



Florida Legislature Requires Sworn Statement of Non-Payment as Condition Precedent to a Payment Bond Claim

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In the 2019 legislative session, the Florida Legislature amended sections 255.05 (governing public projects) and 713.23 (governing private projects) requiring a notice of non-payment to be under oath. The changes are contained in House Bill 1247 and pertain to subcontractors and materials suppliers not in privity with the prime contractor. Before the passage of HB 1247, sections 255.05 and 713.23 required subcontractors and material suppliers to simply furnish a notice of non-payment within 90 days after final furnishing of labor, services or materials as condition precedent to filing suit to recover amounts owed.

HB 1247 amends sections 255.05 and 713.23 so that they now provide that a notice of nonpayment must be made oath, and also must include:

- The nature of the labor or services performed;
- If known, the nature of the labor or services to be performed;
- The materials furnished;
- If known, the material to be furnished;
- The amounts unpaid to date; and
- If known, the amount due and the amount to become due.

The new statutory language also provides that a claimant who serves fraudulent notice of nonpayment forfeits his or her rights under the payment bond. It goes on to specify that a notice is fraudulent if it willfully exaggerates the amount unpaid, willfully includes a claim for work not performed or materials not furnished, or is prepared with "such willful or gross negligence as to amount to a willful exaggeration." However, minor mistakes or good faith disputes as to the amount due are not considered fraudulent. HB 1247 also provides sample language a claimant may use in its notice of nonpayment under both 255.05 and 713.23.

These are important changes because it requires the claimant to do more work before serving its notice of nonpayment. Previously, a claimant could serve a notice on nonpayment with no justification and file suit if it did not receive payment. After filing suit, the claimant would be entitled to its attorneys' fees under Florida law if it recovered even a nominal sum from the surety. This created an environment in which claimants' attorneys could incur substantial attorneys' fees simply for providing documents or other evidence to substantiate the claim against the payment bond.

Now that the law requires a sworn statement to be made under oath, a claimant must ensure the amount of its claim is accurate and represents work or materials furnished for the job or the claimant risks forfeiting its claim on the bond. Presumably, claimants will compile documentation and other evidence supporting the claim before serving the notice of nonpayment, and before the meter begins to run on attorneys' fees. Thus, by requiring potential payment bond claimants to verify their notices of nonpayment under oath, HB 1247 will likely assist owners and sureties in analyzing the merits of claims before litigation.