



## 98TH GENERAL ASSEMBLY

### State of Illinois

2013 and 2014

HB2804

by Rep. Arthur Turner

#### SYNOPSIS AS INTRODUCED:

770 ILCS 60/38.1 new

Amends the Mechanics Lien Act. Provides that an applicant may at any time file a petition to substitute a bond for the property subject to a lien claim under the Act with the clerk of the circuit court of the county in which the property against which the lien claim is asserted is located, or if there is a pending action to enforce the lien claim, an applicant may timely apply to become a party to the pending action at any time before a final judgment is rendered and file a petition to substitute a bond for the property subject to the lien claim in the pending action. Defines terms. Contains notice and procedural requirements; a statement of legislative intent; and language limiting the applicability of the new provisions.

LRB098 09251 HEP 39390 b

1 AN ACT concerning civil law.

2 **Be it enacted by the People of the State of Illinois,**  
3 **represented in the General Assembly:**

4 Section 5. The Mechanics Lien Act is amended by adding  
5 Section 38.1 as follows:

6 (770 ILCS 60/38.1 new)

7 Sec. 38.1. Substitution of bond for lien.

8 (a) As used in this Section:

9 "Lien claim" means a claim on account of which (1) a notice  
10 of claim for lien under Section 24 of this Act has been served;  
11 (2) a claim for lien under Section 7 of this Act has been  
12 recorded; or (3) a suit to enforce a lien under this Act,  
13 including but not limited to a lien on funds action under  
14 Section 27 of this Act, has been filed. Unless otherwise  
15 indicated in this Section, "lien claim" is the lien claim to be  
16 affected by an eligible surety bond.

17 "Lien claimant" means the party whose lien claim is to be  
18 affected by an eligible surety bond.

19 "Applicant" means (1) an owner, other lien claimant, or  
20 other person having an interest in the property against which a  
21 lien claim under this Act is asserted; (2) an association  
22 representing owners organized under any statute or to which the  
23 Common Interest Community Association Act applies; or (3) any

1 person who may be liable for the payment of a lien claim,  
2 including an owner, former owner, association representing  
3 owners organized under any statute or to which the Common  
4 Interest Community Association Act applies, or the contractor  
5 or subcontractor.

6 "Eligible surety bond" means a surety bond that meets all  
7 of the following requirements:

8 (1) it specifically states that the principal and  
9 surety thereunder submit to the jurisdiction of the circuit  
10 court of the county where the property being improved is  
11 located and that any final non-appealable judgment or  
12 decree entered in a proceeding in favor of the lien  
13 claimant based on any lien claim that is the subject of an  
14 eligible surety bond shall constitute a judgment against  
15 the principal and surety of the bond for the amount found  
16 due to the lien claimant, including interest and fees,  
17 limited as to the surety to the full amount of the bond,  
18 payable within 15 days of the expiration of all appeal  
19 periods;

20 (2) it continues in effect until the complete  
21 satisfaction of the adjudicated amount due under the lien  
22 claim or as to the surety to the payment of the full amount  
23 of the bond or a final determination that the lien claim is  
24 invalid, void, has been released by the lien claimant, or  
25 the time to enforce the lien claim has expired;

26 (3) it is in an amount equal to 150% of the amount of

1 the lien claim;

2 (4) it has as its surety a company that has a  
3 certificate of authority from the Department of Insurance  
4 specifically authorizing the company to execute surety  
5 bonds;

6 (5) the surety has a current financial strength rating  
7 of not less than A with no rating modifier, an outlook  
8 which is either positive or stable, and a financial size  
9 category of not less than IX, as rated by A.M. Best Company  
10 Inc.; and

11 (6) if property affected by a mechanics lien is in a  
12 judicial circuit that has its own list of approved  
13 sureties, the bond shall be issued by a surety company  
14 specifically authorized to issue surety bonds for that  
15 circuit court by order or rule.

16 Except as otherwise expressly provided in this Section, the  
17 terms not expressly defined in this Section shall have the same  
18 meaning as they have under other provisions of this Act.

19 (b) This Section applies to liens arising under Sections 1  
20 or 21 of this Act and to claims or actions arising under  
21 Sections 9, 27, or 28 of this Act.

