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FISCAL IMPACT REPORT

ORIGINAL DATE 2/6/2007

SPONSOR M. Sanchez LAST UPDATED 2/23/2007 HB _____

SHORT TITLE Mechanic, Materialmen and Contractor Liens SB 574/a SCONC/a SJC

ANALYST Schuss

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Administrative Office of the Courts (AOC)
 Regulation and Licensing Department (RLD)

SUMMARY

Synopsis of SJC Amendment

The amendment proposed by the Senate Judiciary Committee removes *Clarifying Mechanics' and Materialmen's lien rights in other than fee interests* from the title. The amendment also removes Section 1 in its entirety. Section 1 amended 48-2-2 and was titled *Mechanics and Materialmen – Lien – Labor, Equipment and Materials Furnished – Definition of Agent of Owner*.

Synopsis of SCONC Amendment

The Senate Conservation Committee amendments to Senate Bill 574 eliminate language in the original bill providing that a contract, agreement or understanding that contains a waiver of the right to file or enforce a lien created pursuant to Sections 48-2-1 through 48-2-17 NMSA 1978 is void as against public policy and unenforceable.

In lieu of that language, the amendments add a provision to NMSA Section 48-2-10 of the

Mechanic's and Materialmen's lien statutes which would provide:

"A contingent payment clause in a contract shall not be construed as a waiver of the right to file and enforce a mechanic's or materialman's lien pursuant to Sections 48-2-1 through 48-2-17 NMSA 1978."

The AGO lists the following significant issues:

The amendments eliminate language which effectively prohibited the inclusion of lien waiver language in contracts. They also allow the filing of a lien on real property for the provision of labor, equipment, or machinery, regardless of whether the contract contains a contingent payment clause.

Construction managers, general contractors and subcontractors commonly use conditional payment clauses to shift the financial risk of a project to lower-tier subcontractors and suppliers. Contingent payment provisions are commonly referred to as "pay-if-paid" or "pay-when-paid" provisions. By accepting a contingent payment provision, a lower-tier contractor or supplier assumes increased risk that third parties will fail to meet their financial or performance obligations on the project. The amendments to this bill would confer the right to file and enforce a lien regardless of whether the contract between the filer and the contractor contains those provisions.

Synopsis of Original Bill

Senate Bill 574 amends various sections of state law relating to mechanics and materialmen's liens. Specifically, the bill:

- Confers the right to a lien if labor, equipment, tools, or material is hauled or furnished at the instance of the owner of any interest in the building or improvement, or the owner's agent;
- Exempts the "original contractor" from the current requirement that notice be given to the owner or original contractor of the lien claimant's right to claim a lien in the event of non-payment;
- Allows the original contractor to petition the district court for cancellation of a subcontractors lien;
- Prohibits an owner or contractor from providing a single security for the cancellation of the lien of more than one claimant;
- Allows the commencement of binding arbitration proceedings to toll the 2 year time period maintaining the validity of a lien;
- Provides that a contract that waives the right to file or enforce a lien is against public policy and void and unenforceable;

- Prevents an owner from withholding funds owed a contractor during the pendency of a lien action if the lien was asserted as a result of the owner's failure to pay the contractor for work done and materials furnished;
- Provides that a prevailing party in a dispute arising out of or relating to a lien action is entitled to recover from the other party reasonable attorney fees, costs and expenses.

SIGNIFICANT ISSUES

According to the AGO, the bill amends NMSA Section 48-2-12 to add the title “CONTRACTOR LIABLE FOR LIENS OF SUBCONTRACTORS”. However, that section does not make the contractor “liable” for those liens, but only allows the contractor to recover amounts due to him/her, after deducting all subcontractor claims.

Further, the bill amends that section to allow an owner to withhold the amount of money from the contractor for which the lien was filed during the pendency of an action to recover on the lien “unless the lien was asserted as a result of the owner's failure to pay the contractor for work done and materials furnished”. It is unclear as to circumstances which might exist other than the owner’s failure to pay which would allow a contractor to assert a lien. This amendment presumably would require the owner to pay the contractor all funds claimed during the pendency of the action.

ADMINISTRATIVE IMPLICATIONS

The AOC states that there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and petitions for orders canceling liens. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

BS/mt