

Senator Michael G. Waddoups proposes the following substitute bill:

1 **UTAH CONSTRUCTION CONTRACTS PROMPT**

2 **PAYMENT ACT**

3 2002 GENERAL SESSION

4 STATE OF UTAH

5 **Sponsor: Michael G. Waddoups**

6 **This act modifies the Commerce and Trade provisions by enacting the Utah Construction**
7 **Contracts Prompt Payment Act. The act defines certain terms. The act does not apply to**
8 **a construction contract for a residence. The act provides that, with exceptions, the**
9 **provisions of this chapter are default terms with respect to the matters covered in the**
10 **chapter and are superseded by inconsistent provisions in a written construction contract.**
11 **The act requires progress payments on certain construction contracts. The act requires the**
12 **owner to promptly dispute a billing or estimate with which the owner does not agree and**
13 **limits the amount that an owner can withhold from a progress payment. The act requires**
14 **prompt payment by the owner upon completion of the work. The act gives subcontractors**
15 **the right to notification of progress payments. The act requires prompt payment by the**
16 **contractor to subcontractors and suppliers. The act requires the waiver of mechanics' lien**
17 **rights by contractors and subcontractors upon receipt of payment. The act provides for the**
18 **interruption of the work on a construction contract without penalty in cases of an**
19 **environmental hazard. The act provides for the interruption of work on a construction**
20 **contract or the termination of the contract in cases of nonpayment. The act provides for**
21 **interest on late payments. The act provides for the awarding of costs and attorneys' fees.**
22 **The act provides an effective date.**

23 This act affects sections of Utah Code Annotated 1953 as follows:

24 ENACTS:

25 **13-34-101**, Utah Code Annotated 1953



- 26 13-34-102, Utah Code Annotated 1953
- 27 13-34-103, Utah Code Annotated 1953
- 28 13-34-201, Utah Code Annotated 1953
- 29 13-34-202, Utah Code Annotated 1953
- 30 13-34-203, Utah Code Annotated 1953
- 31 13-34-204, Utah Code Annotated 1953
- 32 13-34-205, Utah Code Annotated 1953
- 33 13-34-206, Utah Code Annotated 1953
- 34 13-34-207, Utah Code Annotated 1953
- 35 13-34-208, Utah Code Annotated 1953
- 36 13-34-209, Utah Code Annotated 1953
- 37 13-34-210, Utah Code Annotated 1953
- 38 13-34-211, Utah Code Annotated 1953

39 *Be it enacted by the Legislature of the state of Utah:*

40 Section 1. Section 13-34-101 is enacted to read:

41 **CHAPTER 34. UTAH CONSTRUCTION CONTRACTS PROMPT PAYMENT ACT**

42 **Part 1. General Provisions**

43 **13-34-101. Title.**

44 This chapter is known as the "Utah Construction Contracts Prompt Payment Act."

45 Section 2. Section 13-34-102 is enacted to read:

46 **13-34-102. Definitions.**

47 As used in this chapter:

48 (1) "Construction contract" means a contract or agreement to provide services, labor, or
49 materials for the "design-build," construction, installation, alteration, or repair of any building,
50 structure, or improvement to real property located in Utah.

51 (2) "Construction project bid documents" means the drawings, specifications, invitation
52 for bids, request for proposals, or any other written document describing the proposed construction
53 project that requests the submission of bids or prices for furnishing labor, materials, supplies, or
54 equipment for construction of the project.

55 (3) "Contractor" means a person who is or may be awarded a construction contract.

56 (4) "Owner" means a person holding any legal or equitable title or interest in real property

57 which is the subject of a construction contract.

58 (5) "Residence" has the meaning as defined in Section 38-11-102.

59 (6) "Subcontractor" means any person engaged by a contractor or another subcontractor
60 to provide services, labor, or materials for the construction, installation, alteration, or repair of any
61 building, structure, or improvement to real property located in Utah.

