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Referred: Commerce

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1 IN THE HOUSE

2 CS SS HOUSE BILL NO. 739 (Commerce)  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to materialmen and mechanics liens;  
7 and providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 34.35.050 is repealed and re-enacted to read:

10 Sec. 34.35.050. LIEN FOR LABOR OR MATERIALS FURNISHED. A person  
11 who performs labor upon the real property of the owner or delivers  
12 materials at the site for construction, alteration, or repair upon that  
13 property or furnishes equipment that is used upon that property or a  
14 person at whose direction labor, materials or equipment are furnished  
15 upon or delivered to the property has a lien, only to the extent pro-  
16 vided under this chapter, to secure the payment of his contract price.

17 \* Sec. 2. AS 34.35.060(a) is repealed and re-enacted to read:

18 (a) Except as provided in (c) of this sec. and sec. 62(a)(6) of  
19 this chapter, a lien, mortgage, deed of trust or other encumbrance shall  
20 be preferred to a lien under secs. 50 - 120 of this chapter which has  
21 not been recorded before the recording of that lien, mortgage, deed of  
22 trust or other encumbrance. The preference granted under this section  
23 applies to all sums secured by a preferred mortgage or deed of trust  
24 without regard to when the sums are disbursed or whether the disburse-  
25 ments are required under the terms of a contract.

26 \* Sec. 3. AS 34.35.060(b) is repealed and re-enacted to read:

27 (b) The right to record a lien created under secs. 50 - 120 of  
28 this chapter arises when either

29 (1) materials or equipment furnished by the claimant for the

1 construction, alteration or repair are first placed upon or adjacent to  
2 the property; or

3 (2) Labor performed by the claimant for the construction,  
4 alteration or repair is started.

5 \* Sec. 4. AS 34.35.060(c) is amended to read:

6 (c) A lien created by secs. 50 - 120 of this chapter in favor of a  
7 person actually performing labor upon [OR FURNISHING MATERIAL USED IN] a  
8 building or other improvement in its original construction and who is  
9 not a "contractor" as defined in AS 08.18.171 is preferred to a prior  
10 lien, mortgage, or other encumbrance upon the land on which the building  
11 or other improvement is constructed.

12 \* Sec. 5. AS 34.35 is amended by adding new sections to read:

13 Sec. 34.35.062. INTERIM OR CONSTRUCTION FINANCING. (a) Any  
14 lender providing interim or construction financing where there is not a  
15 payment bond of at least 50 per cent of the amount of construction  
16 financing shall observe the following procedures:

17 (1) Draws against construction financing shall be made only  
18 after certification of job progress by the original contractor and the  
19 owner or his agent. The form of the certification may be prescribed by  
20 the lender.

21 (2) Any potential lien claimant under secs. 50 - 120 of this  
22 chapter who has not received a payment within 20 days after the date  
23 required by his contract, employee benefit plan agreement, or purchase  
24 order, may within 20 days thereafter give a notice of the sums due and  
25 to become due for which a potential lien claimant may claim a lien under  
26 this chapter.

27 (3) The notice shall be given in writing with the lender at  
28 the office administering the interim or construction financing, with a  
29 copy furnished to the owner and appropriate original contractor. The

1 notice shall state in substance and effect

2 (A) that the claimant, firm, trustee, or corporation is  
3 entitled to receive contributions to any type of employee benefit  
4 plan, has furnished labor, materials and supplies, or supplied  
5 equipment for which right of lien is given by this chapter;

6 (B) the name of the original contractor, agent or person  
7 ordering the materials and supplies, labor, or equipment;

8 (C) a common street address of the real property being  
9 improved or developed or, if there is none, the legal description  
10 of the real property;

11 (D) a description of the labor or material furnished, or  
12 equipment leased, or a brief statement describing the contributions  
13 owed to any type of employee benefit plan; and

14 (E) the name, business address and telephone number of  
15 the potential lien claimant.

16 (4) After receipt of a notice under this section, the lender  
17 shall withhold from the next and subsequent draws sufficient money to  
18 pay the amount of the claim. Alternatively, the lender may obtain from  
19 the original contractor or borrower a bond conditioned as provided in  
20 sec. 72(b) of this chapter for the benefit of the potential lien claim-  
21 ant.

22 (5) Sums withheld under a notice of claim may not be dis-  
23 bursed by the lender except by the written agreement of the potential  
24 lien claimant, owner and original contractor in a form prescribed by the  
25 lender, or the order of a court of competent jurisdiction.

26 (6) If a lender fails to abide by the provisions of (4) or  
27 (5) of this subsection, the mortgage, deed of trust or other encumbrance  
28 securing the lender will be subordinated to the lien of the potential  
29 lien claimant to the extent of the interim or construction financing

1 wrongfully disbursed, but in no event in an amount greater than the sums  
2 ultimately determined to be due the potential lien claimant by a court  
3 of competent jurisdiction, or more than the sum stated in the notice,  
4 whichever is less.

