

[Second Reprint]
SENATE, No. 834

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 26, 1996

By Senators BUBBA and KENNY

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

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.

Matter enclosed in superscript numerals has been adopted as follows:

¹ Senate SCM committee amendments adopted June 3, 1996.

² Senate floor amendments adopted June 20, 1996.

1 this section shall, within 20 days of the first performance of work or
2 performance of work or delivery of labor or materials to a
3 subcontractor, ¹[provide to the contractor] file with the municipal
4 clerk, the chief financial officer of the county or the chairman of the
5 commission, board or authority, whichever is appropriate.¹ written
6 notice that he or she has furnished labor or materials to the
7 subcontractor. The notice shall contain the name, address and
8 telephone number of the person providing the labor or materials, the
9 name and geographical location of the public improvement for which
10 the labor or materials have been supplied, the name of the
11 subcontractor to which the labor or materials have been supplied, a
12 description of the labor or materials supplied, and the date that the
13 labor or materials were first supplied to the subcontractor. ¹[The
14 provision of] The officer of the public agency shall maintain a
15 separate file for all written notices which shall be available to the
16 public for inspection and copying during regular business hours.
17 Failure to provide¹ this written notice ¹[to the contractor] as required¹
18 within 20 days of the first performance of work or delivery of labor or
19 materials to the subcontractor shall be a ¹[requirement for, and shall
20 be a condition of, the securing of a lien by the person supplying the
21 labor or materials] bar to secure a lien for the labor or materials
22 provided, unless there is money owing from the contractor to the
23 subcontractor to whom the labor or materials were provided, in which
24 case the lien shall be limited in value to a sum not greater than the
25 money owing from the contractor to the subcontractor.

26 ²The public entity with which the notice required by this section is
27 filed may charge an inquiry fee for information contained in the notice
28 to any person, including the contractor. The inquiry fee shall be
29 reasonable and shall be set to reflect the cost to the public entity of
30 retrieving the information.²

31 Notwithstanding the provisions of this section to the contrary, if a
32 notice is filed after the 20-day period, the person so filing may assert
33 a lien under subsection a. of this section for any labor or materials
34 provided on or after that filing date.

35 No additional notice shall be required for work or materials
36 provided under the same public improvement contract subsequent to
37 the initial notice, notwithstanding that the work and materials may be
38 provided under a separate contract or purchase order¹.

39 Written notice ¹[to the contractor]¹ shall be substantially in the
40 following form:

41
42 **NOTICE ¹[TO CONTRACTOR]¹ OF THE DELIVERY OF**
43 **LABOR OR MATERIALS**

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

1 implements or machinery used or consumed in, upon, for or about the
2 construction, erection, alteration or repair of such buildings, works or
3 improvements [and] provided by subcontractors or material suppliers
4 in contract with the contractor, or subcontractors² or material
5 suppliers² in contract with a subcontractor² [or material supplier]² to
6 the contractor,² [or material suppliers to a contractor.]² which class of
7 persons shall be the beneficiaries of¹ [such surety] the payment and
8 performance¹ bond. The board, officer or agent¹ [contracting on
9 behalf of the State, contracting unit or school district also]¹ shall¹ also¹
10 require that all payment and performance bonds be issued by a surety
11 which meets the following standards:

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

15 (b) With respect to all payment and performance bonds in the
16 amount of \$850,000 or more, (i) if the amount of the bond is at least
17 \$850,000 but not more than \$3.5 million, the surety shall hold a
18 current certificate of authority, issued by the United States Secretary
19 of the Treasury pursuant to 31 U.S.C. §9305, that is valid in the State
20 of New Jersey as listed annually in the United States Treasury Circular
21 570, except that if the surety has been operational for a period in
22 excess of five years, the surety shall be deemed to meet the
23 requirements of this subsubparagraph if it is rated in one of the three
24 highest categories by an independent, nationally recognized United
25 States rating company that determines the financial stability of
26 insurance companies, which rating company or companies shall be
27 determined pursuant to standards promulgated by the Commissioner
28 of Insurance by regulation adopted pursuant to the "Administrative
29 Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), and (ii) if the
30 amount of the bond is more than \$3.5 million, then the surety shall
31 hold a current certificate of authority, issued by the United States
32 Secretary of the Treasury pursuant to 31 U.S.C. §9305, that is valid in
33 the State of New Jersey as listed annually in the United States
34 Treasury Circular 570 and, if the surety has been operational for a
35 period in excess of five years, shall be rated in one of the three highest
36 categories by an independent, nationally recognized United States
37 rating company that determines the financial stability of insurance
38 companies, which rating company or companies shall be determined
39 pursuant to standards promulgated by the Commissioner of Insurance
40 by regulation adopted pursuant to the "Administrative Procedure Act,"
41 P.L.1968, c.410 (C.52:14B-1 et seq.). A surety subject to the
42 provisions of subsubparagraph (ii) of this subparagraph which does not
43 hold a certificate of authority issued by the United States Secretary of
44 the Treasury shall be exempt from the requirement to hold such a
45 certificate if the surety meets an equivalent set of standards developed
46 by the Commissioner of Insurance through regulations which at least

