

Senate Bill No. 428

An act relating to building construction; amending s. 95.11, F.S.; providing alternative applications to a statute of limitations for certain legal or equitable actions for actions to enforce claims against payment bonds; revising a statute of limitations for actions to enforce claims against certain payment bonds; amending s. 255.05, F.S.; clarifying criteria for performance of bonds; revising a provision relating to notice of nonpayment for certain labor, materials, or supplies; amending s. 713.01, F.S.; revising certain definitions; amending s. 713.02, F.S.; clarifying a criterion for a proscription against certain liens; amending s. 713.13, F.S.; deleting authorization for certain fax numbers in notices of commencement; amending s. 713.18, F.S.; revising provisions relating to manner of serving notices and certain instruments; amending s. 713.23, F.S.; including certain unpaid finance charges under a written notice of nonpayment of a payment bond; amending s. 713.245, F.S.; providing additional bond criteria for coextension of a surety's duty to pay lienors with a contractor's duty to pay; amending s. 725.06, F.S.; revising indemnification and hold harmless restrictions for certain construction agreements, contracts, or guarantees; providing application; amending s. 725.08, F.S.; revising indemnification and hold harmless restrictions for certain professional services contracts; repealing s. 713.18(3), F.S., relating to service of certain notices by facsimile transmission; amending s. 489.13, F.S.; providing for issuance of a notice of noncompliance, imposition of an administrative fine, and assessment of reasonable investigative and legal costs of prosecution for unlicensed contracting; specifying that such remedies are not exclusive; providing for uses of fine proceeds; requiring the Department of Business and Professional Regulation to create a web page on its Internet website dedicated to listing known information concerning unlicensed contractors; providing an effective date.

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

Section 1. Section 489.13, Florida Statutes, is amended to read:

489.13 Unlicensed contracting; notice of noncompliance; fine; authority to issue or receive a building permit; web page.—

(1) Any person performing an activity requiring licensure under this part as a construction contractor is guilty of unlicensed contracting if he or she does not hold a valid active certificate or registration authorizing him or her to perform such activity, regardless of whether he or she holds a local construction contractor license or local certificate of competency. Persons working outside the geographical scope of their registration are guilty of unlicensed activity for purposes of this part.

(2) For a first offense, any person who holds a state or local construction license and is found guilty of unlicensed contracting under this section shall be issued a notice of noncompliance pursuant to s. 489.131(7).

(3) Notwithstanding s. 455.228, the department may impose an administrative fine of up to \$10,000 on any unlicensed person guilty of unlicensed contracting. In addition, the department may assess reasonable investigative and legal costs for prosecution of the violation against the unlicensed contractor. The department may waive up to one-half of any fine imposed if the unlicensed contractor complies with certification or registration within 1 year after imposition of the fine under this subsection.

(4)(a) Any fines collected under this section shall be first used to cover the investigative and legal costs of prosecution.

(b) Any local governing body that forwards information relating to any person who is an unlicensed contractor shall collect 30 percent of the fine collected, after deduction of the investigative and legal costs of prosecution.

(c) The balance of any fines collected under this section shall be used to maintain the department's unlicensed contractor website page, as specified in subsection (6), and to fund the Construction Industries Recovery Fund. Nothing in this paragraph shall be construed to permit recovery from the Construction Industries Recovery Fund if the contractor is unlicensed.

(5)(2) A local building department shall not issue a building permit to any contractor, or to any person representing himself or herself as a contractor, who does not hold a valid active certificate or registration in the appropriate category. Possession of a local certificate of competency or local construction license is not sufficient to lawfully obtain a building permit as a construction contractor if the activity in question requires licensure under this part. Nothing in this section shall be construed as prohibiting a local building department from issuing a building permit to a locally licensed or certified contractor for an activity that does not require licensure under this part.

(6) The department shall create a web page, accessible through its Internet website, dedicated solely to listing any known information concerning unlicensed contractors. The information shall be provided in such a way that any person with computer on-line capabilities can access information concerning unlicensed contractors by name or by county. The department shall recognize that persons found guilty of unlicensed contracting do not have the same rights and privileges as licensees, and the department shall not restrict the quality or quantity of information on the web page required by this subsection, unless otherwise required by law.

