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1 IN THE HOUSE

2 SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 739

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 AS 34.35.050 is repealed and re-enacted to read: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 has a lien, only to the extent provided under this chapter, to secure  
12 the payment of his contract price if he, or someone at his direction,

13 (1) performs labor upon real property at the request of the  
14 owner or his agent for the construction, alteration, or repair of that  
15 property;

16 (2) delivers materials to real property at the request of the  
17 owner or his agent to be used in the construction, alteration or repair  
18 of that property;

19 (3) furnishes equipment that is used upon real property at  
20 the request of the owner or his agent for the construction, alteration  
21 or repair of that property; or

22 (4) performs services at the request of the owner or his  
23 agent in connection with the preparation of plans, surveys, or archi-  
24 tectural or engineering plans or drawings for any change in the physical  
25 condition of real property or structures whether or not used incident to  
26 producing a change in the physical condition of that property.

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 AS 34.35.060(a) is repealed and re-enacted to read:

28 (a) Except as provided in (c) of this sec. and sec. 62(a)(6) of  
29 this chapter, a lien, mortgage, deed of trust or other encumbrance shall

1 be preferred to a lien under secs. 50 - 120 of this chapter which has  
2 not been recorded before the recording of that lien, mortgage, deed of  
3 trust or other encumbrance. The preference granted under this section  
4 applies to all sums secured by a preferred mortgage or deed of trust  
5 without regard to when the sums are disbursed or whether the disburse-  
6 ments are required under the terms of a contract.

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 AS 34.35.060(b) is repealed and re-enacted to read:

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

10 (1) materials or equipment furnished by the claimant for the  
11 construction, alteration or repair are first placed upon or adjacent to  
12 the property; or

13 (2) labor performed by the claimant for the construction,  
14 alteration or repair is started.

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

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

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

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

27 (1) Draws against construction financing shall be made only  
28 after certification of job progress by the original contractor and the  
29 owner or his agent. The form of the certification may be prescribed by

1 the lender.

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

8 (3) The notice shall be given in writing with the lender at  
9 the office administering the interim or construction financing, with a  
10 copy furnished to the owner and appropriate original contractor. The  
11 notice shall state in substance and effect

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

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

18 (C) a common street address of the real property being  
19 improved or developed or, if there is none, the legal description  
20 of the real property;

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

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

26 (4) After receipt of a notice under this section, the lender  
27 shall withhold from the next and subsequent draws sufficient money to  
28 pay the amount of the claim. Alternatively, the lender may obtain from  
29 the original contractor or borrower a bond conditioned as provided in

1 sec. 72(b) of this chapter for the benefit of the potential lien claim-  
2 ant.

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

7 (6) If a lender fails to abide by the provisions of (4) or  
8 (5) of this subsection, the mortgage, deed of trust or other encumbrance  
9 securing the lender will be subordinated to the lien of the potential  
10 lien claimant to the extent of the interim or construction financing  
11 wrongfully disbursed, but in no event in an amount greater than the sums  
12 ultimately determined to be due the potential lien claimant by a court  
13 of competent jurisdiction, or more than the sum stated in the notice,  
14 whichever is less.

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

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

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

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

29 (2) the name and address of the person with whom the claimant

1 contracted;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 (4) the name and address of the person with whom the claimant  
10 contracted;

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

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

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

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

21 (g) A notice of completion is not effective if recorded before  
22 completion.

23 (h) Labor, materials or equipment furnished after a notice of com-  
24 pletion is recorded to satisfy warranty obligations or to remedy defec-  
25 tive, incomplete, or unsatisfactory labor or materials for which no  
26 additional consideration is owed to the person furnishing the additional  
27 labor or materials shall not result in lien liability under secs. 50 -  
28 120 of this chapter. This subsection does not apply to labor, materials  
29 or equipment furnished under an agreement for which funds have been

1 allocated, set aside, placed in escrow, or secured for payment, in which  
2 case the lien liability of an owner may not exceed the amount of funds  
3 specified in the contract.

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

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

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

10 (3) the amount of the potential lien claim does not exceed  
11 five per cent of the amount of the interim or construction financing;  
12 and

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

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

17 (b) If a potential lien claimant gives notice under sec. 62 of  
18 this chapter to a lender, the lender may require the owner or original  
19 contractor to obtain a bond in favor of the potential lien claimant with  
20 sufficient sureties in a penal sum equal to one and one-quarter times  
21 the amount of the claim conditioned that if the potential lien claimant  
22 recovers judgment in an action brought on that claim or on the lien  
23 subsequently filed by the claimant, the surety shall pay all costs that  
24 may be awarded against the owner, original contractor, subcontractor,  
25 lender, or any of them, and all damages that the potential lien claimant  
26 may sustain resulting from the claim, not exceeding the amount specified  
27 in the bond.

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

29 Sec. 34.35.495. WAIVER OF LIEN. Except as provided under sec. 70-

1        (i) of this chapter, no [NO] agreement by a person mentioned in secs.  
2        10 - 425 of this chapter to waive his right to acquire a lien provided  
3        in secs. 10 - 425 of this chapter is valid.

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

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

7                (4) "interim or construction financing" means that portion of  
8        money secured by mortgage, deed of trust, or other encumbrance to fi-  
9        nance construction, alteration or repair of improvements on, or de-  
10       development of, real property, but does not include

11                    (A) funds to acquire real property;

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

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

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

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

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

24                (6) "potential lien claimant" or "claimant" means any person  
25        or entity entitled to assert lien rights under secs. 50 - 120 of this  
26        chapter and who has otherwise complied with the provisions of secs. 50 -  
27        120 of this chapter;

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

1 (8) "completion" means the cessation of the performance of  
2 labor or the furnishing of material or equipment on the property to be  
3 constructed, altered or repaired and includes, but is not limited to,  
4 the following:

5 (A) the occupation or use of the property constructed,  
6 altered or repaired by the owner or his agent, accompanied by  
7 cessation of the furnishing of labor, material or equipment on the  
8 property to be constructed, altered or repaired;

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

11 (C) the cessation of the performance of labor or fur-  
12 nishing of material or equipment for a continuous period of 60 days  
13 when that cessation occurs after the commencement of the furnishing  
14 of the labor, materials or equipment and amounts to a breach of the  
15 contract for construction, alteration, or repair of the property;

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

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

23 (B) construction or installation on, above, or below the  
24 surface of land;

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

27 (D) seeding, sodding, or other landscaping operation;

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

29 and

1 (F) preparation of plans, surveys, or architectural or  
2 engineering plans or drawings for any change in the physical con-  
3 dition of land or structures whether or not used incident to pro-  
4 ducing a change in physical condition of the real estate;

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

13 (11) "give notice" means to mail a notice required under secs.  
14 50 - 120 of this chapter to the person entitled to receive the notice at  
15 his last known address by first-class mail and by using a form of mail  
16 requiring a signed receipt.

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

19 \* Sec. 14. This Act takes effect immediately in accordance with AS 01.-  
20 10.070(c).