

1 **CONSTRUCTION AMENDMENTS**

2 2012 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Michael T. Morley**

5 Senate Sponsor: Wayne L. Niederhauser

7 **LONG TITLE**

8 **General Description:**

9 This bill amends provisions of the Utah Code relating to construction contract terms,
10 bond claims, and lien claims.

11 **Highlighted Provisions:**

12 This bill:

- 13 ▶ defines terms;
- 14 ▶ provides that, unless otherwise specified by contract, the interest rate applicable to a
15 lien or bond claim is the statutory rate of 10% per annum;
- 16 ▶ provides that the following are not exempt from providing preliminary notice of a
17 payment bond claim or a lien:
 - 18 • a temporary labor service company;
 - 19 • a professional employer company or organization; or
 - 20 • any other entity that provides labor;
- 21 ▶ requires a construction contract to contain a differing site conditions clause; and
- 22 ▶ provides that a design-build construction project contract may include provision by
23 the contractor of operations, maintenance, or financing; and
- 24 ▶ makes technical changes.

25 **Money Appropriated in this Bill:**

26 None

27 **Other Special Clauses:**

28 None

29 **Utah Code Sections Affected:**

30 AMENDS:

31 **14-1-19**, as enacted by Laws of Utah 1987, Chapter 218

32 **14-1-20**, as last amended by Laws of Utah 2011, Chapter 299

33 **14-2-1**, as last amended by Laws of Utah 2004, Chapter 111

34 **14-2-2**, as last amended by Laws of Utah 2004, Chapter 111

35 **14-2-5**, as last amended by Laws of Utah 2011, Chapter 299

36 **38-1-32.5**, as enacted by Laws of Utah 2011, Chapter 299

37 **63G-6-501**, as renumbered and amended by Laws of Utah 2008, Chapter 382

38 **63G-6-502**, as last amended by Laws of Utah 2010, Chapter 358

39 **63G-6-506**, as last amended by Laws of Utah 2011, Chapter 299

40 **63G-6-601**, as renumbered and amended by Laws of Utah 2008, Chapter 382

41 ENACTS:

42 **38-1-41**, Utah Code Annotated 1953

43 **53A-20-109**, Utah Code Annotated 1953

44 **63G-6-506.5**, Utah Code Annotated 1953

45 **Uncodified Material Affected:**

46 ENACTS UNCODIFIED MATERIAL



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

49 Section 1. Section **14-1-19** is amended to read:

50 **14-1-19. Failure of government entity to obtain payment bond -- Right of action**

51 **-- Notice.**

52 (1) If the state or a political subdivision fails to obtain a payment bond, it shall, upon
53 demand by a person who has furnished labor or supplied materials to the contractor or
54 subcontractor for the work provided for in a contract which is subject to Section 14-1-18,
55 promptly make payment to that person. [~~That person~~]

56 (2) A person described in Subsection (1):

57 (a) shall have a direct right of action against the state or the political subdivision in any

58 court having jurisdiction in any county in which the contract was to be performed, upon giving
59 written notice to the state or political subdivision within 90 days from the date on which such
60 person performed the last of the labor or supplied the last of the material for which claim is
61 made~~[- The person];~~

62 (b) shall state in the notice a designation of the construction project and its location, the
63 amount claimed, and the name of the party for whom the labor was performed or to whom the
64 material was supplied~~[- The notice shall be served];~~ and

65 (c) shall serve the notice by registered or certified mail, postage prepaid, on the state
66 agency or political subdivision that is a party to the contract. ~~[No such action may be~~
67 ~~commenced after the expiration of]~~

68 (3) An action described in this section may not be commenced later than one year after
69 the day on which the last of the labor was performed or material was supplied by ~~[such]~~ the
70 person bringing the action.

71 (4) Unless otherwise specified in a lawful contract between the state or the political
72 subdivision against which the claim is made and the person demanding payment, the interest
73 rate applicable to the payment or claim is the rate described in Subsection 15-1-1(2).

74 Section 2. Section **14-1-20** is amended to read:

75 **14-1-20. Preliminary notice requirement.**

76 (1) Any person furnishing labor, service, equipment, or material for which a payment
77 bond claim may be made under this chapter shall provide preliminary notice to the designated
78 agent as prescribed by Section 38-1-32.5, except that this section does not apply:

79 (a) to ~~[a person]~~ an individual performing labor for wages; or

80 (b) if a notice of commencement is not filed as prescribed in Section 38-1-31.5 for the
81 project or improvement for which labor, service, equipment, or material is furnished.

