Senator Michael G. Waddoups proposes to substitute the following bill:

CONSTRUCTION CONTRACTS - PROMPT PAYMENT ACT

2001 GENERAL SESSION
STATE OF UTAH

Sponsor: Michael G. Waddoups

This act modifies the Commerce and Trade Code by enacting the Utah Prompt Payment Act. The act requires progress payments on certain construction contracts. The act requires the owner to promptly dispute a billing or estimate with which the owner does not agree and limits the amount that an owner can withhold from a progress payment. The act requires prompt payment by the owner upon completion of the work. The act provides for interest on late payments. The act gives subcontractors the right to notification of progress payments. The act provides for the awarding of costs and attorneys' fees. The act requires prompt payment by the contractor to subcontractors and suppliers. The act requires the waiver of mechanics' lien rights by subcontractors and suppliers upon receipt of payment. The act provides for the interruption of the work on a construction contract without penalty in cases of an environmental hazard. The act provides for the interruption of work on a construction contract or the termination of the contract in cases of nonpayment.

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

AMENDS:

58-55-501, as last amended by Chapters 233 and 317, Laws of Utah 2000

ENACTS:

13-33-101, Utah Code Annotated 1953
13-33-102, Utah Code Annotated 1953
13-33-201, Utah Code Annotated 1953
13-33-202, Utah Code Annotated 1953
Be it enacted by the Legislature of the state of Utah:

Section 1. Section 13-33-101 is enacted to read:

CHAPTER 33. UTAH PROMPT PAYMENT ACT


13-33-101. Title.
This chapter is known as the "Utah Prompt Payment Act."

Section 2. Section 13-33-102 is enacted to read:

As used in this chapter:
(1) the terms "construction contract", "contractor", "owner", and "subcontractor" have the
same meaning as defined in Section 13-8-5; and
(2) "construction project bid documents" means the drawings, specifications, invitation
for bids, request for proposals, or any other written document describing the proposed construction
project that requests the submission of bids or prices for furnishing labor, materials, supplies, or
equipment for construction of the project.

Section 3. Section 13-33-201 is enacted to read:

Part 2. Prompt Payment

13-33-201. Progress payments to contractor -- Payment upon completion of work --
Withholdings from payments -- Approval of billings -- Interest on late payments
--Notification to subcontractor of payments by owner -- Costs and attorneys' fees.
(1) An owner shall make progress payments as provided in Subsection (2) to a contractor
on all construction contracts where the contract performance period exceeds 45 days.
(2) (a) Progress payments shall be made on the basis of a duly certified and approved
billing or estimate of the work performed and the materials supplied during the preceding 30-day
billing cycle, or an alternate billing cycle as stated in the construction contract.
(b) If billings or estimates are to be submitted in other than 30-day billing cycles, the
construction project bid documents shall specifically identify the alternate billing cycle in a clear
and conspicuous manner as prescribed in Subsection (3).
(c) Except as provided in Subsection (4), the owner shall make progress payments to the
contractor within seven days after the date the billing or estimate is certified and approved pursuant to Subsection (5).

(3) (a) A construction contract may provide for a billing cycle other than a 30-day billing cycle if:

(i) the construction project bid documents and the construction contract specifically set forth the alternate billing cycle; and

(ii) the provisions of either Subsection (3)(b) or (3)(c) are satisfied.

(b) The following legend or substantially similar language setting forth the other billing cycle appears in clear and conspicuous type on the construction project bid documents and the construction contract:

"Notice of alternate billing cycle.

This contract allows the owner to require the submission of billings or estimates in billing cycles other than 30 days. Billings or estimates for this contract shall be submitted as follows: [description of alternate billing cycle]."

(c) The following legend or substantially similar language setting forth the other billing cycle appears in clear and conspicuous type on the construction project bid documents and the construction contract:

"Notice of alternate billing cycle.

This contract allows the owner to require the submission of billings or estimates in billing cycles other than 30 days. A written description of the alternate billing cycle applicable to the project is available from the owner or the owner's designated agent at [telephone number or address, or both], and the owner or its designated agent shall provide this written description on request."

