

SENATE, No. 834

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 26, 1996

By Senator BUBBA

1 AN ACT concerning certain types of liens and amending various parts
2 of the statutory law.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6

7 1. N.J.S.2A:44-128 is amended to read as follows:

8 2A:44-128. a. Any person who, as laborer, mechanic,
9 materialman, merchant or trader, or subcontractor, in pursuance of or
10 conformity with the terms of any contract for any public improvement
11 made between any person and a public agency as defined in [section]
12 N.J.S.2A:44-126 [of this title] and authorized by law to make
13 contracts for the making of public improvements, performs any labor
14 or furnishes any materials, including the furnishing of oil, gasoline or
15 lubricants and vehicle use, toward the performance or completion of
16 any such contract, shall, on complying with the provisions of
17 [sections] subsection b. of N.J.S.2A:44-128, N.J.S.2A:44-132 and
18 N.J.S.2A:44-133 [of this title], have a lien for the value of the labor
19 or materials, or both, upon the moneys due or to grow due under the
20 contract and in the control of the public agency, to the full value of the
21 claim or demand. The lien may be filed and, to the extent of the
22 amount due or to grow due under the contract, shall become an
23 absolute lien to the full value of the labor performed or materials
24 furnished in favor of every person and his representatives and assigns
25 employed by or furnishing materials to the contractor or
26 subcontractor.

27 No public agency shall be required to pay a greater amount than the
28 contract price of the labor performed and materials furnished or the
29 value thereof when no specific contract is made with respect to the
30 same by the contractor or subcontractor, respectively.

31 b. Any person who may seek to assert a lien under subsection a. of
32 this section shall, within 20 days of the first performance of work or
33 performance of work or delivery of labor or materials to a
34 subcontractor, provide to the contractor written notice that he or she

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 has furnished labor or materials to the subcontractor. The notice shall
 2 contain the name, address and telephone number of the person
 3 providing the labor or materials, the name and geographical location
 4 of the public improvement for which the labor or materials have been
 5 supplied, the name of the subcontractor to which the labor or materials
 6 have been supplied, a description of the labor or materials supplied,
 7 and the date that the labor or materials were first supplied to the
 8 subcontractor. The provision of this written notice to the contractor
 9 within 20 days of the first performance of work or delivery of labor or
 10 materials to the subcontractor shall be a requirement for, and shall be
 11 a condition of, the securing of a lien by the person supplying the labor
 12 or materials.

13 Written notice to the contractor shall be substantially in the
 14 following form:

15
 16 NOTICE TO CONTRACTOR OF THE DELIVERY OF LABOR
 17 OR
 18 MATERIALS

19
 20 In accordance with the terms and provisions of the "Municipal
 21 Mechanics' Lien Law," N.J.S.2A:44-125 et seq., notice is hereby given
 22 that:

23 1. (Name of person supplying labor or materials) of (address of
 24 person supplying labor or materials) has on (date) provided to (name
 25 of subcontractor) the following: (description of labor or materials).
 26 My telephone number is (telephone number of person supplying labor
 27 or materials).

28 2. The (description of labor or materials) were provided for the
 29 (name of public improvement) in (name of municipality), New Jersey.

30
 31
 32 Signed: _____

33 For: _____

34 Individual, firm or corporation

35
 36 c. Funds received by a contractor and paid to a subcontractor or
 37 supplier for work performed or labor or materials supplied pursuant to
 38 a contract for any public improvement shall be applied only to amounts
 39 due and owing for work performed or labor or materials supplied for
 40 such public improvement. Any supplier who knowingly applies such
 41 payment received from the contractor on the public improvement to
 42 amounts due and owing for work performed or labor or materials
 43 supplied on a construction project other than the public improvement
 44 and then claims a lien on the public improvement for non-payment
 45 shall forfeit all lien rights under this title. A supplier forfeiting his lien
 46 rights pursuant to this section shall be liable for all damages incurred

1 by any contractor as a result of the misapplication of such funds,
2 including attorney's fees, and shall be liable for all court costs and
3 reasonable legal expenses, including attorneys' fees, incurred by the
4 contractor in defending or causing the discharge of the lien claim.