22 (c) The Department of Insurance may issue a certificate of  
23 authority to a surety company to issue bonds to discharge real  
24 estate and moneys due to contractors and subcontractors from  
25 liens asserted under Sections 1, 21, or 27 of this Act,  
26 provided the surety:

1           (1) is licensed to issue surety bonds in this State;  
2           and  
3           (2) is domiciled in one of the states of the United  
4           States of America.

5           (d) An applicant may at any time file a petition to  
6           substitute a bond for the property subject to a lien claim with  
7           the clerk of the circuit court of the county in which the  
8           property against which the lien claim is asserted is located,  
9           or if there is a pending action to enforce the lien claim, an  
10           applicant may timely apply to become a party to the pending  
11           action at any time before a final judgment is rendered and file  
12           a petition to substitute a bond for the property subject to the  
13           lien claim in the pending action. The petition shall be  
14           verified and shall include:

15           (1) the name and address of the applicant and the  
16           applicant's attorney, if any;

17           (2) the name and address of the lien claimant;

18           (3) if there is a suit to enforce the lien claim, the  
19           name of the attorney of record for the lien claimant, or if  
20           no suit has been filed but a lien claim has been recorded  
21           by the lien claimant, the name of the preparer of the lien  
22           claim;

23           (4) the name and address of the owner of record of any  
24           real estate subject to the lien claim or the name and  
25           address of any condominium association or association to  
26           which the Common Interest Community Association Act

1 applies representing owners of record if the association is  
2 an obligor under the bond;

3 (5) a description of the property subject to the lien  
4 claim and, if the property includes real estate, both a  
5 common and legal description of the real estate, including  
6 the address, if any;

7 (6) an attached copy of the lien claim which includes  
8 the date of its recording, where it was recorded, and the  
9 number under which it was recorded if there is no pending  
10 proceeding to enforce the lien claim;

11 (7) an attached copy of the proposed eligible surety  
12 bond;

13 (8) a certified copy of the surety's certificate of  
14 authority; and

15 (9) an undertaking by the applicant to replace the bond  
16 with another eligible surety bond in the event that the  
17 proposed eligible surety bond at any time ceases to be an  
18 eligible surety bond.

19 Liability of the principal and surety on a bond that has  
20 ceased to be an eligible surety bond shall continue until a  
21 court order is entered replacing the bond with another eligible  
22 surety bond. Even if a bond ceases to be an eligible surety  
23 bond, the original bond remains in effect as substitute  
24 security until it is replaced.

25 (e) The person filing a petition under this Section shall  
26 personally serve or send via certified mail, return receipt

1 requested, to each person whose name and address is stated in  
2 the petition, or his or her attorney of record in a pending  
3 action, a copy of the petition attached together with the  
4 following notice:

5 "PLEASE TAKE NOTICE that on .....(date), the  
6 undersigned, ....., filed a petition to substitute a  
7 bond for property subject to a lien claim, a copy of which is  
8 attached to this notice.

9 PLEASE TAKE FURTHER NOTICE that if you fail to file an  
10 objection to the substitution of a bond for the lien claim with  
11 the clerk of the circuit court of ..... County under  
12 general number ....., or under case number .....,  
13 within 30 days after you receive this notice or 33 days after  
14 this notice is mailed by certified mail, whichever date is  
15 earlier, you will have waived your right to object and an order  
16 will be entered substituting the security of the bond for the  
17 property securing the lien claim and discharging the property  
18 described in the petition as being subject to the lien, such as  
19 the real estate and the moneys or other considerations due or  
20 to become due from the owner to the contractor under the  
21 original contract giving rise to the lien claim."

22 For purposes of this Section, notice by certified mail,  
23 return receipt requested, shall be deemed served 3 business  
24 days after mailing of the notice.

1       (f) If no objection is filed to the substitution of the  
2 proposed eligible surety bond for the property securing the  
3 lien claim within 30 days after all persons entitled to notice  
4 under subsection (e) of this Section have either received the  
5 notice or have been served with the notice, or have waived any  
6 objections to the substitution, if the petition complies with  
7 the requirements of this Section, the court, on ex parte motion  
8 of the petitioner, shall, if the court finds that the proposed  
9 bond is in fact an eligible surety bond, enter an order:

10           (1) substituting the eligible surety bond for the  
11 property securing the lien claim; and

12           (2) substituting the lien claimant's right to recover  
13 on the bond for the lien claimant's causes of action that  
14 could be asserted by the lien claimant under Sections 9,  
15 27, or 28 of this Act.