1 equal, and may exceed, the general criteria required for issuance of a
2 certificate of authority by the United States Secretary of the Treasury
3 pursuant to 31 U.S.C. §9305. A surety company seeking such an
4 exemption shall, not later than the 180th day following the effective
5 date of P.L.1995, c.384, certify to the appropriate contracting unit that
6 it meets that equivalent set of standards set forth by the Commissioner
7 as promulgated.

8 (2) When such contract is to be performed at the expense of the
9 State and is entered into by the Director of the Division of Building
10 and Construction or State departments designated by the Director of
11 the Division of Building and Construction, the director or the State
12 departments may:(a) establish for that contract the amount of the bond
13 at any percentage, not exceeding 100%, of the amount bid, based upon
14 the director's or department's assessment of the risk presented to the
15 State by the type of contract, and other relevant factors, and (b) waive
16 the bond requirement of this section entirely if the contract is for a
17 sum not exceeding \$200,000.

18 (3) When such a contract is to be performed at the expense of a
19 contracting unit or school district, the board, officer or agent
20 contracting on behalf of the contracting unit or school district may:
21 (a) establish for that contract the amount of the bond at any
22 percentage, not exceeding 100%, of the amount bid, based upon the
23 board's, officer's or agent's assessment of the risk presented to the
24 contracting unit or school district by the type of contract and other
25 relevant factors, and (b) waive the bond requirement of this section
26 entirely if the contract is for a sum not exceeding \$100,000.

27 b. A surety's obligation shall not extend to any claim for damages
28 based upon alleged negligence that resulted in personal injury,
29 wrongful death, or damage to real or personal property, and no bond
30 shall in any way be construed as a liability insurance policy. Nothing
31 herein shall relieve the surety's obligation to guarantee the contractor's
32 performance of all conditions of the contract, including the
33 maintenance of liability insurance if and as required by the contract.
34 Only the obligee named on the bond, and any subcontractor
35 performing labor or any subcontractor or materialman providing
36 materials for the construction, erection, alteration or repair of the
37 public building, work or improvement for which the bond is required
38 pursuant to this section, shall have any claim against the surety under
39 the bond.

40 c. A board, officer or agent contracting on behalf of the State,
41 contracting unit or school district shall not accept more than one
42 payment and performance bond to cover a single construction
43 contract. The board, officer or agent may accept a single bond
44 executed by more than one surety to cover a single construction
45 contract only if the combined underwriting limitations of all the named
46 sureties, as set forth in the most current annual revision of United

1 States Treasury Circular 570, or as determined by the Commissioner
2 of Insurance ¹pursuant to R.S.17:18-9¹, meet or exceed the amount of
3 the contract to be performed.

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

11

12 **SURETY DISCLOSURE STATEMENT AND CERTIFICATION**

13

14 , surety(ies) on the attached bond, hereby
15 certifies(y) the following:

16

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

20 (2) The capital (where applicable) and surplus, as determined in
21 accordance with the applicable laws of this State, of the surety(ies)
22 participating in the issuance of the attached bond is (are) in the
23 following amount(s) as of the calendar year ended December 31,
24 (most recent calendar year for which capital and surplus amounts are
25 available), which amounts have been certified as indicated by certified
26 public accountants (indicating separately for each surety that surety's
27 capital and surplus amounts, together with the name and address of the
28 firm of certified public accounts that shall have certified those
29 amounts):

30 _____

31 _____

32 _____

33 _____.