5 (cf: N.J.S.2A:44-128)

6
7 2. N.J.S.2A:44-143 is amended to read as follows:

8 2A:44-143. a. (1) When public buildings or other public
9 works or improvements are about to be constructed, erected, altered
10 or repaired under contract, at the expense of the State or any
11 contracting unit, as defined in section 2 of P.L.1971, c.198
12 (C.40A:11-2), or school district, the board, officer or agent
13 contracting on behalf of the State, contracting unit or school district,
14 shall require the [payment and] delivery of a surety performance bond
15 and payment bond issued in accordance with N.J.S.2A:44-147 and
16 otherwise, as provided for by law, [with an] with good and sufficient
17 sureties. It shall be the obligation of the payment bond for the
18 payment by the contractor[, and by all subcontractors,] for all labor
19 performed or materials, provisions, provender or other supplies,
20 teams, fuels, oils, implements or machinery used or consumed in,
21 upon, for or about the construction, erection, alteration or repair of
22 such buildings, works or improvements [and]provided by
23 subcontractors or material suppliers in contract with the contractor, or
24 subcontractors in contract with a subcontractor, or material supplier
25 to the contractor, or material suppliers to a contractor, which class of
26 persons shall be the beneficiaries of such surety bond. The board,
27 officer or agent contracting on behalf of the State, contracting unit or
28 school district also shall require that all payment and performance
29 bonds be issued by a surety which meets the following standards:

30 (a) The surety shall have the minimum surplus and capital stock or
31 net cash assets required by R.S.17:17-6 or R.S.17:17-7, whichever is
32 appropriate, at the time the invitation to bid is issued; and

33 (b) With respect to all payment and performance bonds in the
34 amount of \$850,000 or more, (i) if the amount of the bond is at least
35 \$850,000 but not more than \$3.5 million, the surety shall hold a
36 current certificate of authority, issued by the United States Secretary
37 of the Treasury pursuant to 31 U.S.C. §9305, that is valid in the State
38 of New Jersey as listed annually in the United States Treasury Circular
39 570, except that if the surety has been operational for a period in
40 excess of five years, the surety shall be deemed to meet the
41 requirements of this subsubparagraph if it is rated in one of the three
42 highest categories by an independent, nationally recognized United
43 States rating company that determines the financial stability of
44 insurance companies, which rating company or companies shall be
45 determined pursuant to standards promulgated by the Commissioner
46 of Insurance by regulation adopted pursuant to the "Administrative

1 Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), and (ii) if the
2 amount of the bond is more than \$3.5 million, then the surety shall
3 hold a current certificate of authority, issued by the United States
4 Secretary of the Treasury pursuant to 31 U.S.C.§9305, that is valid in
5 the State of New Jersey as listed annually in the United States
6 Treasury Circular 570 and, if the surety has been operational for a
7 period in excess of five years, shall be rated in one of the three highest
8 categories by an independent, nationally recognized United States
9 rating company that determines the financial stability of insurance
10 companies, which rating company or companies shall be determined
11 pursuant to standards promulgated by the Commissioner of Insurance
12 by regulation adopted pursuant to the "Administrative Procedure Act,"
13 P.L.1968, c.410 (C.52:14B-1 et seq.). A surety subject to the
14 provisions of subparagraph (ii) of this subparagraph which does not
15 hold a certificate of authority issued by the United States Secretary of
16 the Treasury shall be exempt from the requirement to hold such a
17 certificate if the surety meets an equivalent set of standards developed
18 by the Commissioner of Insurance through regulations which at least
19 equal, and may exceed, the general criteria required for issuance of a
20 certificate of authority by the United States Secretary of the Treasury
21 pursuant to 31 U.S.C.§9305. A surety company seeking such an
22 exemption shall, not later than the 180th day following the effective
23 date of P.L.1995, c.384, certify to the appropriate contracting unit that
24 it meets that equivalent set of standards set forth by the Commissioner
25 as promulgated.

26 (2) When such contract is to be performed at the expense of the
27 State and is entered into by the Director of the Division of Building
28 and Construction or State departments designated by the Director of
29 the Division of Building and Construction, the director or the State
30 departments may:(a) establish for that contract the amount of the bond
31 at any percentage, not exceeding 100%, of the amount bid, based upon
32 the director's or department's assessment of the risk presented to the
33 State by the type of contract, and other relevant factors, and (b) waive
34 the bond requirement of this section entirely if the contract is for a
35 sum not exceeding \$200,000.