(4) An owner may make progress payments later than seven days after the date the billing or estimate is certified and approved if both:

(a) the construction project bid documents and the construction contract in a clear and conspicuous manner specifically provide for a later payment defined by a specified number of days after certification and approval; and

(b) the following legend or substantially similar language setting forth the specified number of days appears in clear and conspicuous type on the construction project bid documents and the construction contract:
"Notice of extended payment provision.
"This contract allows the owner to make payment within _____ days after certification and approval of billings and estimates."

(5) (a) Except as provided in Subsection (7), a billing or estimate shall be considered to be approved and certified 14 days after the owner receives the billing or estimate, unless before that time the owner or the owner's agent prepares and issues a written statement detailing those items in the billing or estimate that are not approved and certified.

(b) An owner may decline to approve and certify a billing or estimate or a portion of a billing or estimate for:

(i) unsatisfactory job progress;

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

(iii) disputed work or materials;

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

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

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

(vii) damage to the owner;

(viii) reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum; or

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

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

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

(7) An owner may extend the period within which the billing or estimate is certified and approved if both:

(a) the construction project bid documents and the construction contract in a clear and conspicuous manner specifically provide for an extended time period within which a billing or estimate shall be certified and approved, defined by a specified number of days after the owner has
received the billing or estimate; and

(b) the following legend or substantially similar language, setting forth the specified number of days, appears in clear and conspicuous type on the construction project bid documents and the construction contract:

"Notice of extended certification and approval period provision.

"This contract allows the owner to certify and approve billings and estimates within ______ days after the billings and estimates are received from the contractor."

(8) (a) When a contractor completes and an owner approves and certifies all work under a construction contract, the owner shall make payment in full on the construction contract within seven days.

(b) When a contractor completes and an owner approves and certifies all work under a portion of a construction contract for which the construction contract states a separate price, the owner shall make payment in full on that portion of the construction contract within seven days.

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

(9) Payment shall not be required pursuant to this section unless the contractor provides the owner with a billing or estimate for the work performed or the material supplied in accordance with the terms of the construction contract between the parties.

(10) A construction contract shall not alter the rights of any contractor, subcontractor, or material supplier to receive prompt and timely progress payments as provided under this chapter.

(11) If an owner or a third party designated by an owner as the person responsible for making progress payments on a construction contract does not make a timely payment pursuant to this section, the owner shall pay the contractor interest at the rate of 1.5% per month or fraction of a month on the unpaid balance, or at a higher rate as the parties to the construction contract agree.

(12) On the written request of a subcontractor, the owner shall notify the subcontractor within 5 days after the issuance of a progress payment to the contractor or final payment to the contractor on the construction contract.

(13) In any action or arbitration brought to collect payments or interest pursuant to this section, the successful party shall be awarded its costs and reasonable attorneys' fees.
(14) If the owner and contractor on a construction project are a single entity, that entity shall pay its subcontractors and material suppliers within 14 days after the billing or estimate is certified and approved unless the deadlines for approval and certification or for payment have been modified pursuant to Subsection (4) or (7).

Section 4. Section 13-33-202 is enacted to read:

13-33-202. Progress payments to subcontractor or supplier -- Waiver of liens
--Withholdings from a payment -- Interest on late payments -- Costs and attorneys' fees.

(1) Notwithstanding any other provision of this section, performance by a contractor, subcontractor, or material supplier in accordance with the provisions of a construction contract entitles the contractor, subcontractor, or material supplier to payment from the party with whom the contractor, subcontractor, or material supplier contracts.

(2) (a) If a subcontractor or material supplier has performed in accordance with the provisions of a construction contract, the contractor shall pay to its subcontractors or material suppliers and each subcontractor shall pay to its subcontractors or material suppliers, within seven days of receipt by the contractor or subcontractor of each progress payment or final payment, the full amount received for that subcontractor's work and materials supplied based on work completed or materials supplied under the subcontract.

(b) Payment shall not be required pursuant to this Subsection (2) unless the subcontractor or material supplier provides to the contractor or subcontractor a billing or invoice for the work performed or material supplied in compliance with the terms of the contract between the parties.

(c) Each subcontractor or material supplier shall provide a waiver of any mechanic's or materialman's lien conditioned upon payment for the work completed or material supplied. The contractor or subcontractor may require that these conditional waivers of lien be notarized.