5 (b) A potential lien claimant shall be liable for any loss, cost  
6 or expense, including reasonable attorney fees, to the party injured by  
7 an unjust, excessive or premature notice of claim.

8 \* Sec. 6. AS 34.35 is amended by adding a new section to read:

9 Sec. 34.35.064. NOTICE OF LIEN LIABILITY. (a) Within 20 days  
10 after a claimant has entered into the contract under which he may claim  
11 a lien under secs. 50 - 120 of this chapter, he shall give a notice of  
12 lien liability to the owner and to the lender providing interim or con-  
13 struction financing. The notice of lien liability must be in writing,  
14 state that it is a notice of a right to assert a lien against real  
15 estate for labor, materials or equipment furnished in connection with  
16 improvement of the real estate and contain

17 (1) the name of the claimant and the address to which the  
18 owner or others may send communications to the claimant;

19 (2) the name and address of the person with whom the claimant  
20 contracted;

21 (3) the name of the owner against whom a lien is, or may be,  
22 claimed;

23 (4) a general description of the services or materials pro-  
24 vided or to be provided;

25 (5) a description sufficient to identify the real estate  
26 against which the lien is, or may be, claimed;

27 (6) a statement that the claimant has recorded a lien and the  
28 date of recording or, if the lien has not been recorded, a statement  
29 that the claimant is entitled to record a lien;

1 (7) the amount unpaid to the claimant for services or mater-  
2 ials, whether or not due, (if no amount is fixed by the contract, a good  
3 faith estimate of the amount designated as an estimate); and

4 (8) the following statement in type no smaller than that used  
5 in providing the information required by (1) through (7) of this subsec-  
6 tion:

7 Warning. If you did not contract with the person giving this  
8 notice, any future payments you make in connection with this  
9 project may subject you to double liability.

10 (b) A lien under secs. 50 - 120 of this chapter may not be en-  
11 forced unless a copy of the notice required under (a) of this section is  
12 given and the original is recorded in the same manner as lien claims  
13 under sec. 75 of this chapter.

14 \* Sec. 7. AS 34.35.070(a) is repealed and re-enacted to read:

15 (a) A lien under secs. 50 - 120 of this chapter does not attach  
16 and may not be enforced unless a claim of lien is recorded with the  
17 recorder of the recording district in which the real property of the  
18 owner, or a part of it, is located.

19 \* Sec. 8. AS 34.35.070(c) is repealed and re-enacted to read:

20 (c) The claimant may record a lien which shall be verified by the  
21 oath of the claimant or another person having knowledge of the facts and  
22 state

23 (1) the real estate subject to the lien, with a description  
24 sufficient for identification;

25 (2) the name of the person against whose interest in the real  
26 estate a lien is claimed;

27 (3) the name and address of the claimant;

28 (4) the name and address of the person with whom the claimant  
29 contracted;

1 (5) a general description of the labor, materials or equip-  
2 ment furnished or to be furnished for the improvement and the contract  
3 price of the labor, materials or equipment;

4 (6) the amount unpaid, whether or not due, to the claimant  
5 for the labor, materials or equipment; if no amount is fixed by the  
6 contract a good faith estimate of the amount designated as an estimate;  
7 and

8 (7) the time the last labor, materials or equipment were  
9 furnished or if that time has not yet occurred, an estimate of the time.

10 \* Sec. 9. AS 34.35.070 is amended by adding new subsections to read:

11 (g) A notice of completion is not effective if recorded before  
12 completion.

13 (h) Labor, materials or equipment furnished after a notice of com-  
14 pletion is recorded to satisfy warranty obligations or to remedy defec-  
15 tive, incomplete, or unsatisfactory labor or materials for which no  
16 additional consideration is owed to the person furnishing the additional  
17 labor or materials shall not result in lien liability under secs. 50 -  
18 120 of this chapter. This subsection does not apply to labor, materials  
19 or equipment furnished under an agreement for which funds have been  
20 allocated, set aside, placed in escrow, or secured for payment, in which  
21 case the lien liability of an owner may not exceed the amount of funds  
22 specified in the contract.

23 (i) An original contractor may waive his right to claim a lien  
24 under secs. 50 - 120 of this chapter if

25 (1) the construction financing is provided through a lender;

26 (2) the potential lien claim is for labor, materials or  
27 equipment to be furnished not later than six months from the date of the  
28 lien waiver;

29 (3) the amount of the potential lien claim does not exceed

1 five per cent of the amount of the interim or construction financing;  
2 and

3 (4) the lender agrees to withhold sufficient money to pay the  
4 potential lien claim until receipt of a certification from the owner  
5 that the labor, materials or equipment have been furnished.