34 (3) (a) With respect to each surety participating in the issuance of
35 the attached bond that has received from the United States Secretary
36 of the Treasury a certificate of authority pursuant to 31 U.S.C. §9305,
37 the underwriting limitation established therein and the date as of which
38 that limitation was effective is as follows (indicating for each such
39 surety that surety's underwriting limitation and the effective date
40 thereof):

41 _____

42 _____

43 _____

44 _____.

45 (b) With respect to each surety participating in the issuance of the
46 attached bond that has not received such a certificate of authority from

1 the United States Secretary of the Treasury, the underwriting
2 limitation of that surety as established pursuant to R.S.17:18-9 as of
3 (date on which such limitation was so established) is as follows
4 (indicating for each such surety that surety's underwriting limitation
5 and the date on which that limitation was established):

6 _____
7 _____
8 _____
9 _____.

10 (4) The amount of the bond to which this statement and
11 certification is attached is \$.

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

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

20 _____
21 _____
22 _____; and

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

29

30 CERTIFICATE

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

33

34 I (name of agent), as (title of agent) for (name of
35 surety), a corporation/mutual insurance company/other (indicating
36 type of business organization) (circle one) domiciled in (state of
37 domicile), DO HEREBY CERTIFY that, to the best of my
38 knowledge, the foregoing statements made by me are true, and
39 ACKNOWLEDGE that, if any of those statements are false, this bond
40 is ²[VOID] VOIDABLE².

41

42 _____

43 (Signature of certifying agent)

44

45 _____

46 (Printed name of certifying agent)

1 _____
2 (Title of certifying agent)
3 (cf: P.L.1995, c.384, s.1)

4
5 3. N.J.S.2A:44-144 is amended to read as follows:

6 2A:44-144. The bond required by this article shall be executed by
7 the contractor with such sureties in accordance with N.J.S.2A:44-147
8 as shall be approved by the board, officer or agent acting on behalf of
9 the State, contracting unit or school district, in an amount equal to [at
10 least] 100 per cent of the contract price[, and]. The payment bond
11 shall be conditioned for the payment by the contractor[, and by all
12 subcontractors, or his or their subcontractor,] of all indebtedness
13 which may accrue to any person, firm or corporation designated as a
14 "beneficiary" pursuant to N.J.S.2A:44-143, in an amount not
15 exceeding the sum specified in the bond, on account of any labor
16 performed or materials, provisions, provender or other supplies, or
17 teams, fuels, oils, implements or machinery used or consumed in,
18 upon, for or about the construction, erection, alteration or repair of
19 the public building or public work or improvement.

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

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

25

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

27 2A:44-145. Any person who may be a beneficiary of the payment
28 bond, as defined in this article, and who does not have a direct
29 contract with the contractor furnishing the bond shall, prior to
30 commencing any work, provide written notice to the contractor by
31 certified mail or otherwise, provided that he shall have proof of
32 delivery of same, that said person is a beneficiary of the bond. If a
33 beneficiary fails to provide the required written notice, the beneficiary
34 shall [not] only have [any] rights to the benefits [otherwise]
35 available hereunder from the date the notice is provided.

36 Any [person] beneficiary, as defined in N.J.S.2A:44-143, to whom
37 any money shall be due on account of having performed any labor or
38 furnished any materials, provisions, provender or other supplies, or
39 teams, fuels, oils, implements or machinery in, upon, for or about the
40 construction, erection, alteration or repair of any public building or
41 other public work or improvement, shall, at any time before the
42 [acceptance of such building, work or improvement by the duly
43 authorized board or officer, or within 80 days thereafter] expiration of
44 one year from the last date upon which such beneficiary shall have
45 performed actual work or delivered materials to the project, in the
46 case of a material supplier, furnish the sureties on the bond required

1 by this article a statement of the amount due to him.

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

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

10

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

12 2A:44-146. If the indebtedness due to any person as shown by the
13 statement required to be filed by [section] N.J.S.2A:44-145 [of this
14 title] shall not be paid in full at the expiration of [80] 90 days from
15 the [acceptance of the building, work or improvement by the duly
16 authorized board or officer] date of notice of the amount due to the
person, such person [may] shall, within 1 year from the [date of such
18 acceptance] last date that work was performed or materials were
supplied by that person, bring an action in his own name upon the
20 bond required by this article.

