

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. It requires progress**
8 **payments on certain construction contracts. The act requires the owner to promptly dispute**
9 **a billing or estimate with which the owner does not agree and limits the amount that an**
10 **owner can withhold from a progress payment. The act requires prompt payment by the**
11 **owner upon completion of the work. The act provides for interest on late payments. The act**
12 **gives subcontractors the right to notification of progress payments. The act provides for the**
13 **awarding of costs and attorneys' fees. The act requires prompt payment by the contractor**
14 **to subcontractors and suppliers. The act requires the waiver of mechanics' lien rights by**
15 **contractors and subcontractors upon receipt of payment. The act provides for the**
16 **interruption of the work on a construction contract without penalty in cases of an**
17 **environmental hazard. The act provides for the interruption of work on a construction**
18 **contract or the termination of the contract in cases of nonpayment. The act provides an**
19 **effective date.**

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

21 ENACTS:

22 **13-34-101**, Utah Code Annotated 1953

23 **13-34-102**, Utah Code Annotated 1953

24 **13-34-103**, Utah Code Annotated 1953

25 **13-34-201**, Utah Code Annotated 1953



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

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

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

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

39 **Part 1. General Provisions**

40 **13-34-101. Title.**

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

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

43 **13-34-102. Definitions.**

44 As used in this chapter:

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

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

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

53 (4) "Owner" means a person holding any legal or equitable title or interest in real property
54 which is the subject of a construction contract.

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

56 (6) "Subcontractor" means any person engaged by a contractor or another subcontractor

57 to provide services, labor, or materials for the construction, installation, alteration, or repair of any
58 building, structure, or improvement to real property located in Utah.

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

60 **13-34-103. Scope of chapter.**

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

63 (2) Except as otherwise provided in Subsection (3), this chapter applies to all construction
64 contracts entered into on or after July 1, 2002.

65 (3) This chapter does not apply to a construction contract for the construction of a
66 residence.

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

68 **Part 2. Prompt Payment**

69 **13-34-201. Progress payments to contractor -- Alternate billing cycle -- Lien waivers**
70 **-- Extended payment provision.**

71 (1) An owner shall make progress payments as provided in Subsection (2) to a contractor
72 on a construction contract where the contract performance period exceeds 45 calendar days.

73 (2) (a) Progress payments shall be made on the basis of an approved billing or estimate of
74 the work performed and the materials supplied during the preceding monthly billing cycle, or an
75 alternate billing cycle as stated in the construction contract.

76 (b) If billings or estimates are to be submitted in other than monthly billing cycles, the
77 construction project bid documents shall specifically identify the alternate billing cycle in a clear
78 and conspicuous manner as required in Subsection (3).

79 (c) Except as provided in Subsection (4), the owner shall make progress payments to the
80 contractor within ten working days after the date the billing or estimate is approved by the owner
81 pursuant to Subsection 13-34-202(1).

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

86 (3) (a) A construction contract may provide for a billing cycle other than a monthly billing
87 cycle if:

88 (i) the construction project bid documents specifically establish the alternate billing cycle;
89 and

90 (ii) the notice requirements of Subsection (3)(b) are satisfied.

91 (b) Either of the following legends, or language setting forth the alternate billing cycle,
92 shall appear in a clear and conspicuous manner in the payment section of the construction project
93 bid documents:

94 (i) "Notice of alternate billing cycle"

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

98 (ii) "Notice of alternate billing cycle"

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

104 (4) An owner may make progress payments and final payment later than ten working days
105 after the date the billing or estimate is approved by the owner if:

106 (a) the construction project bid documents in a clear and conspicuous manner specifically
107 provide for payment to be made on a specified number of days after approval; and

108 (b) the following legend or language setting forth the specified number of days appears in
109 a clear and conspicuous manner in the payment section of the construction project bid documents:

110 "Notice of extended payment provision"

111 "This contract allows the owner to make payment within _____ days after approval of
112 billings and estimates."