6 \* Sec. 10. AS 34.35.072 is amended by adding a new subsection to read:

7 (b) If a potential lien claimant gives notice under sec. 64 of  
8 this chapter to a lender, the lender may require the owner or original  
9 contractor to obtain a bond in favor of the potential lien claimant with  
10 sufficient sureties in a penal sum equal to one and one-quarter times  
11 the amount of the claim conditioned that if the potential lien claimant  
12 recovers judgment in an action brought on that claim or on the lien  
13 subsequently filed by the claimant, the surety shall pay all costs that  
14 may be awarded against the owner, original contractor, subcontractor,  
15 lender, or any of them, and all damages that the potential lien claimant  
16 may sustain resulting from the claim, not exceeding the amount specified  
17 in the bond.

18 \* Sec. 11. AS 34.35.495 is amended to read:

19 Sec. 34.35.495. WAIVER OF LIEN. Except as provided under sec. 70-  
20 (i) of this chapter, no [NO] agreement by a person mentioned in secs.  
21 10 - 425 of this chapter to waive his right to acquire a lien provided  
22 in secs. 10 - 425 of this chapter is valid.

23 \* Sec. 12. AS 34.35.120 is amended by adding new paragraphs to read:

24 (3) "lender" means any person or entity regularly providing  
25 interim or construction financing;

26 (4) "interim or construction financing" means that portion of  
27 money secured by mortgage, deed of trust, or other encumbrance to  
28 finance construction, alteration or repair of improvements on, or de-  
29 velopment of, real property, but does not include

1 (A) funds to acquire real property;

2 (B) funds to pay interest, insurance premiums, lease  
3 deposits, taxes, assessments, or prior encumbrances;

4 (C) funds to pay loan, commitment, title, legal, clos-  
5 ing, recording or appraisal fees;

6 (D) funds to pay other customary fees which under agree-  
7 ment with the owner or borrower are to be paid by the lender from  
8 time to time;

9 (E) funds to acquire personal property for which the  
10 potential lien claimant may not claim a lien under secs. 50 - 120 of  
11 this chapter;

12 (5) "owner" means the record holder of the legal or bene-  
13 ficial title to the real property to be improved or developed;

14 (6) "potential lien claimant" or "claimant" means any person  
15 or entity entitled to assert lien rights under secs. 50 - 120 of this  
16 chapter and who has otherwise complied with the provisions of secs. 50 -  
17 120 of this chapter;

18 (7) "draws" means periodic disbursements of interim or con-  
19 struction financing by a lender;

20 (8) "completion" means the cessation of the performance of  
21 labor or the furnishing of material or equipment on the property to be  
22 constructed, altered or repaired and includes, but is not limited to,  
23 the following:

24 (A) the occupation or use of the property constructed,  
25 altered or repaired by the owner or his agent, accompanied by  
26 cessation of the furnishing of labor, material or equipment on the  
27 property to be constructed, altered or repaired;

28 (B) the acceptance by the owner or his agent of the  
29 construction, alteration or repair;

1 (C) the cessation of the performance of labor or fur-  
2 nishing of material or equipment for a continuous period of 60 days  
3 when that cessation occurs after the commencement of the furnishing  
4 of the labor, materials or equipment and amounts to a breach of the  
5 contract for construction, alteration, or repair of the property;

6 (9) "contract" means an agreement, either expressed or im-  
7 plied, to furnish labor, materials or equipment for the purpose of  
8 producing a change in the physical condition of land or of a structure,  
9 including

10 (A) alteration of the surface by excavation, fill,  
11 change in grade, or change in a shore, bank, or flood plain of a  
12 stream, swamp, or body of water;

13 (B) construction or installation on, above, or below the  
14 surface of land;

15 (C) demolition, repair, remodeling, or removal of a  
16 structure previously constructed or installed;

17 (D) seeding, sodding, or other landscaping operation;  
18 and

19 (E) surface or subsurface testing, boring, or analyzing;

20 (10) "contract price" means the amount agreed upon by the con-  
21 tracting parties for furnishing labor, materials or equipment covered by  
22 the contract, increased or diminished by the price of change orders,  
23 extras, or amounts attributable to altered specifications; liquidation  
24 of damages between the owner and an original contractor does not dimin-  
25 ish the contract price as to other claimants; if no price is agreed upon  
26 by the contracting parties, "contract price" means the reasonable value  
27 of all services or materials covered by the contract.

28 (11) "give notice" means to mail a notice required under secs.  
29 50 - 120 of this chapter to the person entitled to receive the notice at

1 his last known address by first-class mail and by using a form of mail  
2 requiring a signed receipt.

3 \* Sec. 13. This Act is inapplicable to a lien which attaches before the  
4 effective date of this Act.

5 \* Sec. 14. This Act takes effect immediately in accordance with AS 01.10.  
6 070(c).