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

22

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

24 2A:44-147. The bond required by this article shall be in
25 substantially the following form:

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

31 "Signed this day of , 19 .

32

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

37 "Now, if the said shall well and faithfully do and perform the things
38 agreed by to be done and performed according to the terms of said
39 contract, and shall pay all lawful claims of [subcontractors,
40 materialmen, laborers, persons, firms or corporations] beneficiaries as
defined by N.J.S.2A:44-143 for labor performed or materials,
42 provisions, provender or other supplies or teams, fuels, oils,
43 implements or machinery furnished, used or consumed in the carrying
44 forward, performing or completing of said contract, we agreeing and
45 assenting that this undertaking shall be for the benefit of any
46 [subcontractor, materialman, laborer, person, firm or corporation]

1 beneficiary as defined in N.J.S.2A:44-143 having a just claim, as well
2 as for the obligee herein; then this obligation shall be void; otherwise
3 the same shall remain in full force and effect; it being expressly
4 understood and agreed that the liability of the surety for any and all
5 claims hereunder shall in no event exceed the penal amount of this
6 obligation as herein stated.

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

11 Recovery of any claimant under the bond shall be subject to the
12 conditions and provisions of this article to the same extent as if such
13 conditions and provisions were fully incorporated in the form set forth
14 above.

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

16

17 ^{27.} Section 13 of P.L.1971, c. 198 (C.40A:11-13) is amended to
18 read as follows:

19 13. Specifications. Any specifications for an acquisition under this
20 act, whether by purchase, contract or agreement, shall be drafted in a
21 manner to encourage free, open and competitive bidding. In particular,
22 no specifications under this act may:

23 (a) Require any standard, restriction, condition or limitation not
24 directly related to the purpose, function or activity for which the
25 purchase, contract or agreement is made; or

26 (b) Require that any bidder be a resident of, or that his place of
27 business be located in, the county or municipality in which the
28 purchase will be made or the contract or agreement performed, unless
29 the physical proximity of the bidder is requisite to the efficient and
30 economical purchase or performance of the contract or agreement;
31 except that no specification for a contract for the collection and
32 disposal of municipal solid waste shall require any bidder to be a
33 resident of, or that his place of business be located in, the county or
34 municipality in which the contract will be performed; or

35 (c) Discriminate on the basis of race, religion, sex, national origin;
36 or

37 (d) Require, with regard to any purchase, contract or agreement,
38 the furnishing of any "brand name," but may in all cases require "brand
39 name or equivalent," except that if the materials to be supplied or
40 purchased are patented or copyrighted, such materials or supplies may
41 be purchased by specification in any case in which the ordinance or
42 resolution authorizing the purchase, contract, sale or agreement so
43 indicates, and the special need for such patented or copyrighted
44 materials or supplies is directly related to the performance, completion
45 or undertaking of the purpose for which the purchase, contract or
46 agreement is made; or

1 (e) Fail to include any option for renewal, extension, or release
2 which the contracting unit may intend to exercise or require; or any
3 terms and conditions necessary for the performance of any extra work;
4 or fail to disclose any matter necessary to the substantial performance
5 of the contract or agreement.

6 Any specification adopted by the governing body, which knowingly
7 excludes prospective bidders by reason of the impossibility of
8 performance, bidding or qualification by any but one bidder, except as
9 provided herein, shall be null and void and of no effect and subject
10 purchase, contract or agreement shall be readvertised, and the original
11 purchase, contract or agreement shall be set aside by the governing
12 body.

13 Any specification adopted by the governing body for a contract for
14 the collection and disposal of municipal solid waste shall conform to
15 the uniform bid specifications for municipal solid waste collection
16 contracts established pursuant to section 22 of P.L.1991, c.381
17 (C.48:13A-7.22).

18 Any specification adopted by the governing body may include an
19 item for the cost, which shall be paid by the contractor, of creating a
20 file to maintain the notices of the delivery of labor or materials
21 required by N.J.S.2A:44-128.²

22 (cf: P.L.1991, c.381, s.48)

23

24 ²[7.] 8.² This act shall take effect on the 30th day next following
25 enactment.

26

27

28

29

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