

1 **CONSTRUCTION PAYMENT AMENDMENTS**

2 2009 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Curtis S. Bramble**

5 House Sponsor: Kevin S. Garn

7 **LONG TITLE**

8 **General Description:**

9 This bill amends the portion of the Utah Code relating to mechanic's liens by changing
10 notification requirements.

11 **Highlighted Provisions:**

12 This bill:

- 13 ▶ requires an owner and a lender to file a notice of completion with the State
14 Construction Registry;
- 15 ▶ requires certain owners or contractors of a commercial nonresidential construction
16 project to file a notice of intent to file a notice of completion with the State
17 Construction Registry;
- 18 ▶ requires a person to file a balance statement with the State Construction Registry;
- 19 ▶ allows a person to make a demand for adequate assurance;
- 20 ▶ creates a civil action for failure to provide adequate assurance;
- 21 ▶ creates a civil action if a person makes a bad faith misrepresentation on the person's
22 balance statement; and
- 23 ▶ makes technical corrections.

24 **Monies Appropriated in this Bill:**

25 None

26 **Other Special Clauses:**

27 This bill takes effect on October 1, 2009.

28 **Utah Code Sections Affected:**

29 AMENDS:

30 38-1-27, as last amended by Laws of Utah 2008, Chapter 382

31 38-1-33, as last amended by Laws of Utah 2007, Chapter 332

32 ENACTS:

33 38-1-40, Utah Code Annotated 1953



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

36 Section 1. Section 38-1-27 is amended to read:

37 **38-1-27. State Construction Registry -- Form and contents of notice of**
38 **commencement, preliminary notice, and notice of completion.**

39 (1) As used in this section [~~and~~], Sections 38-1-30 through 38-1-37, and Section
40 38-1-40:

41 (a) "Alternate filing" means a legible and complete filing made in a manner
42 established by the division under Subsection (2)(e) other than an electronic filing.

43 (b) "Cancel" means to indicate that a filing is no longer given effect.

44 (c) "Construction project," "project," or "improvement" means all labor, equipment,
45 and materials provided:

46 (i) under an original contract; or

47 (ii) by, or under contracts with, an owner-builder.

48 (d) "Database" means the State Construction Registry created in this section.

49 (e) (i) "Designated agent" means the third party the Division of Occupational and
50 Professional Licensing contracts with to create and maintain the State Construction Registry.

51 (ii) The designated agent is not an agency, instrumentality, or a political subdivision
52 of the state.

53 (f) "Division" means the Division of Occupational and Professional Licensing.

54 (g) "Interested person" means a person who may be affected by a construction project.

55 (h) "Program" means the State Construction Registry Program created in this section.

56 (2) Subject to receiving adequate funding through a legislative appropriation and
57 contracting with an approved third party vendor who meets the requirements of Sections

58 38-1-30 through 38-1-37, there is created the State Construction Registry Program that shall:

59 (a) (i) assist in protecting public health, safety, and welfare; and

60 (ii) promote a fair working environment;

61 (b) be overseen by the division with the assistance of the designated agent;

62 (c) provide a central repository for notices of commencement, preliminary notices, and

63 notices of completion filed in connection with all privately owned construction projects as well

64 as all state and local government owned construction projects throughout Utah;

65 (d) be accessible for filing and review by way of the program Internet website of:

66 (i) notices of commencement;

67 (ii) preliminary notices; ~~and~~

68 (iii) a notice of intent to file notice of final completion;

69 (iv) a notice for remaining amounts due to complete the contract; and

70 ~~(iii)~~ (v) notices of completion;

71 (e) accommodate:

72 (i) electronic filing of the notices described in Subsection (2)(d); and

73 (ii) alternate filing of the notices described in Subsection (2)(d) by U.S. mail, telefax,

74 or any other alternate method as provided by rule made by the division in accordance with

75 Title 63G, Chapter 3, Utah Administrative Rulemaking Act;

76 (f) (i) provide electronic notification for up to three e-mail addresses for each

77 interested person or company who requests notice from the construction notice registry; and

78 (ii) provide alternate means of notification for a person who makes an alternate filing,

79 including U.S. mail, telefax, or any other method as prescribed by rule made by the division in

80 accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act; and

81 (g) provide hard-copy printing of electronic receipts for an individual filing

82 evidencing the date and time of the individual filing and the content of the individual filing.

83 (3) (a) The designated agent shall provide notice of all other filings for a project to any

84 person who files a notice of commencement, preliminary notice, or notice of completion for

85 that project, unless the person:

86 (i) requests that the person not receive notice of other filings; or
87 (ii) does not provide the designated agent with the person's contact information in a
88 manner that adequately informs the designated agent.