(7) The remedies set forth in this section are not exclusive and may be imposed in addition to the remedies set forth in s. 489.127(2). In addition, nothing in this section is intended to prohibit the department or any local governing body from filing a civil action or seeking criminal penalties against an unlicensed contractor.

Section 2. Paragraph (b) of subsection (2) and paragraph (e) of subsection (5) of section 95.11, Florida Statutes, are amended to read:

95.11 Limitations other than for the recovery of real property.—Actions other than for recovery of real property shall be commenced as follows:

(2) WITHIN FIVE YEARS.—

(b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument, except for an action to enforce a claim against a payment bond, which shall be governed by the applicable provisions of ss. 255.05(2)(a)2. and 713.23(1)(e).

(5) WITHIN ONE YEAR.—

(e) An action to enforce any claim against a payment bond on which the principal is a contractor, subcontractor, or sub-subcontractor as defined in s. 713.01, for private work as well as public work, from the last furnishing of labor, services, or materials or from the last furnishing of labor, services, or materials by the general contractor if the general contractor is the principal on a bond on the same construction project, whichever is later.

Section 3. Paragraph (a) of subsection (1) and paragraph (a) of subsection (2) of section 255.05, Florida Statutes, are amended to read:

255.05 Bond of contractor constructing public buildings; form; action by materialmen.—

(1)(a) Any person entering 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 shall be required, before commencing the work or before recommencing the work after a default or abandonment, to execute, deliver to the public owner, and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer authorized to do business in this state as surety. The 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 including, if applicable, a legal description or and the street address of the property being improved, and a general description of the improvement. Such bond shall be conditioned upon the contractor's performance of the construction work that the contractor perform the contract in the time and manner prescribed in the contract and promptly make payments to all persons defined in s. 713.01 who furnish labor, services, or materials for whose claims derive directly or indirectly from the prosecution of the work provided for in the contract. Any claimant may apply to the governmental entity having charge of the work for copies of the contract and bond and shall thereupon be furnished with a certified copy of the contract and bond. The claimant shall have a right of action against the contractor and surety for the amount due him or her, including unpaid finance charges due under the claimant's contract. Such action shall not involve the public authority in any expense. When such work is done for the state and the contract is for \$100,000 or less, no payment and performance bond shall be required. At the discretion of the official or board awarding such contract when such work is done for any county, city, political subdivision, or public authority, any person entering into such a contract which is for \$200,000 or

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

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

(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 prescribed time in this paragraph within which an action to enforce any claim against a payment bond provided pursuant to this section may 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 any 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 shall be extinguished automatically. The clerk shall mail 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 such notice and record the notice. Service is complete upon mailing.

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, materials, or supplies for the prosecution of the work, furnish the contractor with a 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 his or her labor, materials, or supplies shall deliver to the contractor and 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 may be served at any time during the progress of the work or thereafter but not before 45 days after the first furnishing of labor, services, or materials, and not 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. No action for the labor, materials, or supplies may be instituted against the contractor or the surety unless both notices have been given. Notices required or permitted under this section may be served in accordance with s. 713.18. An action, except for an action exclusively for recovery of retainage, must be instituted against the contractor or the surety on the payment bond or the payment provisions of a combined payment and performance bond within 1 year after the performance of the labor or completion of delivery of the materials or supplies. An action exclusively for recovery of retainage must be instituted against the contractor or the surety within 1 year after the performance of the labor or completion of delivery of the materials or supplies, or within 90 days after ~~the contractor's~~ receipt of final payment (or the payment estimate containing the owner's final reconciliation of quantities if no further payment is earned and due as a result of deductive adjustments) by the contractor or surety, whichever comes last. 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 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.

Section 4. Subsections (26) and (27) of section 713.01, Florida Statutes, are amended to read:

713.01 Definitions.—As used in this part, the term:

(26) "Subcontractor" means a person other than a materialman or laborer who enters into a contract with a contractor for the performance of any part of such contractor's contract, including the removal of solid waste from the real property. The term includes a temporary help firm as defined in s. 443.101.

