

Representative Kevin S. Garn proposes the following substitute bill:

CONSTRUCTION PAYMENT AMENDMENTS

2009 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Curtis S. Bramble

House Sponsor: Kevin S. Garn

LONG TITLE

General Description:

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

Highlighted Provisions:

This bill:

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

Monies Appropriated in this Bill:

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 established
42 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 of
52 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 Title
75 63G, Chapter 3, Utah Administrative Rulemaking Act;

76 (f) (i) provide electronic notification for up to three e-mail addresses for each interested
77 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 evidencing
82 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 shall
100 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 the
117 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 (5)(c).

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

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

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

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

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

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

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

140 (7) The division and the designated agent need not determine the timeliness of any
141 notice before filing the notice in the database.

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

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

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

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

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

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

156 **38-1-33. Notice of completion.**

157 (1) (a) Upon final completion of a construction project and in accordance with Section
158 38-1-40:

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

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~~] shall file a notice of completion.

164 (b) Notwithstanding Section 38-1-2, if a subcontractor performs substantial work after
165 the applicable dates established by Subsections (1)(a)(i) and (ii), that subcontractor's
166 subcontract is considered an original contract for the sole purpose of determining:

167 (i) the subcontractor's time frame to file a notice to hold and claim a lien under
168 Subsection 38-1-7(1); and

169 (ii) the original contractor's time frame to file a notice to hold and claim a lien under
170 Subsection 38-1-7(1) for that subcontractor's work.

171 (c) A notice of completion shall include:

172 (i) the building permit number for the project, or the number assigned to the project by
173 the designated agent;

174 (ii) the name, address, and telephone number of the person filing the notice of
175 completion;

176 (iii) the name of the original contractor for the project;

177 (iv) the address of the project or a description of the location of the project;

178 (v) the date on which final completion is alleged to have occurred; and

179 (vi) the method used to determine final completion.

180 (d) For purposes of this section, final completion of the original contract does not occur

181 if work remains to be completed for which the owner is holding payment to ensure completion
182 of the work.

183 (e) (i) Unless a person indicates to the division or designated agent that the person does
184 not wish to receive a notice under this section, electronic notification of the filing of a notice of
185 completion or alternate notice as prescribed in Subsection (1)(a), shall be provided to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

219 **38-1-40. Notice of intent to file notice of final completion.**

220 (1) An owner, as defined in Section 14-2-1, or a contractor of a commercial
221 nonresidential construction project shall file a notice of intent to file a notice of completion
222 with the database in accordance with the provisions of Section 38-1-33 if:

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

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

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

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

230 (3) A person supplying labor, materials, or services to a contractor or owner who files a
231 notice of intent in accordance with Subsection (1) shall file a balance statement with the
232 database:

233 (a) that includes:

234 (i) the total amount remaining due to complete the contract, purchase order, or
235 agreement relating to the person's labor, materials, and services;

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

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

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

241 (4) (a) A person described in Subsection (3) may demand a statement of adequate
242 assurance no later than ten days after the day on which the person files a balance statement in

243 accordance with Subsection (3) from an owner, contractor, or subcontractor who is in privity of
244 contract with the person.

245 (b) A demand for adequate assurance as described in Subsection (4)(a) may include a
246 request for a statement from the owner, contractor, or subcontractor that the owner, contractor,
247 or subcontractor has sufficient funds dedicated and available to pay for all sums due or that will
248 become due in order to complete a construction project.

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

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

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

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

254 (5) (a) A person may bring a legal action, including a request for injunctive or
255 declaratory relief, to determine the adequacy of an owner's, contractor's, or subcontractor's
256 funds if, after the person demands adequate assurance in accordance with the requirements of
257 this section:

258 (i) the owner, contractor, or subcontractor fails to provide adequate assurance that the
259 owner or contractor has sufficient available funds to pay for the completion of the construction
260 project; or

261 (ii) the parties disagree as to whether there are adequate funds to pay for the
262 completion of the construction project.

263 (b) If a court finds that an owner, contractor, or subcontractor has failed to provide
264 adequate assurance in accordance with Subsection (4)(a), the court may require the owner,
265 contractor, or subcontractor to post adequate security with the court sufficient to assure timely
266 payment of the remaining contract balance claimed by the person seeking adequate assurance
267 for completion of the construction project, including:

268 (i) cash;

269 (ii) a bond;

270 (iii) an irrevocable letter of credit;

271 (iv) property; or

272 (v) another form of security approved by the court.

273 (6) (a) A person is subject to the civil penalty described in Subsection (6)(b), if the

274 person files a balance statement described in Subsection (3):
275 (i) that misrepresents the amount due under the contract; and
276 (ii) with the intent to:
277 (A) charge an owner, contractor, or subcontractor more than the actual amount due; or
278 (B) procure any other unfair advantage or benefit on the person's behalf.
279 (b) The civil penalty described in Subsection (6)(a) is the greater of:
280 (i) twice the amount by which the balance statement filed under Subsection (3) exceeds
281 the amount actually remaining due under the contract for completion of construction; or
282 (ii) the actual damages incurred by the owner, contractor, or subcontractor.
283 (7) A court shall award reasonable attorney fees to a prevailing party for an action
284 brought under this section.
285 (8) Failure to file a notice of intent to file a notice of final completion in accordance
286 with this section does not affect any other right under this chapter.
287 **Section 4. Effective date.**
288 This bill takes effect on October 1, 2009.