89 (b) An interested person may request notice of filings related to a project.

90 (c) The database shall be indexed by:

91 (i) owner name;

92 (ii) original contractor name;

93 (iii) subdivision, development, or other project name, if any;

94 (iv) project address;

95 (v) lot or parcel number;

96 (vi) unique project number assigned by the designated agent; and

97 (vii) any other identifier that the division considers reasonably appropriate in
98 collaboration with the designated agent.

99 (4) (a) In accordance with the process required by Section 63J-1-303, the division
100 shall establish the fees for:

101 (i) a notice of commencement;

102 (ii) a preliminary notice;

103 (iii) a notice of intent to file notice of final completion;

104 (iv) a notice for remaining amounts due to complete the contract;

105 [~~(iii)~~] (v) a notice of completion;

106 [~~(iv)~~] (vi) a request for notice;

107 [~~(v)~~] (vii) providing a required notice by an alternate method of delivery;

108 [~~(vi)~~] (viii) a duplicate receipt of a filing; and

109 [~~(vii)~~] (ix) account setup for a person who wishes to be billed periodically for filings
110 with the database.

111 (b) The fees allowed under Subsection (4)(a) may not exceed the amount reasonably
112 necessary to create and maintain the database.

113 (c) The fees established by the division may vary by method of filing if one form of

114 filing is more costly to process than another form of filing.

115 (d) The division may provide by contract that the designated agent may retain all fees
116 collected by the designated agent except that the designated agent shall remit to the division
117 the cost of the division's oversight under Subsection (2)(b).

118 (5) (a) The database is classified as a public record under Title 63G, Chapter 2,
119 Government Records Access and Management Act, unless otherwise classified by the division.

120 (b) A request for information submitted to the designated agent is not subject to Title
121 63G, Chapter 2, Government Records Access and Management Act.

122 (c) Information contained in a public record contained in the database shall be
123 requested from the designated agent.

124 (d) The designated agent may charge a commercially reasonable fee allowed by the
125 designated agent's contract with the division for providing information under Subsection
126 (5)(c).

127 (e) Notwithstanding Title 63G, Chapter 2, Government Records Access and
128 Management Act, if information is available in a public record contained in the database, a
129 person may not request the information from the division.

130 (f) (i) A person may request information that is not a public record contained in the
131 database from the division in accordance with Title 63G, Chapter 2, Government Records
132 Access and Management Act.

133 (ii) The division shall inform the designated agent of how to direct inquiries made to
134 the designated agent for information that is not a public record contained in the database.

135 (6) The following are not an adjudicative proceeding under Title 63G, Chapter 4,
136 Administrative Procedures Act:

137 (a) the filing of a notice permitted by this chapter;

138 (b) the rejection of a filing permitted by this chapter; or

139 (c) other action by the designated agent in connection with a filing of any notice
140 permitted by this chapter.

141 (7) The division and the designated agent need not determine the timeliness of any

142 notice before filing the notice in the database.

143 (8) (a) A person who is delinquent on the payment of a fee established under
144 Subsection (4) may not file a notice with the database.

145 (b) A determination that a person is delinquent on the payment of a fee for filing
146 established under Subsection (4) shall be made in accordance with Title 63G, Chapter 4,
147 Administrative Procedures Act.

148 (c) Any order issued in a proceeding described in Subsection (8)(b) may prescribe the
149 method of that person's payment of fees for filing notices with the database after issuance of
150 the order.

151 (9) If a notice is filed by a third party on behalf of another, the notice is considered to
152 be filed by the person on whose behalf the notice is filed.

153 (10) A person filing a notice of commencement, preliminary notice, or notice of
154 completion is responsible for verifying the accuracy of information entered into the database,
155 whether the person files electronically or by alternate or third party filing.

156 Section 2. Section **38-1-33** is amended to read:

157 **38-1-33. Notice of completion.**

158 [~~(1) (a) Upon final completion of a construction project;~~]

159 [~~(i) an owner of a construction project or an original contractor may file a notice of
160 completion with the database; and]~~

161 [~~(ii) a lender that has provided financing for the construction project, a surety that has
162 provided bonding for the construction project, or a title company issuing a title insurance
163 policy on the construction project, may file a notice of completion.]~~

164 (1) (a) Upon final completion of a construction project, and in accordance with
165 Section 38-1-40, the following with a construction project registered with the database may
166 file a notice of completion with the database:

167 (i) an owner of the construction project;

168 (ii) an original contractor of the construction project;

169 (iii) a lender that has provided financing for the construction project;