36 (3) When such a contract is to be performed at the expense of a
37 contracting unit or school district, the board, officer or agent
38 contracting on behalf of the contracting unit or school district may:
39 (a) establish for that contract the amount of the bond at any
40 percentage, not exceeding 100%, of the amount bid, based upon the
41 board's, officer's or agent's assessment of the risk presented to the
42 contracting unit or school district by the type of contract and other
43 relevant factors, and (b) waive the bond requirement of this section
44 entirely if the contract is for a sum not exceeding \$100,000.

45 b. A surety's obligation shall not extend to any claim for damages
46 based upon alleged negligence that resulted in personal injury,

1 wrongful death, or damage to real or personal property, and no bond
2 shall in any way be construed as a liability insurance policy. Nothing
3 herein shall relieve the surety's obligation to guarantee the contractor's
4 performance of all conditions of the contract, including the
5 maintenance of liability insurance if and as required by the contract.
6 Only the obligee named on the bond, and any subcontractor
7 performing labor or any subcontractor or materialman providing
8 materials for the construction, erection, alteration or repair of the
9 public building, work or improvement for which the bond is required
10 pursuant to this section, shall have any claim against the surety under
11 the bond.

12 c. A board, officer or agent contracting on behalf of the State,
13 contracting unit or school district shall not accept more than one
14 payment and performance bond to cover a single construction
15 contract. The board, officer or agent may accept a single bond
16 executed by more than one surety to cover a single construction
17 contract only if the combined underwriting limitations of all the named
18 sureties, as set forth in the most current annual revision of United
19 States Treasury Circular 570, or as determined by the Commissioner
20 of Insurance, meet or exceed the amount of the contract to be
21 performed.

22 d. A board, officer or agent contracting on behalf of the State,
23 contracting unit or school district shall not accept a payment or
24 performance bond unless there is attached thereto a Surety Disclosure
25 Statement and Certification to which each surety executing the bond
26 shall have subscribed. This statement and certification shall be
27 complete in all respects and duly acknowledged according to law, and
28 shall have substantially the following form:

29

30 SURETY DISCLOSURE STATEMENT AND CERTIFICATION

31

32 _____, surety(ies) on the attached bond, hereby
33 certifies(y) the following:

34

35 (1) The surety meets the applicable capital and surplus
36 requirements of R.S.17:17-6 or R.S.17:17-7 as of the surety's most
37 current annual filing with the New Jersey Department of Insurance.

38 (2) The capital (where applicable) and surplus, as determined in
39 accordance with the applicable laws of this State, of the surety(ies)
40 participating in the issuance of the attached bond is (are) in the
41 following amount(s) as of the calendar year ended December 31,
42 (most recent calendar year for which capital and surplus amounts are
43 available), which amounts have been certified as indicated by certified
44 public accountants (indicating separately for each surety that surety's
45 capital and surplus amounts, together with the name and address of the
46 firm of certified public accounts that shall have certified those

1 amounts):

2 _____
3 _____
4 _____
5 _____.

6 (3) (a) With respect to each surety participating in the issuance of
7 the attached bond that has received from the United States Secretary
8 of the Treasury a certificate of authority pursuant to 31 U.S.C. §9305,
9 the underwriting limitation established therein and the date as of which
10 that limitation was effective is as follows (indicating for each such
11 surety that surety's underwriting limitation and the effective date
12 thereof):

13 _____
14 _____
15 _____
16 _____.

17 (b) With respect to each surety participating in the issuance of the
18 attached bond that has not received such a certificate of authority from
19 the United States Secretary of the Treasury, the underwriting
20 limitation of that surety as established pursuant to R.S.17:18-9 as of
21 (date on which such limitation was so established) is as follows
22 (indicating for each such surety that surety's underwriting limitation
23 and the date on which that limitation was established):

24 _____
25 _____
26 _____
27 _____.

28 (4) The amount of the bond to which this statement and
29 certification is attached is \$ _____.

30 (5) If, by virtue of one or more contracts of reinsurance, the
31 amount of the bond indicated under item (4) above exceeds the total
32 underwriting limitation of all sureties on the bond as set forth in items
33 (3)(a) or (3)(b) above, or both, then for each such contract of
34 reinsurance:

35 (a) The name and address of each such reinsurer under that contract
36 and the amount of that reinsurer's participation in the contract is as
37 follows: _____

38 _____
39 _____
40 _____ ; and

41 (b) Each surety that is party to any such contract of reinsurance
42 certifies that each reinsurer listed under item (5)(a) satisfies the credit
43 for reinsurance requirement established under P.L.1993, c.243
44 (C.17:51B-1 et seq.) and any applicable regulations in effect as of the
45 date on which the bond to which this statement and certification is
46 attached shall have been filed with the appropriate public agency.

