



# House of Representatives

General Assembly

**File No. 336**

January Session, 2007

Substitute House Bill No. 7202

*House of Representatives, April 4, 2007*

The Committee on General Law reported through REP. STONE of the 9th Dist., Chairperson of the Committee on the part of the House, that the substitute bill ought to pass.

***AN ACT CONCERNING THE DISCHARGING OF MECHANIC'S LIENS BY GENERAL CONTRACTORS, THE SUBSTITUTION OF SECURITIES IN LIEU OF RETAINAGE AND RETAINAGE LIMITS FOR CONSTRUCTION CONTRACTS.***

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. (NEW) (*Effective October 1, 2007*) Notwithstanding the  
2 provisions of chapter 847 of the general statutes, an original contractor  
3 for the construction, raising, removal or repair of a residential building  
4 or any of its appurtenances may cause a mechanic's lien regarding  
5 such building or any of its appurtenances placed pursuant to the  
6 provisions of chapter 847 of the general statutes by a subcontractor to  
7 be discharged by the superior court for the judicial district in which the  
8 lien may be foreclosed pursuant to section 51-345 of the general  
9 statutes, upon sufficient showing to the court by such original  
10 contractor that such contractor has been paid in full by the homeowner  
11 or that the work which is the subject of such lien was performed in an  
12 unworkmanlike manner.

13 Sec. 2. Subsection (a) of section 3-112a of the general statutes is  
14 repealed and the following is substituted in lieu thereof (*Effective*  
15 *October 1, 2007*):

16 (a) Under any contract made or awarded by the state, or by any  
17 public department or official thereof, or under any subcontract made  
18 directly thereunder with the contractor, the contractor and any  
19 subcontractor may, from time to time, withdraw the whole or any  
20 portion of the amount retained for payments to the contractor or  
21 subcontractors, as the case may be, pursuant to the terms of the  
22 contract or subcontracts, upon depositing with the Comptroller (1)  
23 United States Treasury bonds, United States Treasury notes, United  
24 States Treasury certificates of indebtedness or United States Treasury  
25 bills, or (2) bonds or notes of the state of Connecticut, or (3) bonds of  
26 any political subdivision in the state of Connecticut. No amount shall  
27 be withdrawn in excess of the market value of the securities at the time  
28 of deposit or of the par value of such securities, whichever is lower.  
29 Any such amount withdrawn by a contractor or subcontractor shall be  
30 considered a release of funds and, to the extent a subcontractor has  
31 performed its obligations under its subcontract, such release of funds  
32 shall trigger applicable payment obligations of the contractor's  
33 subcontractors or subcontractor's sub-subcontractors pursuant to the  
34 terms of any applicable subcontracts or provisions of the general  
35 statutes concerning payment obligations.

36 Sec. 3. Subsection (h) of section 42-158p of the general statutes is  
37 repealed and the following is substituted in lieu thereof (*Effective*  
38 *October 1, 2007*):

39 (h) An owner may accept securities in lieu of retainage from a  
40 contractor and a contractor may accept securities in lieu of retainage  
41 from a subcontractor. Any such securities accepted in lieu of payment  
42 by a contractor or subcontractor shall be considered a release of funds  
43 and, to the extent a subcontractor has performed its obligations under  
44 its subcontract, such release of funds shall trigger applicable payment  
45 obligations of the contractor's subcontractors or subcontractor's sub-

46 subcontractors pursuant to the terms of any applicable subcontracts or  
47 provisions of the general statutes concerning payment obligations.

48 Sec. 4. Section 42-158k of the general statutes is repealed and the  
49 following is substituted in lieu thereof (*Effective October 1, 2007*):

50 No construction contract may provide for any retainage in an  
51 amount that exceeds [seven and one-half] five per cent of the estimated  
52 amount of a progress payment for the life of the construction project.

53 Sec. 5. Section 49-41b of the general statutes is repealed and the  
54 following is substituted in lieu thereof (*Effective October 1, 2007*):

55 When any public work is awarded by a contract for which a  
56 payment bond is required by section 49-41 and such contract contains  
57 a provision requiring the general or prime contractor under such  
58 contract to furnish a performance bond in the full amount of the  
59 contract price, the following shall apply:

60 (1) In the case of a contract advertised by the state Department of  
61 Public Works or any other state agency, except as specified in  
62 subdivision (2) of this section, (A) the awarding authority shall not  
63 withhold more than [ten] five per cent from any periodic or final  
64 payment which is otherwise properly due to the general or prime  
65 contractor under the terms of such contract, and (B) any such general  
66 or prime contractor shall not withhold from any subcontractor more  
67 than (i) [ten] five per cent from any periodic or final payment which is  
68 otherwise due to the subcontractor, or (ii) the amount withheld by the  
69 awarding authority from such general or prime contractor under  
70 subparagraph (A) of this subdivision, whichever is less.  
71 Notwithstanding the provisions of this subdivision (1), the awarding  
72 authority shall establish an early release program with respect to  
73 periodic payments by general or prime contractors to subcontractors.