170 (iv) a surety that has provided bonding for the construction project;
171 (v) a title company issuing a title insurance policy on the construction project;
172 (vi) a lender that has provided financing for the construction project;
173 (vii) a surety that has provided bonding for the construction project; or
174 (viii) a title company issuing a title insurance policy on the construction project.
175 (b) Notwithstanding Section 38-1-2, if a subcontractor performs substantial work after
176 the applicable dates established by ~~[Subsections]~~ Subsection (1)(a)~~[(i) and (ii)]~~, that
177 subcontractor's subcontract is considered an original contract for the sole purpose of
178 determining:
179 (i) the subcontractor's time frame to file a notice to hold and claim a lien under
180 Subsection 38-1-7(1); and
181 (ii) the original contractor's time frame to file a notice to hold and claim a lien under
182 Subsection 38-1-7(1) for that subcontractor's work.
183 (c) A notice of completion shall include:
184 (i) the building permit number for the project, or the number assigned to the project by
185 the designated agent;
186 (ii) the name, address, and telephone number of the person filing the notice of
187 completion;
188 (iii) the name of the original contractor for the project;
189 (iv) the address of the project or a description of the location of the project;
190 (v) the date on which final completion is alleged to have occurred; and
191 (vi) the method used to determine final completion.
192 (d) For purposes of this section, final completion of the original contract does not
193 occur if work remains to be completed for which the owner is holding payment to ensure
194 completion of the work.
195 (e) (i) Unless a person indicates to the division or designated agent that the person
196 does not wish to receive a notice under this section, electronic notification of the filing of a
197 notice of completion or alternate notice as prescribed in Subsection (1)(a), shall be provided

198 to:

199 (A) each person that filed a notice of commencement for the project;

200 (B) each person that filed preliminary notice for the project; and

201 (C) all interested persons who have requested notices concerning the project.

202 (ii) A person to whom notice is required under this Subsection (1)(e) is responsible

203 for:

204 (A) providing an e-mail address, mailing address, or telefax number to which a notice
205 required by this Subsection (1)(e) is to be sent; and

206 (B) the accuracy of any e-mail address, mailing address, or telefax number to which
207 notice is to be sent.

208 (iii) The designated agent fulfills the notice requirement of Subsection (1)(e)(i) when
209 it sends the notice to the e-mail address, mailing address, or telefax number provided to the
210 designated agent, whether or not the notice is actually received.

211 (iv) Upon the filing of a notice of completion, the time periods for filing preliminary
212 notices stated in Section 38-1-27 are modified such that all preliminary notices shall be filed
213 subsequent to the notice of completion and within ten days from the day on which the notice
214 of completion is filed.

215 (f) A subcontract that is considered an original contract for purposes of this section
216 does not create a requirement for an additional preliminary notice if a preliminary notice has
217 already been given for the labor, service, equipment, and material furnished to the
218 subcontractor who performs substantial work.

219 (2) (a) If a construction project owner, original contractor, subcontractor, or other
220 interested person believes that a notice of completion has been filed erroneously, that owner,
221 original contractor, subcontractor, or other interested person can request from the person who
222 filed the notice of completion evidence establishing the validity of the notice of completion.

223 (b) Within ten days after the request described in Subsection (2)(a), the person who
224 filed the notice of completion shall provide the requesting person proof that the notice of
225 completion is valid.

226 (c) If the person that filed the notice of completion does not provide proof of the
227 validity of the notice of completion, that person shall immediately cancel the notice of
228 completion from the database in any manner prescribed by the division pursuant to rule.

229 (3) A person filing a notice of completion by alternate filing is responsible for
230 verifying and changing any incorrect information in the notice of completion before the
231 expiration of the time period during which the notice is required to be filed.

232 Section 3. Section **38-1-40** is enacted to read:

233 **38-1-40. Notice of intent to file notice of final completion.**

234 (1) An owner, as defined in Section 14-2-1, and of a construction project that is
235 registered with the database who intends to file a notice of completion in accordance with the
236 provisions of Section 38-1-33(1)(a), or a contractor of a commercial nonresidential
237 construction project that is registered with the database who intends to file a notice of
238 completion in accordance with the provisions of Section 38-1-33(1)(a), shall first file a notice
239 of intent to file a notice of completion with the database in accordance with the provisions of
240 Section 38-1-40 if:

241 (a) the completion of performance time under the original contract is greater than 120
242 days;

243 (b) the total original construction contract price exceeds \$500,000; and

244 (c) the contractor or owner has not obtained a payment bond in accordance with
245 Section 14-2-1.