(27) "Sub-subcontractor" means a person other than a materialman or laborer who enters into a contract with a subcontractor for the performance of any part of such subcontractor's contract, including the removal of solid waste from the real property. The term includes a temporary help firm as defined in s. 443.101.

Section 5. Subsection (7) of section 713.02, Florida Statutes, is amended to read:

713.02 Types of lienors and exemptions.—

(7) Notwithstanding any other provision of this part, no lien shall exist in favor of any contractor, subcontractor, or sub-subcontractor unless such contractor, subcontractor, or sub-subcontractor is licensed, if required to be licensed, as a contractor pursuant to the laws of the jurisdiction within which she or he is doing business.

Section 6. Effective July 1, 2002, paragraph (d) of subsection (1) of section 713.13, Florida Statutes, is amended to read:

713.13 Notice of commencement.—

(1)

(d) A notice of commencement must be in substantially the following form:

Permit No..... Tax Folio No.....

NOTICE OF COMMENCEMENT

State of....

County of....

The undersigned hereby gives notice that improvement will be made to certain real property, and in accordance with Chapter 713, Florida Statutes, the following information is provided in this Notice of Commencement.

1. Description of property: ...(legal description of the property, and street address if available)....

2. General description of improvement:.....

3. Owner information:.....

a. Name and address:.....

b. Interest in property:.....

c. Name and address of fee simple titleholder (if other than Owner):.....

4.a. Contractor: ...(name and address)....

b.a. Contractor's phone number:.....

~~b.~~ ~~Fax number:.....(optional, if service by fax is acceptable).~~

5. Surety

a. Name and address:.....

b. Phone number:.....

~~c.~~ ~~Fax number:.....(optional, if service by fax is acceptable).~~

c.d. Amount of bond: \$.....

6.a. Lender: ...(name and address)...

b.a. Lender's phone number:.....

b. ~~Fax number:.....(optional, if service by fax is acceptable).~~

7.a. Persons within the State of Florida designated by Owner upon whom notices or other documents may be served as provided by Section 713.13(1)(a)7., Florida Statutes: ...(name and address)...

b.a. Phone numbers of designated persons number:.....

b. ~~Fax number:.....(optional, if service by fax is acceptable).~~

8.a. In addition to himself or herself, Owner designates of to receive a copy of the Lienor's Notice as provided in Section 713.13(1)(b), Florida Statutes.

b.a. Phone number of person or entity designated by owner:.....

b. ~~Fax number:.....(optional, if service by fax is acceptable).~~

9. Expiration date of notice of commencement (the expiration date is 1 year from the date of recording unless a different date is specified).....

...(Signature of Owner)...

Sworn to (or affirmed) and subscribed before me this day of, ... (year)...., by ... (name of person making statement)....

...(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 7. Subsections (1) and (2) of section 713.18, Florida Statutes, are amended to read:

713.18 Manner of serving notices and other instruments.—

(1) Service of notices, claims of lien, affidavits, assignments, and other instruments permitted or required under this part, or copies thereof when so permitted or required, unless otherwise specifically provided in this part, must be made by one of the following methods:

(a) By actual delivery to the person to be served; or, if a partnership, to one of the partners; or, if a corporation, to an officer, director, managing agent, or business agent thereof.

(b) By sending mailing the same, postage prepaid, by registered or certified mail, with postage prepaid, or by overnight or second-day delivery with to the person to be served at her or his last known address and evidence of delivery.

1. If a notice to owner, ~~or~~ a notice to contractor under s. 713.23, or a preliminary notice under s. 255.05 is mailed by registered or certified mail with postage prepaid to the person to be served at any of the addresses set forth in subparagraph 2. pursuant to this paragraph within 40 days after the date the lienor first furnishes labor, services, or materials, service of that notice is effective as of the date of mailing if the person who served the notice maintains a registered or certified mail log that shows ~~the date the notice was served,~~ the registered or certified mail number issued by the United States Postal Service, the name and address of the person served, and the date stamp of the United States Postal Service confirming the date of mailing.