(3) Nothing in this section prevents the contractor or subcontractor, at the time of application or certification to the owner or contractor, from withholding the application or certification to the owner or contractor for payment to the subcontractor or material supplier for:

(a) unsatisfactory job progress;
(b) defective construction work or materials which have not been remedied;
(c) disputed work or materials;
(d) failure to comply with a material provision of the subcontract;
(e) third-party claims filed or reasonable evidence that a claim will be filed;
(f) failure of the subcontractor to make timely payments for labor, equipment, or materials;
(g) damage to the contractor or another subcontractor or material supplier;
(h) reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum; or
(i) a reasonable amount for retention as provided in Section 13-8-5 that does not exceed the actual percentage retained by the owner.

(4) If a periodic or final payment to a subcontractor or material supplier is delayed by more than seven days after receipt of periodic or final payment by the contractor or subcontractor, the contractor or subcontractor shall pay its subcontractor or material supplier interest, except for periods of time during which payment is withheld pursuant to Subsection (3), at the rate of 1.5% per month or a fraction of a month on the unpaid balance or at a higher rate as the parties agree.

(5) In any action or arbitration brought to collect payments or interest pursuant to this section, the successful party shall be awarded costs and reasonable attorneys' fees.

Section 5. Section 13-33-203 is enacted to read:

13-33-203. Interruption of work for environmental hazard -- Termination of contract.

(1) A contractor may interrupt the performance of a construction contract without penalty or liability for breach of contract if:
(a) any applicable law or rule requires the cessation of work; or
(b) (i) the contractor encounters any hazardous substance or hazardous material which is required to be removed or contained by any applicable law or rule; and
(ii) (A) any applicable law or rule prohibits the contractor from proceeding to remove or contain the hazardous material or hazardous substance unless the contractor is duly licensed and the contractor is not so licensed; or
(B) the removal or containment of the hazardous material or hazardous substance cannot be accomplished without a cessation of work.

(2) A contractor whose work is impaired, impeded, or prohibited under Subsection (1) may interrupt performance of the construction contract as provided in this section only to the extent of the area affected by the hazardous materials or hazardous substances removed or contained by the owner or as otherwise required by applicable statute or rule.

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

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

Section 6. Section 13-33-204 is enacted to read:

13-33-204. Suspension or termination of work for nonpayment -- Notice -- Costs and attorneys' fees.

(1) (a) A contractor may suspend performance under a construction contract or terminate
a construction contract for failure by the owner to make timely payment of the amount certified
and approved pursuant to Subsection 13-33-201(5).

(b) A contractor shall provide written notice to the owner at least seven calendar days
before the contractor's intended suspension or termination unless a shorter notice period is
prescribed in the construction contract between the owner and contractor. A construction contract
may not extend the time period for a contractor to suspend performance or terminate a construction
contract under this Subsection (1).

(c) The suspension of performance or termination of a construction contract pursuant to
this Subsection (1) does not constitute a breach of contract by the contractor.

(2) (a) A subcontractor may suspend performance under a construction contract or
terminate a construction contract if the owner fails to make timely payment of amounts certified
and approved pursuant to Subsection 13-33-201(5) for the subcontractor's work and the contractor
fails to pay the subcontractor for the certified and approved work.

(b) A subcontractor shall provide written notice to the contractor and owner at least three
calendar days before the subcontractor's intended suspension or termination unless a shorter notice
period is prescribed in the construction contract between the contractor and subcontractor. A
construction contract may not extend the time period for a subcontractor to suspend performance
or terminate a construction contract under this Subsection (2).

(c) The suspension of performance or termination of a subcontract pursuant to this
Subsection (2) does not constitute a breach of contract by the subcontractor.

(3) (a) A subcontractor may suspend performance under a construction contract or
terminate a construction contract if the owner makes timely payment of amounts certified and
approved pursuant to Subsection 13-33-201(5) for the subcontractor's work but the contractor fails to pay the subcontractor for the certified and approved work.

(b) A subcontractor shall provide written notice to the contractor and owner at least seven calendar days before the subcontractor's intended suspension or termination unless a shorter notice period is prescribed in the construction contract between the contractor and subcontractor. A construction contract may not extend the time period for a subcontractor to suspend performance or terminate a construction contract under this Subsection (3).

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

(4) (a) A subcontractor may suspend performance under a construction contract or terminate a construction contract if the owner declines to approve and certify portions of the contractor's billing or estimate pursuant to Subsection 13-33-201(5) for that subcontractor's work but the reasons for that failure by the owner to approve and certify are not the fault of or directly related to the subcontractor's work.

