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LOOMING INFRASTRUCTURE BILL SPOTLIGHTS RECENT AMENDMENT TO FLORIDA'S PUBLIC BONDING LAW FOR CONSTRUCTION PROJECTS

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Florida's fraudulent lien law has been on the books for well over a decade. The law simultaneously created a powerful tool for responding to construction liens while intensifying the scrutiny of lienors and the amounts liened for. Today, a host of caselaw exists to assist the industry in navigating the legal minefield that comes with enforcing construction liens in the Sunshine State. Just two years ago, and perhaps armed with some prescience, the legislature amended Chapter 255, Florida Statutes, in order to create a similar statutory framework for fraudulent bond claims on public projects. Since then, not one single opinion can be found in connection with the new language in Section 255.05(2)(a)(2), Florida Statutes. Yet, with the substantial increase in public construction work, more bond claims will inevitably follow.

The section 255.05 legislative scheme is designed to afford protection for those providing work and materials on public projects, because these persons and entities cannot perfect a mechanics' lien on public property. See Coastal Caisson Drill Co. v. Am. Cas. Co. of Reading, Pa., 523 So.2d 791, 793 (Fla. 2d DCA 1988), approved, 542 So.2d 957 (Fla.1989); William H. Gulsby, Inc. v. Miller Const. Inc., of Leesburg, 351 So.2d 396, 397 (Fla. 2d DCA 1977). Additionally, however, the statute at issue was also designed to afford protection to both the surety on the project and the public. American Home Assur. Co. v. Plaza Materials Corp., 908 So. 2d 360, 363 (Fla. 2005). The bond itself protects the public, as "owner" of the project, from "two particular defaults by a builder. Id. The payment portion of the bond contains the insurer's undertaking to guarantee that all subcontractors and material men will be paid and the performance part of the bond guarantees that the contract ... will be fully performed." Coastal Caisson, 523 So.2d at 793. Finally, section 255.05(2) affords protection to contractors and the contractors' sureties from being compelled to account to unknown suppliers and subcontractors by placing a burden on claimants to advise the contractor and surety of their participation on the project and to advise if they are not promptly paid. See Sch. Bd. of Palm Beach County v. Vincent J. Fasano, Inc., 417 So.2d 1063, 1065 (Fla. 4th DCA 1982).

The new language in Florida's public bonding law is as follows: "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 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. (Emphasis added). See Section 255.05(2)(a)(2).

The new fraudulent bond language tracks the fraudulent lien language, so the industry at least has a solid foundation to build upon. However, the differences between private and public projects cannot be overlooked, including the potential impacts of those differences on an area of law still in its infancy. By way of example, change orders are typically difficult to obtain on public construction projects, and contractors have an even harder time demonstrating entitlement; whether it be before dispute resolution boards, arbitral panels, or the courts. Issues specific to government work such as sovereign immunity, authority, and detailed agreements/specifications can easily become entangled in such disputes.

Whether you are a surety or principal responding to a notice of nonpayment, or a lower tier contractor seeking to make a bond claim, consulting with a construction lawyer is critical; even more so for those unfamiliar with public work but eager to join the infrastructure rush. The amount along with entitlement must be scrutinized, and as is usual in this industry fraught with risk, an ounce of prevention is worth a pound of cure.

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