62 Section 3. Section **13-34-103** is enacted to read:

63 **13-34-103. Scope of chapter.**

64 (1) Where there are any conflicts between the provisions of this chapter with the provisions
65 of Title 15, Chapter 6, Utah Prompt Payment Act, the provisions of this chapter shall govern.

66 (2) Except as provided in Section 13-34-207, the provisions of this chapter are default
67 terms with respect to matters covered in the chapter and are superseded by inconsistent provisions
68 in a written construction contract.

69 (3) This chapter does not apply to a construction contract for a residence.

70 Section 4. Section **13-34-201** is enacted to read:

71 **Part 2. Prompt Payment**

72 **13-34-201. Progress payments to contractor -- Alternate billing cycle -- Lien waivers**
73 **-- Extended payment provision.**

74 (1) An owner shall make progress payments, as provided in Subsections (1)(a), (b), (c),
75 and (d), to a contractor on a construction contract where the contract performance period exceeds
76 45 calendar days:

77 (a) Progress payments shall be made on the basis of an approved billing or estimate of the
78 work performed and the materials supplied during the preceding monthly billing cycle.

79 (b) If billings or estimates are to be submitted in other than monthly billing cycles, the
80 payment section of the construction project bid documents shall disclose in a clear and
81 conspicuous manner any proposed alternate billing cycle in a clear and conspicuous manner.

82 (c) Except as provided in Subsection (2), the owner shall make progress payments to the
83 contractor within ten working days after the date the billing or estimate is approved by the owner
84 pursuant to Subsection 13-34-202(1).

85 (d) If required by the owner, the contractor shall provide waivers of mechanics' or
86 materialmens' liens from both the contractor and its subcontractors conditioned upon payment for
87 the work completed and materials supplied. The owner may require that these conditional waivers

88 of lien be notarized.

89 (2) If progress payments and final payment are to be made later than ten working days after
90 the date the billing or estimate is approved by the owner, the payment section of the construction
91 bid documents shall disclose in a clear and conspicuous manner any proposed extended payment
92 provision.

93 (3) Notwithstanding Subsections (1) and (2), for a construction project that is
94 "design-build" or "negotiated" before the development of bid documents, the owner, contractor,
95 or subcontractor may include any alternate billing cycle and extended payment provision in the
96 construction contract rather than in the construction project bid documents.

97 (4) At the stage of solicitation of bids based upon written bid documents, for any part of
98 the construction project, the requirements in this section for notice of an alternate billing cycle or
99 an extended payment provision apply to the bidding subcontractor. The contractor or
100 subcontractor soliciting the bids is solely responsible for including the notice of an alternate billing
101 cycle and an extended payment provision in the bid documents.

102 Section 5. Section **13-34-202** is enacted to read:

103 **13-34-202. Approval of billings.**

104 (1) (a) Except as provided in Subsection (3), a billing or estimate shall be considered to
105 be approved by the owner 14 calendar days after the date the owner receives the billing or estimate,
106 unless before that time the owner or the owner's agent delivers to the contractor a written statement
107 detailing those items in the billing or estimate that are not approved.

108 (b) An owner may decline to approve a billing or estimate or a portion of a billing or
109 estimate because of:

110 (i) unsatisfactory job progress;

111 (ii) defective construction work or materials which have not been remedied;

112 (iii) disputed work or materials;

113 (iv) failure to comply with a material provision of the construction contract;

114 (v) third-party claims filed or reasonable evidence that a claim will be filed;

115 (vi) failure of the contractor or a subcontractor to make timely payments for labor,
116 equipment, or materials;

117 (vii) loss or damage to the owner or the owner's property attributable to the construction
118 contract and caused by the contractor;

119 (viii) reasonable evidence that the construction contract cannot be completed for the
120 unpaid balance under the construction contract; or

121 (ix) a reasonable amount for retention as provided in Section 13-8-5.

122 (c) The owner is considered to have received the billing or estimate when the billing or
123 estimate is submitted to any person designated by the owner for the receipt of these submissions
124 or for review or approval of the billing or estimate.

