



1995 ASSEMBLY BILL 941

February 23, 1996 – Introduced by Representatives FREESE, GOETSCH, AINSWORTH, GROTHMAN, MUSSEY and HAHN, cosponsored by Senator SCHULTZ. Referred to Committee on Judiciary.

1 **AN ACT** *to renumber and amend* 779.035 (2); *to amend* 779.02 (6), 779.14 (1m)
2 (b) 1. and 779.14 (2) (a) (intro.); and *to create* 779.035 (2) (b) and 779.14 (2) (am)
3 of the statutes; **relating to:** subcontractor and supplier claims against private
4 and public construction project payment bonds and defense of actions by prime
5 contractors on construction liens.

Analysis by the Legislative Reference Bureau

Under current law, when a construction lien is filed by a person other than the prime contractor, the prime contractor is required to defend against any action on the lien at personal expense and the owner may withhold from the prime contractor the amount for which the lien was filed, plus an amount sufficient to defray the costs of the action. In the case of judgment against the owner, the owner may deduct the amount of the judgment from any amount due the prime contractor. This bill provides that these provisions do not apply if the lien is the result of the failure of the owner to pay the prime contractor.

Under current law, every person who performs any work or procures its performance or furnishes any labor, materials, plans or specifications for the improvement of land, has a lien on the land, provided that certain requirements are met. If the prime contractor, pursuant to agreement with the owner, has furnished a payment bond, construction liens are not created for subcontractors and suppliers providing labor or material for the improvement project. Instead, these persons may maintain an action against the prime contractor and the sureties upon the bond for the recovery of any damages sustained by reason of the failure of the prime contractor to comply with the contract or with the contract between the prime contractor and subcontractors.

This bill provides that a subcontractor or supplier may maintain such an action only if the subcontractor or supplier has met certain notice requirements or is exempt

from the notice requirements. Generally, the subcontractor or supplier must notify the prime contractor in writing that the subcontractor or supplier is providing labor or materials for the construction of the improvement; the notice must be provided within 60 days after first providing the labor or materials. Notice is not required if the contract for the provision of the labor or materials does not exceed \$5,000; if the action is brought by an employe of the prime contractor, the subcontractor or the supplier; or if the subcontractor or supplier is listed in a written contract, or in a document appended to a written contract, between a subcontractor or supplier and the prime contractor.

Current law also generally requires a prime contractor on a public construction project to provide the state or other governmental unit with a performance and payment bond to ensure that all subcontractors and suppliers to the project are paid. This bill imposes similar notice requirements and exemptions for subcontractors and suppliers who wish to maintain an action against the prime contractor and the sureties on this performance and payment bond. In addition, the bill requires the prime contractor on a public construction project to maintain a list, to the extent practicable, of all subcontractors and suppliers performing labor or furnishing materials for the public construction project. In addition to the exemptions from the notice requirement for contracts not exceeding \$5,000, for actions by employes and actions by subcontractors or suppliers listed in contracts with the prime contractor, no notice is required if the subcontractor or supplier is listed on the list of subcontractors or suppliers required to be maintained by the prime contractor.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 779.02 (6) of the statutes is amended to read:

2 779.02 (6) PRIME CONTRACTORS TO DEFEND LIEN ACTIONS. Where a lien is filed
3 under this subchapter by any person other than the prime contractor, the prime
4 contractor shall defend any action thereon at personal expense, and during the
5 pendency of the action the owner may withhold from the prime contractor the
6 amount for which the lien was filed and sufficient to defray the costs of the action.
7 In case of judgment against the owner, the owner may deduct from any amount due
8 to the prime contractor the amount of the judgment and if the judgment exceeds the
9 amount due, the owner may recover the difference from the prime contractor. This

1 subsection does not apply if the lien is the result of the failure of the owner to pay the
2 prime contractor.

