

Representative Michael T. Morley 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;~~]

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

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

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

- 166 (i) an owner of the construction project;
- 167 (ii) an original contractor of the construction project;
- 168 (iii) a lender that has provided financing for the construction project;
- 169 (iv) a surety that has provided bonding for the construction project;
- 170 (v) a title company issuing a title insurance policy on the construction project;
- 171 (vi) a lender that has provided financing for the construction project;
- 172 (vii) a surety that has provided bonding for the construction project; or
- 173 (viii) a title company issuing a title insurance policy on the construction project.

174 (b) Notwithstanding Section 38-1-2, if a subcontractor performs substantial work after
175 the applicable dates established by [~~Subsections~~] Subsection (1)(a)[~~(i) and (ii)~~], that
176 subcontractor's subcontract is considered an original contract for the sole purpose of
177 determining:

- 178 (i) the subcontractor's time frame to file a notice to hold and claim a lien under
179 Subsection 38-1-7(1); and
- 180 (ii) the original contractor's time frame to file a notice to hold and claim a lien under

181 Subsection 38-1-7(1) for that subcontractor's work.

182 (c) A notice of completion shall include:

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

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

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

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

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

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

191 (d) For purposes of this section, final completion of the original contract does not occur
192 if work remains to be completed for which the owner is holding payment to ensure completion
193 of the work.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

230 **38-1-40. Notice of intent to file notice of final completion.**

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

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

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

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

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

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

250 (a) that includes:

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

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

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

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

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

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

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

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

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

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

275 (5) (a) A person identified in accordance with Subsection (3)(a)(i) who has complied
276 with, or is exempt from, the provisions of Section 38-1-32 may bring a legal action against a
277 party with whom the person is in privity of contract, including a request for injunctive or
278 declaratory relief, to determine the adequacy of an owner's, with whom the demanding person
279 contracted, contractor's, with whom the demanding person contracted, or subcontractor's, with
280 whom the demanding person contracted, funds if, after the person demands adequate assurance
281 in accordance with the requirements of this section:

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

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

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

294 (i) cash;

295 (ii) a bond;

296 (iii) an irrevocable letter of credit;

297 (iv) property;

298 (v) financing; or

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

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

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

303 (ii) with the intent to:

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

- 305 (B) procure any other unfair advantage or benefit on the person's behalf.
306 (b) The civil penalty described in Subsection (6)(a) is the greater of:
307 (i) twice the amount by which the balance statement filed under Subsection (3) exceeds
308 the amount actually remaining due under the contract for completion of construction; or
309 (ii) the actual damages incurred by the owner, contractor, or subcontractor.
310 (7) A court shall award reasonable attorney fees to a prevailing party for an action
311 brought under this section.
312 (8) Failure to comply with the requirements established in this section does not affect
313 any other requirement or right under this chapter.
314 (9) A person who has not complied with, or is not exempt from, the provisions of
315 Section 38-1-32 may not be entitled to a right or a remedy provided in this section.
316 (10) This section does not create a cause of action against a person with whom the
317 demanding party is not in privity of contract.
318 Section 4. **Effective date.**
319 This bill takes effect on October 1, 2009.

S.B. 230 2nd Sub. (Salmon) - Construction Payment Amendments

Fiscal Note

2009 General Session
State of Utah

State Impact

Enactment of this bill will require a one-time appropriation from the Commerce Service Fund of \$50,000 in FY 2010. This will reduce the transfer to the General Fund by \$50,000.

	<u>2009</u> <u>Approp.</u>	<u>2010</u> <u>Approp.</u>	<u>2011</u> <u>Approp.</u>	<u>2009</u> <u>Revenue</u>	<u>2010</u> <u>Revenue</u>	<u>2011</u> <u>Revenue</u>
General Fund, One-Time	\$0	\$0	\$0	\$0	(\$50,000)	\$0
Commerce Service, One-time	\$0	\$50,000	\$0	\$0	\$0	\$0
Total	\$0	\$50,000	\$0	\$0	(\$50,000)	\$0

Individual, Business and/or Local Impact

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals. Local governments and businesses may be impacted due to the proposed changes in the statute.