74 (2) In the case of a contract advertised by the state Department of  
75 Transportation, (A) the department shall not withhold more than two  
76 and one-half per cent from any periodic or final payment which is

77 otherwise properly due to the general or prime contractor under the  
78 terms of such contract, and (B) any such general or prime contractor  
79 shall not withhold more than two and one-half per cent from any  
80 periodic or final payment which is otherwise due to any subcontractor.

81 (3) If the awarding authority is a municipality, (A) it shall not  
82 withhold more than five per cent from any periodic or final payment  
83 which is otherwise properly due to the general or prime contractor  
84 under the terms of such contract, and (B) any such general or prime  
85 contractor shall not withhold more than five per cent from any  
86 periodic or final payment which is otherwise due to any subcontractor.

This act shall take effect as follows and shall amend the following sections:		
Section 1	<i>October 1, 2007</i>	New section
Sec. 2	<i>October 1, 2007</i>	3-112a(a)
Sec. 3	<i>October 1, 2007</i>	42-158p(h)
Sec. 4	<i>October 1, 2007</i>	42-158k
Sec. 5	<i>October 1, 2007</i>	49-41b

**GL**            *Joint Favorable Subst.*

The following fiscal impact statement and bill analysis are prepared for the benefit of members of the General Assembly, solely for the purpose of information, summarization, and explanation, and do not represent the intent of the General Assembly or either chamber thereof for any purpose:

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**OFA Fiscal Note**

**State Impact:**

Agency Affected	Fund-Effect	FY 08 \$	FY 09 \$
Treasurer, Debt Serv.	GF - Cost	Potential	Potential

Note: GF=General Fund

**Municipal Impact:** None

**Explanation**

Section 5 reduces from 10% to 5% the amount retained by the Department of Public Works (DPW) to insure that the contractor will complete the punch list<sup>1</sup>. To the degree that reducing retainage removes the incentive for contractors to complete the punch list, the bill will increase the project cost because another contractor will have to be hired to finish the punch list. Since most construction projects are financed with General Obligation (GO) bonds, the fiscal impact would be to the General Fund debt service account.

Section 1 of the bill pertains to the potential discharge of mechanic’s liens placed on private property by subcontractors. There is no related fiscal impact.

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<sup>1</sup> A punch list is a record of all items within a project that the contractor must correct or complete to the satisfaction of the client before the job is considered finalized. Prior to the project closeout and final payments, the client and contractor jointly conduct a project inspection to observe all items that need correcting or completing. All parties understand that when the client agrees that the punch list details have been satisfactorily completed, the project is entirely complete and all outstanding payments will be made to the contractor.

***The Out Years***

The annualized ongoing fiscal impact identified above would continue into the future subject to inflation.

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**OLR Bill Analysis****sHB 7202*****AN ACT CONCERNING THE DISCHARGING OF MECHANIC'S LIENS BY GENERAL CONTRACTORS, THE SUBSTITUTION OF SECURITIES IN LIEU OF RETAINAGE AND RETAINAGE LIMITS FOR CONSTRUCTION CONTRACTS.*****SUMMARY:**

This bill allows an original (general) contractor to cause the discharge of a mechanic's lien placed on real estate by a subcontractor in connection with construction, raising, removal, or repair of a residential building if the original contractor can show in Superior Court that (1) the homeowner has paid the original contractor for the work or (2) the work that is subject of the lien was performed in an un-workmanlike manner. The bill does not require that a subcontractor receive a notice or an opportunity for a hearing before his lien on the property is discharged (see COMMENT).

In addition, the bill lowers the maximum retainage allowed in (1) private sector construction contracts from 7.5% to 5% and (2) public works contracts advertised by most state agencies, including the Department of Public Works, from 10% to 5%. By law, the other maximum retainage limits in construction contracts are 2.5% in Department of Transportation contracts and 5% in municipal contracts.

It also requires contractual or statutory payment schedules to be followed after securities are substituted for retainage in a state contract or securities held instead of retainage are returned.