125 (2) Except as provided in Section 13-8-5, an owner may withhold from a progress payment
126 only an amount that is sufficient to pay the direct expenses the owner reasonably expects to incur
127 to correct any items set forth in writing pursuant to Subsection (1).

128 (3) If approval of a billing or estimate is to be made later than 14 calendar days after the
129 date the owner receives the billing or estimate, the payment section of the construction bid
130 documents shall disclose in a clear and conspicuous manner any proposed extended approval
131 period provision.

132 (4) Except as provided in Subsection 13-34-201(2) and in Section 13-8-5:

133 (a) when a contractor completes and an owner approves all work under a construction
134 contract, the owner shall make payment in full on the construction contract within ten working
135 days after the date of approval;

136 (b) when a contractor completes and an owner approves all work under a portion of a
137 construction contract for which the construction contract states a separate price, the owner shall
138 make payment in full on that portion of the construction contract within ten working days after the
139 date of approval; and

140 (c) on construction projects that require a federal agency's final approval or certification,
141 the owner shall make payment in full on the construction contract within seven working days of
142 the federal agency's final approval or certification.

143 (5) Payment is not required under this section unless the contractor provides the owner
144 with a billing or estimate for the work performed or the material supplied in accordance with the
145 terms of the construction contract between the parties.

146 (6) If the owner and contractor on a construction project are a single entity, that entity shall
147 pay its subcontractors within 20 calendar days after the billing or estimate is approved by the
148 owner unless the deadlines for approval or for payment have been modified under Subsection (3)
149 or Subsection 13-34-201(2).

150 Section 6. Section **13-34-203** is enacted to read:

151 **13-34-203. Notice of progress payments.**

152 On the written request of a subcontractor, the owner shall notify the subcontractor within
153 five working days after the issuance of a progress payment or final payment to the contractor under
154 the construction contract.

155 Section 7. Section **13-34-204** is enacted to read:

156 **13-34-204. Progress payments to subcontractor or supplier -- Waiver of liens --**
157 **Withholdings from a payment.**

158 (1) (a) If a subcontractor has performed in accordance with the provisions of a construction
159 contract, the contractor shall pay to its subcontractor and the subcontractor shall pay to its
160 subcontractors, within ten working days of receipt by the contractor or subcontractor, as the case
161 may be, of each progress payment or final payment, the full amount received for that
162 subcontractor's work and materials supplied based on work completed or materials supplied under
163 the subcontract.

164 (b) Payment is not required under Subsection (1)(a) unless the subcontractor provides to
165 the contractor or subcontractor with whom it has the contract a billing or invoice for the work
166 performed or material supplied in compliance with the terms of the construction contract between
167 the parties.

168 (c) If required by the other party to a construction contract, each subcontractor shall
169 provide to the contractor or subcontractor with whom it has the contract a waiver of any
170 mechanic's or materialman's lien or payment bond claims conditioned upon payment for the work
171 completed or material supplied. The contractor or subcontractor may require that the conditional
172 waiver of lien be notarized.

173 (2) Nothing in this section prevents the contractor or subcontractor, at the time of
174 application or certification to its owner or contractor, as the case may be, from withholding the
175 application or certification to the owner or contractor for payment to the subcontractor because of:

176 (a) unsatisfactory job progress;

177 (b) defective construction work or materials which have not been remedied;

178 (c) disputed work or materials;

179 (d) failure to comply with a material provision of the subcontract;

180 (e) third-party claims filed or reasonable evidence that a claim will be filed;

- 181 (f) failure of the subcontractor to make timely payments for labor, equipment, or materials;
- 182 (g) damage to the contractor or another subcontractor or material supplier;
- 183 (h) reasonable evidence that the subcontract cannot be completed for the unpaid balance
- 184 under the contract; or
- 185 (i) a reasonable amount for retention, as provided in Section 13-8-5, that does not exceed
- 186 the actual percentage retained by the owner.

187 Section 8. Section **13-34-205** is enacted to read:

188 **13-34-205. Payment entitlement -- No waiver.**

189 (1) Performance by a contractor or subcontractor in accordance with the provisions of a

190 construction contract entitles the contractor or subcontractor to payment from the party with whom

191 the contractor or subcontractor contracts.