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CERTIFICATE

(to be completed by an authorized certifying agent
for each surety on the bond)

I (name of agent) , as (title of agent) for (name of
surety) , a corporation/mutual insurance company/other (indicating
type of business organization) (circle one) domiciled in (state of
domicile) , DO HEREBY CERTIFY that, to the best of my
knowledge, the foregoing statements made by me are true, and
ACKNOWLEDGE that, if any of those statements are false, this bond
is VOID.

(Signature of certifying agent)

(Printed name of certifying agent)

(Title of certifying agent)

(cf: P.L.1995, c.384, s.1)

3. N.J.S.2A:44-144 is amended to read as follows:

2A:44-144. The bond required by this article shall be executed by
the contractor with such sureties in accordance with N.J.S.2A:44-147
as shall be approved by the board, officer or agent acting on behalf of
the State, contracting unit or school district, in an amount equal to [at
least] 100 per cent of the contract price[, and]. The payment bond
shall be conditioned for the payment by the contractor[, and by all
subcontractors, or his or their subcontractor,] of all indebtedness
which may accrue to any person, firm or corporation designated as a
"beneficiary" pursuant to N.J.S.2A:44-143, in an amount not
exceeding the sum specified in the bond, on account of any labor
performed or materials, provisions, provender or other supplies, or
teams, fuels, oils, implements or machinery used or consumed in,
upon, for or about the construction, erection, alteration or repair of
the public building or public work or improvement.

The payment bond shall be deposited with and be held by the board,
officer or agent acting on behalf of the State, contracting unit or
school district, for the use of [any party interested therein]any
beneficiary thereof.

(cf: P.L.1995, c.384, s.2)

4. N.J.S.2A:44-145 is amended to read as follows:

2A:44-145. Any person who may be a beneficiary of the payment
bond, as defined in this article, and who does not have a direct
contract with the contractor furnishing the bond shall, prior to
commencing any work, provide written notice to the contractor by

1 certified mail or otherwise, provided that he shall have proof of
2 delivery of same, that said person is a beneficiary of the bond. If a
3 beneficiary fails to provide the required written notice, the beneficiary
4 shall not have any rights to the benefits otherwise available hereunder.

5 Any [person] beneficiary, as defined in N.J.S.2A:44-143, to whom
6 any money shall be due on account of having performed any labor or
7 furnished any materials, provisions, provender or other supplies, or
8 teams, fuels, oils, implements or machinery in, upon, for or about the
9 construction, erection, alteration or repair of any public building or
10 other public work or improvement, shall, at any time before the
11 [acceptance of such building, work or improvement by the duly
12 authorized board or officer, or within 80 days thereafter] expiration of
13 one year from the last date upon which such beneficiary shall have
14 performed actual work or delivered materials to the project, in the
15 case of a material supplier, furnish the sureties on the bond required
16 by this article a statement of the amount due to him.

17 No action shall be brought against any of the sureties on the bond
18 required by this article until the expiration of [80] 90 days after [the
19 acceptance of the building, work or improvement by the duly
20 authorized board or officer] provision to the sureties and the
21 contractor of the statement of the amount due to him, but in no event
22 later than one year from the last date upon which such beneficiary shall
23 have performed actual work or delivered materials to the project.

24 (cf: N.J.S.2A:44-145)

25

26 5. N.J.S.2A:44-146 is amended to read as follows:

27 2A:44-146. If the indebtedness due to any person as shown by the
28 statement required to be filed by [section] N.J.S.2A:44-145 [of this
29 title] shall not be paid in full at the expiration of [80] 90 days from
30 the [acceptance of the building, work or improvement by the duly
31 authorized board or officer] date of notice of the amount due to the
32 person, such person [may] shall, within 1 year from the [date of such
33 acceptance] last date that work was performed or materials were
34 supplied by that person, bring an action in his own name upon the
35 bond required by this article.

36 (cf: N.J.S.2A:44-146)

37

38 6. N.J.S.2A:44-147 is amended to read as follows:

39 2A:44-147. The bond required by this article shall be in
40 substantially the following form:

41 "Know all men by these presents, that we, the undersigned as
42 principal and as sureties, are hereby held and firmly bound unto in the
43 penal sum of dollars, for the payment of which well and truly to be
44 made, we hereby jointly and severally bind ourselves, our heirs,
45 executors, administrators, successors and assigns.