82 (2) Any person who fails to provide the preliminary notice required by Subsection (1)
83 may not make a payment bond claim under this chapter.

84 (3) The preliminary notice required by Subsection (1) shall be provided prior to
85 commencement of any action on the payment bond.

86 (4) Subsection (1)(a) does not exempt the following from complying with the
87 requirements of this section:

88 (a) a temporary labor service company or organization;

89 (b) a professional employer company or organization; or

90 (c) any other entity that provides labor.

91 Section 3. Section **14-2-1** is amended to read:

92 **14-2-1. Definitions -- Payment bond required -- Right of action -- Attorney fees.**

93 (1) For purposes of this chapter:

94 (a) "Commercial contract" means a contract for the construction, alteration, or repair of
95 the following if it is not residential construction:

96 (i) a building;

97 (ii) a structure; or

98 (iii) an improvement upon land that is not associated with a single family detached
99 housing.

100 (b) "Contractor" means any person who is or may be awarded an original commercial
101 contract for the construction, alteration, or repair of any building, structure, or improvement
102 upon land.

103 (c) "Owner" means any person contracting with the original contractor for construction,
104 alteration, or repair of the following if it is not residential construction:

105 (i) a building;

106 (ii) a structure; or

107 (iii) an improvement upon land.

108 (d) (i) "Residential construction" means the construction, alteration, or repair of:

109 (A) single family detached housing; or

110 (B) multifamily attached housing up to and including a fourplex.

111 (ii) "Residential construction" includes rental housing.

112 (2) Before any original commercial contract exceeding \$50,000 in amount for the
113 construction, alteration, or repair of any building, structure, or improvement upon land is

114 awarded to any contractor, the owner shall obtain from the contractor a payment bond:
115 (a) complying with Subsection (3); and
116 (b) that becomes binding upon the award of the original commercial contract to the
117 contractor.
118 (3) The payment bond shall be:
119 (a) with a surety or sureties satisfactory to the owner for the protection of all persons
120 supplying labor, services, equipment, or material in the prosecution of the work provided for in
121 the commercial contract; and
122 (b) in a sum equal to the original commercial contract price.
123 (4) A person shall have a right of action on a payment bond under this chapter for any
124 unpaid amount due that person if that person:
125 (a) has furnished labor, services, equipment, or material in the prosecution of the work
126 provided for in the commercial contract for which the payment bond is furnished under this
127 chapter; and
128 (b) has not been paid in full within 90 days after the last day on which that person:
129 (i) performed the labor or service for which a claim is made; or
130 (ii) supplied the equipment or material for which the claim is made.
131 (5) (a) An action under this section shall be brought in a court of competent jurisdiction
132 in the county where the commercial contract was to be performed and not elsewhere.
133 (b) An action under this section is barred if not commenced within one year after the
134 last day on which the claimant:
135 (i) performed the labor or service on which the claim is based; or
136 (ii) supplied the equipment or material on which the claim is based.
137 (c) The obligee named in the payment bond need not be joined as a party to an action
138 under this section.
139 (d) In any action upon a payment bond under this section, the court may award
140 reasonable ~~[attorneys']~~ attorney fees to the prevailing party, which ~~[attorneys']~~ attorney fees
141 shall be taxed as costs in the action.

142 (6) The payment bond shall be exhibited to any interested person upon request.

143 (7) In any suit upon a payment bond under this chapter, the court shall award
144 reasonable [~~attorneys'~~] attorney fees to the prevailing party.

145 (8) Unless otherwise specified in a lawful contract between the owner and the person
146 making a claim under this section, the interest rate applicable to the claim is the rate described
147 in Subsection 15-1-1(2).

148 Section 4. Section **14-2-2** is amended to read:

149 **14-2-2. Failure of owner to obtain payment bond -- Liability.**

150 (1) An owner who fails to obtain a payment bond required under Section 14-2-1 is
151 liable to each person who performed labor or service or supplied equipment or materials under
152 the commercial contract for the reasonable value of the labor or service performed or the
153 equipment or materials furnished up to but not exceeding the commercial contract price.