16       (g) If an objection is filed within 30 days of service of  
17 notice required by this Section, the petitioner may, upon  
18 notice to all parties to whom the notice was required to be  
19 served, move for a hearing as to the adequacy of the proposed  
20 eligible surety bond. The burden shall be upon the petitioner  
21 to establish prima facie that the proposed surety bond is an  
22 eligible surety bond. If it is established prima facie that the  
23 bond is an eligible surety bond, the burden is on the objector  
24 to prove that a proposed surety bond is not an eligible surety  
25 bond. If at the conclusion of the hearing the court finds that  
26 the proposed bond is in fact an eligible surety bond, it shall

1 enter an order:

2 (1) substituting the eligible surety bond for the  
3 property securing the lien claim; and

4 (2) substituting the lien claimant's right to recover  
5 on the bond for the lien claimant's causes of action that  
6 could be asserted by the lien claimant under Sections 9,  
7 27, or 28 of this Act.

8 The prevailing party under this subsection (g) is entitled  
9 to attorney's fees and costs and expenses of litigation to  
10 determine if the proposed bond is an eligible surety bond.

11 (h) If the court enters an order discharging as security  
12 for the lien claim the real estate and the moneys or other  
13 considerations due or to become due from the owner under the  
14 original contract and substituting the eligible surety bond as  
15 security for the lien claim, the petitioner shall:

16 (1) send copies of the order to the lien claimant and  
17 all persons who were to receive copies of the petition and,  
18 if there is a pending proceeding to enforce the lien claim,  
19 to all parties who have appeared in the proceeding; and

20 (2) record a copy of the order, together with an  
21 executed copy of the approved eligible surety bond, with  
22 the recorder of deeds of any county where the property is  
23 located.

24 (i) If the eligible surety bond is approved either before  
25 or after any suit is brought to enforce the lien claim, the  
26 action on the bond shall be in equity against the principal and

1 surety of the bond. If the eligible surety bond is approved and  
2 a proceeding to enforce the lien claim is pending, the sureties  
3 shall, by approval of the bond, ipso facto become parties to  
4 the proceeding.

5 (j) If a prior owner, an association representing owners  
6 organized under any statute or to which the Common Interest  
7 Community Association Act applies, or a contractor or  
8 subcontractor is the principal under the eligible surety bond,  
9 the principal may petition the court to have the current owner,  
10 lien claimant, or party having an interest in the real estate  
11 who is not a principal or surety of the eligible surety bond  
12 dismissed from a pending proceeding to enforce the lien claim.

13 (k) If the bond ceases to be an eligible surety bond, the  
14 court may, after due notice and a hearing, order the surety to  
15 deposit the collateral for the bond posted by the principal to  
16 the surety with the clerk of the court or to assign the  
17 security to an alternative surety company who is ready,  
18 willing, and able to issue an eligible surety bond. Upon the  
19 deposit or assignment, the court shall release the original  
20 surety from its obligations under the original surety bond.

21 (l) The principal and surety of a surety bond shall be  
22 jointly and severally liable to the lien claimant for the  
23 amount that the lien claimant would have been entitled to  
24 recover under this Act if no surety bond had been furnished,  
25 subject to the limitation of liability of the surety to the  
26 face amount of the bond. A judgment in favor of the lien

1 claimant and against the principal and surety shall be entered  
2 for the amount of their liability to the lien claimant.

3 (m) The principal and surety of the bond may assert  
4 defenses only against the lien claim that could have been  
5 asserted against the lien claim by the principal if no surety  
6 bond had been issued.

7 (n) It is the express intent of the General Assembly in  
8 enacting this Section that the entry of an order under this  
9 Section does not release the lien claim or any remedies the  
10 lien claimant may have, but rather substitutes an eligible  
11 surety bond for the property subject to the lien claim and  
12 substitutes an action on the bond for the actions the lien  
13 claimant would otherwise have under Sections 9, 27, and 28 of  
14 this Act.