46 "Signed this day of , 19 .

1 "The condition of the above obligation is such that whereas, the
2 above named principal did on the day of , 19 , enter into a contract
3 with , which said contract is made a part of this the bond the same as
4 though set forth herein;

5 "Now, if the said shall well and faithfully do and perform the things
6 agreed by to be done and performed according to the terms of said
7 contract, and shall pay all lawful claims of [subcontractors,
8 materialmen, laborers, persons, firms or corporations] beneficiaries as
9 defined by N.J.S.2A:44-143 for labor performed or materials,
10 provisions, provender or other supplies or teams, fuels, oils,
11 implements or machinery furnished, used or consumed in the carrying
12 forward, performing or completing of said contract, we agreeing and
13 assenting that this undertaking shall be for the benefit of any
14 [subcontractor, materialman, laborer, person, firm or corporation]
15 beneficiary as defined in N.J.S.2A:44-143 having a just claim, as well
16 as for the obligee herein; then this obligation shall be void; otherwise
17 the same shall remain in full force and effect; it being expressly
18 understood and agreed that the liability of the surety for any and all
19 claims hereunder shall in no event exceed the penal amount of this
20 obligation as herein stated.

21 "The said surety hereby stipulates and agrees that no modifications,
22 omissions or additions in or to the terms of the said contract or in or
23 to the plans or specifications therefor shall in anywise affect the
24 obligation of said surety on its bond."

25 Recovery of any claimant under the bond shall be subject to the
26 conditions and provisions of this article to the same extent as if such
27 conditions and provisions were fully incorporated in the form set forth
28 above.

29 (cf: N.J.S.2A:44-147)

30
31 7. This act shall take effect on the 30th day next following
32 enactment.

33 34 35 STATEMENT

36
37 The intent of this bill is to eliminate the problems that sometimes
38 arise on construction sites when there are many subcontractors on a
39 construction project.

40 In many cases, a general contractor will hire a subcontractor to
41 perform certain parts of a construction job, and the subcontractor will
42 hire a sub-subcontractor. Oftentimes, the general contractor is not
43 aware that the sub-subcontractor has been hired and is working on the
44 construction project. It is the responsibility of the subcontractor who
45 employs a sub-subcontractor to pay the sub-subcontractor for work
46 performed or materials delivered, after receiving his payment from the

1 general contractor. If a sub-subcontractor does not receive payment,
2 a lien is usually filed by him against the contractor, or against the bond
3 or bonds posted by the general contractor.

4 In order to eliminate the potential for confusion in such cases, the
5 bill requires that any subcontractor, or any laborer, mechanic,
6 materialman, merchant or trader, seeking to assert a lien for payment
7 due, must within 20 days of the first performance of work or delivery
8 of labor or materials to a subcontractor, provide to the contractor
9 written notice that he or she has furnished labor or materials to the
10 subcontractor. The notice must contain the name, address and
11 telephone number of the person providing the labor or materials, the
12 name and geographical location of the public improvement for which
13 the labor or materials have been supplied, the name of the
14 subcontractor to which the labor or materials have been supplied, a
15 description of the labor or materials supplied, and the date that the
16 labor or materials were first supplied to the subcontractor. If no such
17 notice is given, a lien cannot be secured.

18 The bill also requires that funds received by a contractor and paid
19 to a subcontractor or supplier for work performed or labor or
20 materials supplied pursuant to a contract for any public improvement
21 shall be applied only to amounts due and owing for work performed
22 or labor or materials supplied for such public improvement. Any
23 supplier who knowingly applies such payment received from the
24 contractor on the public improvement to amounts due and owing for
25 work performed or labor or materials supplied on a construction
26 project other than the public improvement and then claims a lien on the
27 public improvement for non-payment shall forfeit all lien rights under
28 this title. A supplier forfeiting his lien rights pursuant to this section
29 shall be liable for all damages incurred by any contractor as a result of
30 the misapplication of such funds, including attorney's fees, and shall be
31 liable for all court costs and reasonable legal expenses, including
32 attorneys' fees, incurred by the contractor in defending or causing the
33 discharge of the lien claim.

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38 Revises certain aspects of "Municipal Mechanics' Lien Law."