192 (2) This chapter shall not waive or alter any rights or claims a contractor or subcontractor

193 may have arising out of performance of work or supplying of materials pursuant to any

194 construction contract, including the right to receive prompt and timely progress payments.

195 Section 9. Section **13-34-206** is enacted to read:

196 **13-34-206. Interruption of work for environmental hazard -- Termination of**

197 **contract.**

198 (1) A contractor may interrupt the performance of a construction contract without penalty

199 or liability for breach of contract if:

200 (a) any applicable law or rule requires the cessation of work; or

201 (b) (i) the contractor encounters any hazardous substance or hazardous material which is

202 required to be removed or contained by any applicable statute or rule; and

203 (ii) (A) any applicable law or rule prohibits the contractor from proceeding to remove or

204 contain the hazardous material or hazardous substance unless the contractor is duly licensed and

205 the contractor is not so licensed; or

206 (B) the removal or containment of the hazardous material or hazardous substance cannot

207 be accomplished without a cessation of work and the situation which resulted in the cessation of

208 work under Subsection (1)(a) was not part of the scope of the work under the construction contract.

209 (2) A contractor whose work is impaired, impeded, or prohibited under Subsection (1) may

210 interrupt performance of the construction contract as provided in this section only to the extent of

211 the area affected by the hazardous materials or hazardous substances removed or contained by the

212 owner or as otherwise required by applicable statute or rule.

213 (3) The owner may terminate the construction contract upon payment to the contractor,
214 subcontractor, or other person whose work is delayed under Subsection (1) of the amount of any
215 services or materials supplied or expended which conform to the contract terms and specifications.

216 (4) A contractor who interrupts the performance of a construction contract under this
217 section is entitled to recover from the owner any costs incurred for mobilization resulting from the
218 shutdown and restart of the project.

219 Section 10. Section **13-34-207** is enacted to read:

220 **13-34-207. Suspension or termination of work for nonpayment -- Notice -- Costs and**
221 **attorneys' fees.**

222 (1) Except as otherwise provided in this section, the provisions of this section supersede
223 any construction contract within the scope of this chapter entered into on or after May 6, 2002.

224 (2) (a) A contractor may suspend performance under a construction contract or terminate
225 a construction contract for failure by the owner to make timely payment of an amount approved.

226 (b) A contractor shall provide written notice to the owner at least 15 working days before
227 the contractor's intended suspension or termination unless a shorter notice period is set forth in the
228 construction contract between the owner and contractor.

229 (c) A construction contract may not extend the time period for a contractor to suspend
230 performance or terminate a construction contract under this Subsection (2).

231 (d) The suspension of performance or termination of a construction contract pursuant to
232 this Subsection (2) does not constitute a breach of contract by the contractor.

233 (3) (a) A subcontractor may suspend performance under a construction contract or
234 terminate a construction contract if the owner fails to make timely payment of amounts approved
235 for the subcontractor's work or materials supplied and the contractor fails to pay the subcontractor
236 for the approved work.

237 (b) (i) For each of the first and second events of failure of timely payment on the
238 construction project, a subcontractor shall provide written notice to the contractor and owner at
239 least 15 working days before the subcontractor's intended suspension or termination, unless a
240 shorter notice period is prescribed in the construction contract between the contractor and
241 subcontractor.

242 (ii) If, after a first and second event of failure of timely payment followed by notice as

243 provided in Subsection (3)(b)(i), there is a subsequent failure of timely payment on the
244 construction project, the subcontractor shall provide written notice to the contractor and owner at
245 least ten working days before the subcontractor's intended suspension of termination, unless a
246 shorter notice period is prescribed in the construction contract between the contractor and the
247 subcontractor.

248 (iii) A construction contract may not extend the time period for a subcontractor to
249 suspend performance or terminate a construction contract under this Subsection (3).

250 (c) The suspension of performance or termination of a subcontract pursuant to this
251 Subsection (3) does not constitute a breach of contract by the subcontractor.