2. If an instrument served pursuant to this ~~section~~ paragraph to the last address shown in the notice of commencement or any amendment thereto or, in the absence of a notice of commencement, to the last address shown in the building permit application, or to the last known address of the person to be served, is not received, but is returned by the ~~United States Postal Service~~ as being “refused,” “moved, not forwardable,” or “unclaimed,” or is otherwise not delivered or deliverable through no fault of the person serving the item, then service is effective on the date the notice was sent ~~as of the date of mailing.~~

(c) If none ~~neither~~ of the foregoing methods can be accomplished, by posting on the premises.

(2) If the real property is owned by more than one person or a partnership, a lienor may serve any notices or other papers under this part on any one of such owners or partners, and such notice is deemed notice to all owners and partners.

Section 8. 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 is required, as a condition precedent to recovery under the bond, to serve a written notice of nonpayment to the contractor and the surety not later than 90 days after the final furnishing of labor, services, or materials by the lienor. 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 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. The notice under this paragraph may be in substantially the following form:

NOTICE OF NONPAYMENT

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 9. Subsection (1) of section 713.245, Florida Statutes, is amended to read:

713.245 Conditional payment bond.—

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

(a) The bond is listed in the notice of commencement for the project as a conditional payment bond and is recorded together with the notice of commencement for the project prior to commencement of the project.

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

(c) The bond contains on the front page, in at least 10-point type, the statement: THIS BOND ONLY COVERS CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES, OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF LIEN ON THIS PROJECT.

Section 10. Section 725.06, Florida Statutes, is amended to read:

725.06 Construction contracts; limitation on indemnification.—

(1) Any portion of any agreement or contract for or in connection with, or any guarantee of or in connection with, any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance, including moving and excavating associated therewith, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman or any combination thereof wherein any party referred to herein promises to indemnify or hold harmless the other party to the agreement, contract, or guarantee for liability for damages to persons or property caused in whole or in part by any act, omission, or default of the indemnitee arising from the contract or its performance, shall be void and unenforceable unless the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial

relationship to the contract and is part of the project specifications or bid documents, if any. Notwithstanding the foregoing, the monetary limitation on the extent of the indemnification provided to the owner of real property by any party in privity of contract with such owner shall not be less than \$1 million per occurrence, unless otherwise agreed by the parties. Indemnification provisions in any such agreements, contracts, or guarantees may not require that the indemnitor indemnify the indemnitee for damages to persons or property caused in whole or in part by any act, omission, or default of a party other than:

(a) The indemnitor;

(b) Any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees; or

(c) The indemnitee or its officers, directors, agents, or employees. However, such indemnification shall not include claims of, or damages resulting from, gross negligence, or willful, wanton or intentional misconduct of the indemnitee or its officers, directors, agents or employees, or for statutory violation or punitive damages except and to the extent the statutory violation or punitive damages are caused by or result from the acts or omissions of the indemnitor or any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees.

(2)(1) A construction contract for a public agency or in connection with a public agency's project may require a party to that contract to indemnify and hold harmless the other party to the contract, their officers and employees, from liabilities, damages, losses and costs, including, but not limited to, reasonable attorney's fees, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of the indemnifying party and persons employed or utilized by the indemnifying party in the performance of the construction contract.

(3)(2) Except as specifically provided in subsection (2) (4), a construction contract for a public agency or in connection with a public agency's project may not require one party to indemnify, defend, or hold harmless the other party, its employees, officers, directors, or agents from any liability, damage, loss, claim, action, or proceeding, and any such contract provision is void as against public policy of this state.

(4) This section does not affect any contracts, agreements, or guarantees entered into before the effective date of this section or any renewals thereof.

Section 11. Subsection (2) of section 725.08, Florida Statutes, is amended to read:

725.08 Design professional contracts; limitation in indemnification.—

(2) Except as specifically provided in subsection (1), a professional services contract entered into with a public agency may not require that the design professional defend, indemnify, or hold harmless the agency, its

employees, officers, directors, or agents from any liability, damage, loss, claim, action, or proceeding, and any such contract provision shall ~~will~~ be void as against the public policy of this state.

Section 12. Effective July 1, 2002, subsection (3) of section 713.18, Florida Statutes, is repealed.

Section 13. Except as otherwise expressly provided in this act, this act shall take effect July 1, 2001.

Approved by the Governor June 13, 2001.

Filed in Office Secretary of State June 13, 2001.