154 (2) An action to recover on the liability described in Subsection (1) may not be
155 commenced [~~after the expiration of~~] later than one year after the day on which:

- 156 (a) the last of the labor or service was performed; or
- 157 (b) the equipment or material was supplied by the person.

158 (3) In an action for failure to obtain a bond, the court shall award reasonable
159 [~~attorneys'~~] attorney fees to the prevailing party. These [~~attorneys'~~] attorney fees shall be taxed
160 as costs in the action.

161 Section 5. Section **14-2-5** is amended to read:

162 **14-2-5. Preliminary notice requirement.**

163 (1) Any person furnishing labor, service, equipment, or material for which a payment
164 bond claim may be made under this chapter shall provide preliminary notice to the designated
165 agent as prescribed by Section 38-1-32, except that this section does not apply to [~~a person~~] an
166 individual performing labor for wages.

167 (2) Any person who fails to provide the preliminary notice required by Subsection (1)
168 may not make a payment bond claim under this chapter.

169 (3) The preliminary notice required by Subsection (1) shall be provided prior to

170 commencement of any action on the payment bond.

171 (4) Subsection (1) does not exempt the following from complying with the
172 requirements of this section:

173 (a) a temporary labor service company or organization;

174 (b) a professional employer company or organization; or

175 (c) any other entity that provides labor.

176 Section 6. Section **38-1-32.5** is amended to read:

177 **38-1-32.5. Preliminary notice on government project.**

178 (1) (a) Except for a person who has a contract with an owner or an owner-builder or a
179 laborer compensated with wages, a subcontractor on a government project shall file a
180 preliminary notice with the database by the later of:

181 ~~[(a)]~~ (i) 20 days after the subcontractor commences the subcontractor's own work or
182 commences furnishing labor, service, equipment, or material to the construction project; and

183 ~~[(b)]~~ (ii) 20 days after the filing of a notice of commencement, if the subcontractor's
184 work commences before the filing of the first notice of commencement.

185 (b) Subsection (1) does not exempt the following from complying with the
186 requirements of this section:

187 (i) a temporary labor service company or organization;

188 (ii) a professional employer company or organization; or

189 (iii) any other entity that provides labor.

190 (2) A preliminary notice filed within the period described in Subsection (1) is effective
191 as to all labor, service, equipment, and material that the subcontractor furnishes to the
192 construction project, including labor, service, equipment, and material provided that the
193 subcontractor furnishes to more than one contractor or subcontractor.

194 (3) (a) If more than one notice of commencement is filed for a project, a person may
195 attach a preliminary notice to any notice of commencement filed for the project.

196 (b) A preliminary notice attached to an untimely notice of commencement is valid if
197 there is also a valid and timely notice of commencement for the project.

198 (4) If a person files a preliminary notice after the period prescribed by Subsection (1),
199 the preliminary notice becomes effective five days after the day on which the preliminary
200 notice is filed.

201 (5) Except as provided in Subsection (8), failure to file a preliminary notice within the
202 period required by Subsection (1) precludes a person from maintaining any claim for
203 compensation earned for labor, service, material, or equipment furnished to the construction
204 project before the expiration of five days after the late filing of a preliminary notice, except as
205 against the person with whom the person contracted.

206 (6) A preliminary notice on a government project shall include:

207 (a) the government project-identifying information;

208 (b) the name, address, and telephone number of the person furnishing the labor,
209 service, equipment, or material;

210 (c) the name and address of the person who contracted with the claimant for the
211 furnishing of the labor, service, equipment, or material;

212 (d) the name of the record or reputed owner of the project;

213 (e) the name of the original contractor under which the claimant is performing or will
214 perform its work; and

215 (f) the address of the project or a description of the location of the project.

216 (7) Upon request, an original contractor shall provide a subcontractor with the number
217 assigned to the project by the designated agent.

218 (8) A person who provides labor, service, equipment, or material before the filing of a
219 notice of commencement need not file a preliminary notice to maintain any right the person
220 would otherwise have, if the notice of commencement is filed more than 15 days after the day
221 on which the person begins work on the project.

222 (9) Subsections 38-1-32(2), (3), (4), (5), and (6) apply to a preliminary notice on a
223 government project under this section to the same extent that those subsections apply to a
224 preliminary notice on a private project under Section 38-1-32.