(b) A subcontractor shall provide written notice to the contractor and owner at least seven calendar days before the subcontractor's intended suspension or termination unless a shorter notice period is prescribed in the construction contract between the contractor and subcontractor. A construction contract may not extend the time period for a subcontractor to suspend performance or terminate a construction contract under this Subsection (4).

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

(5) A contractor or subcontractor that suspends performance as provided in this section is not required to furnish further labor, materials, or services until the contractor or subcontractor is paid the amount that was certified and approved, together with any costs incurred for mobilization resulting from the shutdown or start-up of a project.

(6) In any action or arbitration brought pursuant to this section, the successful party shall be awarded costs and reasonable attorneys' fees.

(7) Written notice required under this section shall be provided by:

(a) delivery of a written notice in person to the individual or a member of the entity to which it was intended; or

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

Section 7. Section 58-55-501 is amended to read:


Unlawful conduct includes:

(1) engaging in a construction trade, acting as a contractor, an alarm business or company, or an alarm company agent, or representing oneself to be engaged in a construction trade or to be acting as a contractor in a construction trade requiring licensure, unless the person doing any of these is appropriately licensed or exempted from licensure under this chapter;

(2) acting in a construction trade, as an alarm business or company, or as an alarm company agent beyond the scope of the license held;

(3) hiring or employing in any manner an unlicensed person, other than an employee for wages who is not required to be licensed under this chapter, to engage in a construction trade for which licensure is required or to act as a contractor or subcontractor in a construction trade requiring licensure;

(4) applying for or obtaining a building permit either for oneself or another when not licensed or exempted from licensure as a contractor under this chapter;

(5) issuing a building permit to any person for whom there is no evidence of a current license or exemption from licensure as a contractor under this chapter;

(6) applying for or obtaining a building permit for the benefit of or on behalf of any other person who is required to be licensed under this chapter but who is not licensed or is otherwise not entitled to obtain or receive the benefit of the building permit;

(7) failing to obtain a building permit when required by law or rule;

(8) submitting a bid for any work for which a license is required under this chapter by a person not licensed or exempted from licensure as a contractor under this chapter;

(9) willfully or deliberately misrepresenting or omitting a material fact in connection with an application to obtain or renew a license under this chapter;

(10) allowing one's license to be used by another except as provided by statute or rule;

(11) doing business under a name other than the name appearing on the license, except as permitted by statute or rule;

(12) if licensed as a specialty contractor in the electrical trade or plumbing trade, journeyman plumber, residential journeyman plumber, journeyman electrician, master electrician,
or residential electrician, failing to directly supervise an apprentice under one's supervision or exceeding the number of apprentices one is allowed to have under his supervision;

(13) if licensed as a contractor or representing oneself to be a contractor, receiving any funds in payment for a specific project from an owner or any other person, which funds are to pay for work performed or materials and services furnished for that specific project, and after receiving the funds to exercise unauthorized control over the funds by failing to pay the full amounts due and payable to persons who performed work or furnished materials or services within a reasonable period of time;

(14) employing as an alarm company an unlicensed individual as an alarm company agent, except as permitted under the exemption from licensure provisions under Section 58-1-307;

(15) if licensed as an alarm company or alarm company agent, filing with the division fingerprint cards for an applicant which are not those of the applicant, or are in any other way false or fraudulent and intended to mislead the division in its consideration of the applicant for licensure;

(16) if licensed under this chapter, willfully or deliberately disregarding or violating:

(a) the building or construction laws of this state or any political subdivision;

(b) the safety and labor laws applicable to a project;

(c) any provision of the health laws applicable to a project;

(d) the workers' compensation insurance laws of the state applicable to a project;

(e) the laws governing withholdings for employee state and federal income taxes, unemployment taxes, FICA, or other required withholdings; or

(f) reporting, notification, and filing laws of this state or the federal government;

(17) aiding or abetting any person in evading the provisions of this chapter or rules established under the authority of the division to govern this chapter; [or]

(18) engaging in the construction trade or as a contractor for the construction of residences of up to two units when not currently registered or exempt from registration as a qualified beneficiary under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act[;]

or

(19) violating the provisions of Section 13-33-202.