252 (4) (a) A subcontractor may suspend performance under a construction contract or
253 terminate a construction contract if the owner makes timely payment of amounts approved for the
254 subcontractor's work or materials supplied but the contractor fails to pay the subcontractor or the
255 subcontractor fails to pay its subcontractor for the approved work.

256 (b) (i) For each of the first and second events of failure of timely payment on the
257 construction project, a subcontractor shall provide written notice to the contractor and owner at
258 least 15 working days before the subcontractor's intended suspension or termination, unless a
259 shorter notice period is prescribed in the construction contract between the contractor and
260 subcontractor.

261 (ii) If, after a first and second event of failure of timely payment followed by notice as
262 provided in Subsection (4)(b)(i), there is a subsequent failure of timely payment on the
263 construction project, the subcontractor shall provide written notice to the contractor and owner at
264 least ten working days before the subcontractor's intended suspension of termination, unless a
265 shorter notice period is prescribed in the construction contract between the contractor and the
266 subcontractor.

267 (c) The suspension of performance or termination of a subcontract pursuant to this
268 Subsection (4) does not constitute a breach of contract by the subcontractor.

269 (5) (a) A subcontractor may suspend performance under a construction contract or
270 terminate a construction contract if the owner declines to approve and certify portions of the
271 contractor's billing or estimate for that subcontractor's work or materials supplied but the reasons
272 for that failure by the owner to approve are not the fault of, or are not directly related to, the
273 subcontractor's work or materials supplied.

274 (b) A subcontractor shall provide written notice to the contractor and owner at least 15
275 working days before the subcontractor's intended suspension or termination unless a shorter notice
276 period is prescribed in the construction contract between the contractor and subcontractor, or
277 subcontractor and subcontractor.

278 (c) A construction contract may not extend the time period for a subcontractor to suspend
279 performance or terminate a construction contract under this Subsection (5).

280 (d) The suspension of performance or termination of a subcontract pursuant to this
281 Subsection (5) does not constitute a breach of contract by the subcontractor.

282 (6) A contractor or subcontractor that suspends performance as provided in this section
283 is not required to furnish further labor, materials, or services until the contractor or subcontractor
284 is paid the amount that was approved, together with any costs incurred for mobilization resulting
285 from the shutdown or restart of a project.

286 Section 11. Section **13-34-208** is enacted to read:

287 **13-34-208. Written notice.**

288 Written notice required under this chapter shall be provided by:

289 (1) delivery of a written notice in person to the individual or a member of the entity or to
290 an officer of the corporation for which it was intended; or

291 (2) sending the written notice by any means that provides written, third-party verification
292 of delivery to the last business address known to the party giving notice.

293 Section 12. Section **13-34-209** is enacted to read:

294 **13-34-209. Costs and attorneys fees.**

295 In any action or arbitration brought under this chapter, the successful party shall be awarded
296 costs and reasonable attorneys fees.

297 Section 13. Section **13-34-210** is enacted to read:

298 **13-34-210. Time of payment.**

299 For purposes of this chapter, payment is considered to have been made at the time the
300 payment is sent.

301 Section 14. Section **13-34-211** is enacted to read:

302 **13-34-211. Interest on late payments.**

303 (1) If an owner or a third party designated by an owner as the person responsible for
304 making progress payments on a construction contract does not make a timely payment pursuant

305 to this chapter, the owner shall pay the contractor interest, except for periods of time during which
306 payment is withheld pursuant to Section 13-34-202, at the rate of 1.5% per month or fraction of
307 a month on the unpaid balance.

308 (2) If a periodic or final payment to a subcontractor is delayed by more than ten working
309 days after receipt of periodic or final payment by the contractor or subcontractor with whom it has
310 the contract, the contractor or subcontractor, as the case may be, shall pay its subcontractor interest,
311 except for periods of time during which payment is withheld pursuant to Section 13-34-204, at the
312 rate of 1.5% per month or a fraction of a month on the unpaid balance.

313 Section 15. **Effective date.**

314 This act takes effect on July 1, 2002.