225 Section 7. Section **38-1-41** is enacted to read:

226 **38-1-41. Interest rate on lien.**

227 Unless otherwise specified in a lawful contract between the owner-builder and the
228 person claiming a lien under this chapter, the interest rate applicable to the lien is the rate
229 described in Subsection 15-1-1(2).

230 Section 8. Section **53A-20-109** is enacted to read:

231 **53A-20-109. Required contract terms.**

232 A contract for the construction of a school building shall contain a clause that addresses
233 the rights of the parties when, after the contract is executed, site conditions are discovered that:

234 (1) the contractor did not know existed, and could not have reasonably known existed,
235 at the time that the contract was executed; and

236 (2) materially impacts the costs of construction.

237 Section 9. Section **63G-6-501** is amended to read:

238 **63G-6-501. Alternative methods of construction contracting management.**

239 (1) (a) Rules shall provide as many alternative methods of construction contracting
240 management as determined to be feasible.

241 (b) These rules shall:

242 (i) grant to the chief procurement officer or the head of the purchasing agency
243 responsible for carrying out the construction project the discretion to select the appropriate
244 method of construction contracting management for a particular project; and

245 (ii) require the procurement officer to execute and include in the contract file a written
246 statement setting forth the facts which led to the selection of a particular method of
247 construction contracting management for each project.

248 (c) Before choosing a construction contracting management method, the chief
249 procurement officer or the head of the purchasing agency responsible for carrying out the
250 construction project shall consider the following factors:

251 (i) when the project must be ready to be occupied;

252 (ii) the type of project;

253 (iii) the extent to which the requirements of the procuring agencies and the ways in

254 which they are to be met are known;

255 (iv) the location of the project;

256 (v) the size, scope, complexity, and economics of the project;

257 (vi) the source of funding and any resulting constraints necessitated by the funding
258 source;

259 (vii) the availability, qualification, and experience of state personnel to be assigned to
260 the project and how much time the state personnel can devote to the project; and

261 (viii) the availability, qualifications, and experience of outside consultants and
262 contractors to complete the project under the various methods being considered.

263 (2) (a) Rules adopted by state public procurement units and local public procurement
264 units to implement this section may authorize the use of a Construction Manager/General
265 Contractor as one method of construction contracting management.

266 (b) Those rules shall require that:

267 (i) the Construction Manager/General Contractor shall be selected using one of the
268 source selection methods provided for in Part 4, Source Selections and Contract Formation,
269 and Section 63G-6-502; and

270 (ii) when entering into any subcontract that was not specifically included in the
271 Construction Manager/General Contractor's cost proposal submitted under the requirements of
272 Subsection (2)(b)(i), the Construction Manager/General Contractor shall procure that
273 subcontractor by using one of the source selection methods provided for in Part 4, Source
274 Selections and Contract Formation, in the same manner as if the subcontract work was
275 procured directly by the state.

276 (3) Procurement rules adopted by the State Building Board under Subsection (1) for
277 state building construction projects may authorize the use of a design-build provider as one
278 method of construction contracting management.

279 (4) A design-build contract or a construction manager/general contractor contract may
280 include provision by the contractor of operations, maintenance, or financing.

281 Section 10. Section **63G-6-502** is amended to read:

282 **63G-6-502. Procurement of design-build transportation project contracts.**

283 (1) As used in this section:

284 (a) "Design-build transportation project contract" means the procurement of both the
285 design and construction of a transportation project in a single contract with a company or
286 combination of companies capable of providing the necessary engineering services and
287 construction.

288 (b) "Transportation agency" means:

289 (i) the Department of Transportation;

290 (ii) a county of the first or second class, as defined in Section 17-50-501;

291 (iii) a municipality of the first class, as defined in Section 10-2-301;

292 (iv) a public transit district that has more than 200,000 people residing within its
293 boundaries; and

294 (v) a public airport authority.

295 (2) Except as provided in Subsection (3), a transportation agency may award a
296 design-build transportation project contract for any transportation project that has an estimated
297 cost of at least \$50,000,000 by following the requirements of this section.

298 (3) (a) The Department of Transportation:

299 (i) may award a design-build transportation project contract for any transportation
300 project by following the requirements of this section; and

301 (ii) shall make rules, by following the procedures and requirements of Title 63G,
302 Chapter 3, Utah Administrative Rulemaking Act, establishing requirements for the
303 procurement of its design-build transportation project contracts in addition to those required by
304 this section.

