. The notice of nonpayment under this subparagraph must include the following information, current as of the date of the notice, and must be in substantially the following form:

NOTICE OF NONPAYMENT

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

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

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 unpaid to date is \$....., of which \$..... is unpaid retainage.

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

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

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

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

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

STATE OF FLORIDA

COUNTY OF

The foregoing instrument was sworn to (or affirmed) and subscribed before me this.....day of ....., ...(year)...., by ...(name of signatory)....

(Signature of Notary Public-State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known ..... OR Produced Identification .....

Type of Identification Produced .....

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 of this section.

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

627.428 Attorney fees ~~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 fees~~ ~~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 the surety. The notice must be under oath and served during the progress of the work or thereafter, but may not be served 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. A notice of nonpayment that includes sums for retainage must specify the portion of the amount claimed for retainage. ~~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 nonpayment shall be measured from the last day of furnishing labor, services, or materials by the lienor and may ~~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. The negligent inclusion or omission of any information in the notice of nonpayment that has not prejudiced the contractor or surety does not constitute a default that operates to defeat an otherwise valid bond claim. A lienor who serves a fraudulent notice of nonpayment forfeits his or her rights under the bond. A notice of nonpayment is fraudulent if the lienor has willfully exaggerated the amount unpaid, 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 unpaid, 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. The notice under this paragraph must include the following information, current as of the date of the notice, and must ~~may~~ be in 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 to date is \$....., of which \$..... is unpaid retainage.

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

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

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

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

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

STATE OF FLORIDA

COUNTY OF

The foregoing instrument was sworn to (or affirmed) and subscribed before me this ..... day of ....., ... (year)...., by ... (name of signatory)....

(Signature of Notary Public-State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known ..... OR Produced Identification .....

Type of Identification Produced .....

Section 5. The amendment made by this act to s. 627.756, Florida Statutes, applies only to payment or performance bonds issued on or after October 1, 2019.

Section 6. This act shall take effect October 1, 2019.

Approved by the Governor June 7, 2019.

Filed in Office Secretary of State June 7, 2019.