3 **SECTION 2.** 779.035 (2) of the statutes is renumbered 779.035 (2) (a) and
4 amended to read:

5 779.035 (2) (a) ~~Any~~ Except as provided in par. (b), any party in interest may,
6 not later than one year after the completion of the contract for the construction of the
7 improvement, maintain an action in his or her own name against the prime
8 contractor and the sureties upon the bond for the recovery of any damages sustained
9 by reason of the failure of the prime contractor to comply with the contract or with
10 the contract between the prime contractor and subcontractors. If the amount
11 realized on the bond is insufficient to satisfy all of the claims of the parties in full,
12 it shall be distributed among the parties proportionally.

13 **SECTION 3.** 779.035 (2) (b) of the statutes is created to read:

14 779.035 (2) (b) 1. Except as provided in subd. 2., a subcontractor or supplier
15 may maintain an action under par. (a) only if the subcontractor or supplier has
16 notified the prime contractor in writing that the subcontractor or supplier was
17 providing labor or materials for the construction of the improvement. The notice
18 must be provided within 60 days after the date on which the subcontractor or
19 supplier first provided the labor or materials.

20 2. A notice under subd. 1. is not required if any of the following applies:

21 a. The contract for the provision of the labor or materials does not exceed
22 \$5,000.

23 b. The action is brought by an employe of the prime contractor, the
24 subcontractor or the supplier.

1 c. The subcontractor or supplier is listed in a written contract, or in a document
2 appended to a written contract, between a subcontractor or supplier and the prime
3 contractor.

4 **SECTION 4.** 779.14 (1m) (b) 1. of the statutes is amended to read:

5 779.14 **(1m)** (b) 1. A contract under par. (a) shall not be made unless the prime
6 contractor gives a bond issued by a surety company licensed to do business in this
7 state and unless the prime contractor agrees, to the extent practicable, to maintain
8 a list of all subcontractors and suppliers performing labor or furnishing materials
9 under the contract. The department of natural resources for contracts under s. 23.41,
10 the department of administration for other state contracts, and the public board or
11 body authorized to enter into such contracts for all other contracts under par. (a), may
12 waive the requirement that contractors furnish bonds if guarantees or warranties
13 deemed adequate by the department of natural resources, department of
14 administration or public board or body are provided for by the contract.

15 **SECTION 5.** 779.14 (2) (a) (intro.) of the statutes is amended to read:

16 779.14 **(2)** (a) (intro.) ~~Not~~ Except as provided in par. (am), no later than one year
17 after the completion of work under the contract, any party in interest, including any
18 subcontractor or supplier, may maintain an action in that party's name against the
19 prime contractor and the sureties upon the bond for the recovery of any damages
20 sustained by reason of any of the following:

21 **SECTION 6.** 779.14 (2) (am) of the statutes is created to read:

22 779.14 **(2)** (am) 1. Except as provided in subd. 2., a subcontractor or supplier
23 may maintain an action under par. (a) only if the subcontractor or supplier has
24 notified the prime contractor in writing that the subcontractor or supplier has
25 provided or will provide labor or materials to the public work or improvement. The

1 notice must be provided within 60 days after the date on which the subcontractor or
2 supplier first provided the labor or materials.

3 2. A notice under subd. 1. is not required if any of the following applies:

4 a. The contract for the provision of the labor or materials does not exceed
5 \$5,000.

6 b. The action is brought by an employe of the prime contractor, the
7 subcontractor or the supplier.

8 c. The subcontractor or supplier is listed in the list required to be maintained
9 under sub. (1m) (b) 1. or in a written contract, or in a document appended to a written
10 contract, between a subcontractor or supplier and the prime contractor.

11 **SECTION 7. Initial applicability.**

12 (1) This act first applies to contracts entered into on the effective date of this
13 subsection.

14 **SECTION 8. Effective date.**

15 (1) This act takes effect on the first day of the 4th month beginning after
16 publication.

17 (END)