EFFECTIVE DATE: October 1, 2007

**PAYMENT SCHEDULE WHEN SECURITIES HAVE BEEN SUBSTITUTED FOR RETAINAGE**

In state contracts, the law allows a general contractor and its

subcontractors to withdraw some or all of the retainage held by the comptroller if they deposit an amount of securities at least equal to the retainage withdrawn. The allowable securities are: U.S. Treasury bonds, notes, certificates of indebtedness, or bills; State of Connecticut bonds or notes; or Connecticut municipal bonds. The bill deems any amount withdrawn by a contractor or subcontractor to be a release of funds and, to the extent that a subcontractor has performed its obligations under its subcontract, the release triggers the contractor's or subcontractor's applicable payment obligations under the subcontract or relevant state law, which generally requires contractors and subcontractors to pay for goods and services purchased under a state contract within 30 days of receiving payment if there is no dispute (CGS § 49-41c).

In private sector contracts, the law allows owners to accept securities instead of withholding retainage from a contractor and similarly allows contractors to accept securities instead of withholding retainage from subcontractors. The bill deems the return of securities instead of a payment by a contractor or subcontractor to be a release of funds and, to the extent that a subcontractor has performed its obligations under a subcontract, triggers the subcontractor's (and his subcontractors') payment obligations according to the terms of their contracts or state law on payment obligations. The law generally requires payment within 30 days of receiving a payment demand for goods or services provided under a construction contract if there is no dispute (CGS 42-158j).

## **BACKGROUND**

### ***Retainage***

The law defines "retainage" as a sum withheld from progress payments to the contractor or subcontractor otherwise payable by an owner conditioned on substantial or final completion of all work in accordance with the terms of a construction contract, but it does not include any sum withheld due to the contractor's or subcontractor's failure to comply with construction plans and specifications (CGS § 42-158i).

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***Mechanic's Lien Law***

The law allows anyone who “has a claim for more than \$10 for material furnished or services rendered” related to improvements to real property to file a certificate of a mechanic’s lien with the town clerk. It must be filed within 90 days after providing materials or completing the work, be sworn to, and include (1) a property description; (2) the amount claimed; (3) the name of the person against whom the lien is being filed; (4) the date when materials or services were first provided; and (5) a statement that the amount claimed is justly due, as nearly as can be ascertained. A mechanic’s lien cannot attach in favor of a subcontractor for more than the amount that the owner has agreed to pay. A lien is not valid unless, within 30 days after filing the certificate, the lienor perfects it by serving a true and attested copy on the property owner (CGS §§ 49-33 to 49-40a).

***Discharge of Mechanic's Lien***

By law, a property owner, when a mechanic’s lien is placed on his property, may apply to Superior Court for a hearing to determine whether the lien should be discharged or reduced. The court must notify the lienor and set a hearing date. The law specifies the form for the application, order, and summons (CGS § 49-35a).

When the hearing is held, the burden is on the contractor, subcontractor, or supplier to show that there is probable cause to uphold the validity of his lien. Anyone entitled to notice can appear and be heard and prove that the validity of the lien should not be sustained or that the amount is excessive and should be reduced (CGS § 49-35b).

***Dissolution of Lien or Substitution of Bond***

The law also allows a property owner, when a mechanic's lien has been placed on his property, to apply to Superior Court to discharge the lien and substitute a bond in its place. The court must give reasonable notice to the contractor, subcontractor, or supplier. If the court is satisfied that the applicant plans, in good faith, to contest the lien and offers an adequate bond, the court must order the lien

dissolved and substitute the bond. If the applicant, within 10 days, causes a copy of the order, certified by the clerk, to be recorded in the town clerk's office where the lien is recorded, the lien is dissolved. Whenever a bond is substituted, an action to recover on the bond must be brought within one year from the lien certificate's recording date (CGS § 49-37).

### ***Duration of a Lien***

After one year and if no action is pending, the lien is invalid and discharged as a matter of law (CGS § 49-39). Its continued existence without a release on the land records in no way affects the owner's title or the property's marketability (CGS § 49-40a).

## **COMMENT**

### ***Due Process Clause***

The due process clauses of the United States Constitution and the Connecticut Constitution prohibit the deprivation of a property interest without adequate notice and a meaningful opportunity to be heard (*Kukanskis v. Griffith*, 180 Conn. 501 (1980); *Taylor v. Commissioner of Revenue Services*, 48 Conn. Supp. 420 (2004)). This bill does not require a subcontractor to receive notice or an opportunity for a hearing before his lien is discharged.

## **COMMITTEE ACTION**

General Law Committee

Joint Favorable Substitute

Yea 19 Nay 0 (03/14/2007)