246 (2) The notice of intent described in Subsection (1) shall be filed at least 45 days
247 before the day on which the owner or contractor of a commercial nonresidential construction
248 project files or could have filed a notice of completion under Section 38-1-33.

249 (3) A person supplying labor, materials, or services to an owner, a contractor, or
250 subcontractor who files a notice of intent in accordance with Subsection (1) shall file an
251 amendment to the person's preliminary notice previously filed by the person as required in
252 Section 38-1-32:

253 (a) that includes:

254 (i) a good faith estimate of the total amount remaining due to complete the contract,
255 purchase order, or agreement relating to the person's approved labor, approved materials, and
256 approved services;

257 (ii) the identification of each contractor or subcontractor with whom the person has a
258 contract or contracts for supplying project labor, materials, or services; and

259 (iii) a separate statement of all known amounts or categories of work in dispute; and

260 (b) no later than 20 days after the day on which the owner or contractor files a notice
261 of intent.

262 (4) (a) A person identified in accordance with Subsection (3)(a)(i) who has complied
263 with, or is exempt from, the provisions of Section 38-1-22, may demand a statement of
264 adequate assurance from the owner, contractor, or subcontractor with whom the person has
265 privity of contract no later than ten days after the day on which the person files a balance
266 statement in accordance with Subsection (3) from an owner, contractor, or subcontractor who
267 is in privity of contract with the person.

268 (b) A demand for adequate assurance as described in Subsection (4)(a) may include a
269 request for a statement from the owner, contractor, or subcontractor that the owner, contractor,
270 or subcontractor has sufficient funds dedicated and available to pay for all sums due to the
271 person filing for the adequate assurances or that will become due in order to complete a
272 construction project.

273 (c) A person who demands adequate assurance under Subsection (4)(a) shall deliver
274 copies of the demand to the owner and contractor:

275 (i) by hand delivery with a responsible party's acknowledgment of receipt;

276 (ii) by certified mail with a return receipt; or

277 (iii) as provided under Rule 4, Utah Rules of Civil Procedure.

278 (5) (a) A person identified in accordance with Subsection (3)(a)(i) who has complied
279 with, or is exempt from, the provisions of Section 38-1-32 may bring a legal action against a
280 party with whom the person is in privity of contract, including a request for injunctive or
281 declaratory relief, to determine the adequacy of an owner's, with whom the demanding person

282 contracted, contractor's, with whom the demanding person contracted, or subcontractor's, with
283 whom the demanding person contracted, funds if, after the person demands adequate
284 assurance in accordance with the requirements of this section:

285 (i) the owner, contractor, or subcontractor fails to provide adequate assurance that the
286 owner, contractor, or subcontractor has sufficient available funds, or access to financing or
287 other sufficient available funds, to pay for the completion of the demanding person's approved
288 work on the construction project; or

289 (ii) the parties disagree, in good faith, as to whether there are adequate funds, or
290 access to financing or other sufficient available funds, to pay for the completion of the
291 demanding person's approved work on the construction project.

292 (b) If a court finds that an owner, contractor, or subcontractor has failed to provide
293 adequate assurance in accordance with Subsection (4)(a), the court may require the owner,
294 contractor, or subcontractor to post adequate security with the court sufficient to assure timely
295 payment of the remaining contract balance for the approved work of the person seeking
296 adequate assurance, including:

297 (i) cash;

298 (ii) a bond;

299 (iii) an irrevocable letter of credit;

300 (iv) property;

301 (v) financing; or

302 (vi) another form of security approved by the court.

303 (6) (a) A person is subject to the civil penalty described in Subsection (6)(b), if the
304 person files a balance statement described in Subsection (3):

305 (i) that misrepresents the amount due under the contract; and

306 (ii) with the intent to:

307 (A) charge an owner, contractor, or subcontractor more than the actual amount due; or

308 (B) procure any other unfair advantage or benefit on the person's behalf.

309 (b) The civil penalty described in Subsection (6)(a) is the greater of:

310 (i) twice the amount by which the balance statement filed under Subsection (3)
311 exceeds the amount actually remaining due under the contract for completion of construction;
312 or

313 (ii) the actual damages incurred by the owner, contractor, or subcontractor.

314 (7) A court shall award reasonable attorney fees to a prevailing party for an action
315 brought under this section.

316 (8) Failure to comply with the requirements established in this section does not affect
317 any other requirement or right under this chapter.

318 (9) A person who has not complied with, or is not exempt from, the provisions of
319 Section 38-1-32 may not be entitled to a right or a remedy provided in this section.

320 (10) This section does not create a cause of action against a person with whom the
321 demanding party is not in privity of contract.

322 **Section 4. Effective date.**

323 This bill takes effect on October 1, 2009.