113 (5) Notwithstanding Subsections (1) through (4), for a construction project that is
114 "design-build" or "negotiated" before the development of bid documents, the owner, contractor,
115 and subcontractor may include the alternate billing cycle and an extended payment provision in
116 the construction contract rather than in bid documents. At the stage of solicitation of bids based
117 upon written bid documents, for any part of the construction project, the requirements in this
118 section for notice of the alternate billing cycle and an extended payment provision shall apply to

119 the bidding subcontractor. The contractor or subcontractor soliciting the bids shall be solely
120 responsible for including the notice of alternate billing cycle and an extended payment revision in
121 the bid documents.

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

123 **13-34-202. Approval of billings.**

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

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

130 (i) unsatisfactory job progress;

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

132 (iii) disputed work or materials;

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

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

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

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

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

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

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

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

148 (3) An owner may extend the period within which the billing or estimate is approved if:

149 (a) the construction project bid documents in a clear and conspicuous manner specifically

150 provide for an extended time period within which a billing or estimate shall be approved, stating
151 a specified number of days after the owner has received the billing or estimate; and

152 (b) the following legend, or language setting forth the specified number of days, appears
153 in a clear and conspicuous manner in the payment section of the construction project bid
154 documents:

155 "Notice of extended certification and approval period provision"

156 "This contract allows the owner to approve billings and estimates within _____ days after
157 the billings and estimates are received from the contractor."

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

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

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

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

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

172 (6) If the owner and contractor on a construction project are a single entity, that entity shall
173 pay its subcontractors within 20 calendar days after the billing or estimate is approved by the
174 owner unless the deadlines for approval or for payment have been modified under Subsection (3)
175 or Subsection 13-34-201(4).

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

177 **13-34-203. Notice of progress payments.**

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

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

182 **13-34-204. Progress payments to subcontractor or supplier -- Waiver of liens --**

183 **Withholdings from a payment.**

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

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

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

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

202 (a) unsatisfactory job progress;

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

204 (c) disputed work or materials;

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

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

207 (f) failure of the subcontractor to make timely payments for labor, equipment, or materials;

208 (g) damage to the contractor or another subcontractor or material supplier;

209 (h) reasonable evidence that the subcontract cannot be completed for the unpaid balance
210 under the contract; or

211 (i) a reasonable amount for retention, as provided in Section 13-8-5, that does not exceed

212 the actual percentage retained by the owner.

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

214 **13-34-205. Payment entitlement -- No waiver.**

215 (1) Notwithstanding any other provision of this chapter, performance by a contractor or
216 subcontractor in accordance with the provisions of a construction contract entitles the contractor
217 or subcontractor to payment from the party with whom the contractor or subcontractor contracts
218 pursuant to the terms of the construction contract.

219 (2) This chapter shall not waive or alter any rights or claims a contractor or subcontractor
220 may have arising out of performance of work or supplying of materials pursuant to any
221 construction contract, including the right to receive prompt and timely progress payments.

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

223 **13-34-206. Interruption of work for environmental hazard -- Termination of**
224 **contract.**

225 (1) A contractor may interrupt the performance of a construction contract without penalty
226 or liability for breach of contract if:

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

228 (b) (i) the contractor encounters any hazardous substance or hazardous material which is
229 required to be removed or contained by any applicable statute or rule; and

230 (ii) (A) any applicable law or rule prohibits the contractor from proceeding to remove or
231 contain the hazardous material or hazardous substance unless the contractor is duly licensed and
232 the contractor is not so licensed; or

233 (B) the removal or containment of the hazardous material or hazardous substance cannot
234 be accomplished without a cessation of work and the situation which resulted in the cessation of
235 work under Subsection (1)(a) was not part of the scope of the work under the construction contract.

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

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

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

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

247 **13-34-207. Suspension or termination of work for nonpayment -- Notice -- Costs and**
248 **attorneys' fees.**

249 (1) (a) A contractor may suspend performance under a construction contract or terminate
250 a construction contract for failure by the owner to make timely payment of the amount approved
251 pursuant to Subsection 13-34-202(1).

252 (b) A contractor shall provide written notice to the owner at least 15 working days before
253 the contractor's intended suspension or termination unless a shorter notice period is set forth in the
254 construction contract between the owner and contractor. A construction contract may not extend
255 the time period for a contractor to suspend performance or terminate a construction contract under
256 this Subsection (1).

