

Initial Summary AND Analysis of the 2019 Construction Bond Bill – HB 1247 (Nov, 2019)

By: [Gary L. Brown](#) On May 2, 2019, the Florida Senate passed H.B. 1247, which encompassed reform to the manner in which claims are made under both public and private construction bonds in Florida. Governor DeSantis signed the bill on June 7, 2019, and it went into effect on **October 1, 2019**. This Bill will drastically impact the required form and effect of a notice of non-payment, and will ultimately affect the rights of contractors, subcontractors, and material suppliers that make and litigate bond claims in Florida. The below memorandum summarizes the significant statutory changes implemented by the Bill and the impact to the construction industry as a whole. Practitioners in Florida and those from other states that represent construction industry clients in Florida should be aware of these changes to avoid forfeiture of claims and other adverse consequences due to non-compliance. While this bill address changes to Florida's Construction Lien Law and Florida's public payment bond statute (known as the "Little Miller Act"), these changes may also provide insight and guidance to other states which have similar lien laws. **LEGISLATION SUMMARY Section 1 – Fla. Stat. § 255.05(2)(a)2** The Bill addresses claims under public payment bonds. The Bill requires that the notice of non-payment be *under oath*. The Bill differentiates between the negligent inclusion/omission of any information in the notice of non-payment and a fraudulent notice of non-payment. The negligent inclusion or omission of any information in the notice of non-payment that has not prejudiced the contractor or surety does not constitute a default that operates to defeat an otherwise valid bond claim. A fraudulent notice of non-payment forfeits a claimant's rights under the bond.

- A notice of non-payment 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 non-payment, 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 non-payment is a complete defense to the claimant's claim against the bond.
-

The Bill sets forth the form of the required notice of non-payment. **Section 2 – Fla. Stat. § 627.756(1)** The Bill has added "contractors" to the parties who are deemed "beneficiaries" under section 627.428, Florida Statutes, for the purpose of recovering attorney's fees if they prevail in a bond claim action against a surety. **Section 4 – Fla. Stat. § 713.23(1)(d)** The Bill addresses claims under private payment bonds. The Bill requires that the notice of non-payment be *under oath*. The Bill has added the furnishing of "rental equipment" as a basis for making claims under private payment bonds and that, as to rental equipment, the notice of non-payment must be served no later than 90 days after the date the rental equipment was on the job site and available for use. A notice of non-payment that includes sums for retainage must specify the portion of the amount claimed for retainage. The Bill differentiates between the negligent inclusion/omission of information in the notice of non-payment and a fraudulent notice of non-payment.

- The negligent inclusion or omission of any information in the notice of non-payment that has not prejudiced the contractor or surety does not constitute a default that operates to defeat an otherwise valid bond claim.

A fraudulent notice of non-payment forfeits a claimant's rights under the bond.

- A notice of non-payment 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 non-payment, 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 non-payment is a complete defense as to the claimant's claim against the bond.
- The Bill substantially revises the form of the required notice of non-payment.
-

Section 5 The amendment to section 627.756, Florida Statutes, applies to payment and performance bonds issued after October 1, 2019.

ANALYSIS/RECOMMENDATIONS The Bill has implemented statutory changes that will bring about consistency in the manner in which public and private payment bond claims are addressed. Some of the changes implement procedures and standards applicable to lien claims on private projects. For instance, like owners or other parties that challenge a lien claim based upon an inadvertent error or omission in a notice to owner or lien, contractors and sureties that have not been prejudiced by the negligent inclusion or omission of information in a notice of non-payment, will not be able to defeat an otherwise proper bond claim. Further, the standard for establishing a "fraudulent lien" and how that fraud effects a lien claim on private projects, has now been extended to payment bond claims on both private and public projects. Significantly, the Bill requires that a notice of non-payment, like a claim of lien, is made under oath. The Bill also allows contractors to recover their attorney's fees when they prevail on a bond claim. Prior to the amendments, contractors, unlike all other parties pursuing bond claims (such as owners, subcontractors, laborers, and materialmen) were not permitted such recovery. Ultimately, the amendments will level the playing field by allowing contractors broader rights and remedies in pursuing and defending bond claims, while importantly, also protecting claimants from forfeiting their claims due to an inadvertent error or omission in a notice of non-payment. We are available to discuss any questions on this new law, as well as questions regarding the investigation and evaluation of bond claims and other construction-related matters.



Gary Brown is a Partner and the Head of the firm's Construction Practice Group at Kelley Kronenberg. Gary focuses his practice on [construction defect litigation](#) and [complex commercial litigation](#). Contact Gary Brown at: Phone: 844-632-4357 Email: gbrown@kklaw.com ***DISCLAIMER: This article is provided as a courtesy and is intended for the general information of the matters discussed above and should not be relied upon as legal advice. Neither Kelley Kronenberg, nor its individual attorneys or staff, are responsible for errors, omissions and/or typographical errors – always seek competent legal counsel.***