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

259 (2) (a) A subcontractor may suspend performance under a construction contract or
260 terminate a construction contract if the owner fails to make timely payment of amounts approved
261 pursuant to Subsection 13-34-202(1) for the subcontractor's work or materials supplied and the
262 contractor fails to pay the subcontractor for the approved work.

263 (b) (i) For the first event of failure of timely payment on the construction project, a
264 subcontractor shall provide written notice to the contractor and owner at least 15 working days
265 before the subcontractor's intended suspension or termination, unless a shorter notice period is
266 prescribed in the construction contract between the contractor and subcontractor.

267 (ii) If, after a first event of failure of timely payment followed by notice as provided in
268 Subsection (2)(b)(i), there is a subsequent failure of timely payment on the construction project,
269 the subcontractor shall provide written notice to the contractor and owner at least ten working days
270 before the subcontractor's intended suspension of termination, unless a shorter notice period is
271 prescribed in the construction contract between the contractor and the subcontractor.

272 (iii) A construction contract may not extend the time period for a subcontractor to
273 suspend performance or terminate a construction contract under this Subsection (2).

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

276 (3) (a) A subcontractor may suspend performance under a construction contract or
277 terminate a construction contract if the owner makes timely payment of amounts approved
278 pursuant to Subsection 13-34-202(1) for the subcontractor's work or materials supplied but the
279 contractor fails to pay the subcontractor or the subcontractor fails to pay its subcontractor for the
280 approved work.

281 (b) (i) For the first event of failure of timely payment on the construction project, a
282 subcontractor shall provide written notice to the contractor and owner at least 15 working days
283 before the subcontractor's intended suspension or termination, unless a shorter notice period is
284 prescribed in the construction contract between the contractor and subcontractor.

285 (ii) If, after a first event of failure of timely payment followed by notice as provided in
286 Subsection (3)(b)(i), there is a subsequent failure of timely payment on the construction project,
287 the subcontractor shall provide written notice to the contractor and owner at least ten working days
288 before the subcontractor's intended suspension of termination, unless a shorter notice period is
289 prescribed in the construction contract between the contractor and the subcontractor.

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

292 (4) (a) A subcontractor may suspend performance under a construction contract or
293 terminate a construction contract if the owner declines to approve and certify portions of the
294 contractor's billing or estimate pursuant to Subsection 13-34-202(1) for that subcontractor's work
295 or materials supplied but the reasons for that failure by the owner to approve are not the fault of,
296 or are not directly related to, the subcontractor's work or materials supplied.

297 (b) A subcontractor shall provide written notice to the contractor and owner at least ten
298 working days before the subcontractor's intended suspension or termination unless a shorter notice
299 period is prescribed in the construction contract between the contractor and subcontractor, or
300 subcontractor and subcontractor. A construction contract may not extend the time period for a
301 subcontractor to suspend performance or terminate a construction contract under this Subsection
302 (4).

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

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

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

310 **13-34-208. Written notice.**

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

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

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

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

317 **13-34-209. Costs and attorneys fees.**

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

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

321 **13-34-210. Time of payment.**

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

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

325 **13-34-211. Interest on late payments.**

326 (1) If an owner or a third party designated by an owner as the person responsible for
327 making progress payments on a construction contract does not make a timely payment pursuant
328 to this chapter, the owner shall pay the contractor interest at the rate of 1.5% per month or fraction
329 of a month on the unpaid balance, unless otherwise set forth in the construction contract between
330 the parties.

331 (2) If a periodic or final payment to a subcontractor is delayed by more than ten working
332 days after receipt of periodic or final payment by the contractor or subcontractor with whom it has
333 the contract, the contractor or subcontractor, as the case may be, shall pay its subcontractor interest,
334 except for periods of time during which payment is withheld pursuant to Subsection 13-34-204(2),
335 at the rate of 1.5% per month or a fraction of a month on the unpaid balance, unless otherwise set

336 forth in the construction contract between the parties.

337 Section 15. **Effective date.**

338 This act takes effect on July 1, 2002.