305 (b) A public transit district that has more than 200,000 people residing within its
306 boundaries:

307 (i) may award a design-build transportation project contract for any transportation
308 project by following the requirements of this section; and

309 (ii) shall pass ordinances or a resolution establishing requirements for the procurement

310 of its design-build transportation project contracts in addition to those required by this section.

311 (c) A design-build transportation project contract authorized under this Subsection (3)
312 is not subject to the estimated cost threshold under Subsection (2).

313 (d) A design-build transportation project contract may include provision by the
314 contractor of operations, maintenance, or financing.

315 (4) (a) Before entering a design-build transportation project contract, a transportation
316 agency may issue a request for qualifications to prequalify potential contractors.

317 (b) Public notice of the request for qualifications shall be given in accordance with
318 policy board rules.

319 (c) A transportation agency shall require, as part of the qualifications specified in the
320 request for qualifications, that potential contractors at least demonstrate their:

321 (i) construction experience;

322 (ii) design experience;

323 (iii) financial, manpower, and equipment resources available for the project; and

324 (iv) experience in other design-build transportation projects with attributes similar to
325 the project being procured.

326 (d) The request for qualifications shall identify the number of eligible competing
327 proposers that the transportation agency will select to submit a proposal, which must be at least
328 two.

329 (5) (a) The transportation agency shall:

330 (i) evaluate the responses received from the request for qualifications;

331 (ii) select from their number those qualified to submit proposals; and

332 (iii) invite those respondents to submit proposals based upon the transportation
333 agency's request for proposals.

334 (b) (i) Except as provided in Subsection (5)(b)(ii), if the transportation agency fails to
335 receive at least two qualified eligible competing proposers, the transportation agency shall
336 readvertise the project.

337 (ii) A transportation agency may award a contract for a transportation project that has

338 an estimated cost of \$5,000,000 or less to a qualified eligible proposer if:

339 (A) only a single proposal is received; and

340 (B) the transportation agency determines that:

341 (I) the proposal is advantageous to the state; and

342 (II) the proposal price is reasonable.

343 (6) The transportation agency shall issue a request for proposals to those qualified

344 respondents that:

345 (a) includes a scope of work statement constituting an information for proposal that

346 may include:

347 (i) preliminary design concepts;

348 (ii) design criteria, needs, and objectives;

349 (iii) warranty and quality control requirements;

350 (iv) applicable standards;

351 (v) environmental documents;

352 (vi) constraints;

353 (vii) time expectations or limitations;

354 (viii) incentives or disincentives; and

355 (ix) other special considerations;

356 (b) requires submitters to provide:

357 (i) a sealed cost proposal;

358 (ii) a critical path matrix schedule, including cash flow requirements;

359 (iii) proposal security; and

360 (iv) other items required by the department for the project; and

361 (c) may include award of a stipulated fee to be paid to submitters who submit

362 unsuccessful proposals.

363 (7) The transportation agency shall:

364 (a) evaluate the submissions received in response to the request for proposals from the

365 prequalified proposers;

366 (b) comply with rules relating to discussion of proposals, best and final offers, and
367 evaluations of the proposals submitted; and

368 (c) after considering price and other identified factors, award the contract to the
369 responsible proposer whose proposal is most advantageous to the state.

370 Section 11. Section **63G-6-506** is amended to read:

371 **63G-6-506. Preliminary notice requirement.**

372 (1) Any person furnishing labor, service, equipment, or material for which a payment
373 bond claim may be made under this chapter shall provide preliminary notice to the designated
374 agent as prescribed by Section 38-1-32.5, except that this section does not apply:

375 (a) to ~~a person~~ an individual performing labor for wages; or

376 (b) if a notice of commencement is not filed as prescribed in Section 38-1-31.5 for the
377 project or improvement for which labor, service, equipment, or material is furnished.

378 (2) Any person who fails to provide the preliminary notice required by Subsection (1)
379 may not make a payment bond claim under this chapter.

380 (3) The preliminary notice required by Subsection (1) must be provided before
381 commencement of any action on the payment bond.

382 (4) Subsection (1)(a) does not exempt the following from complying with the
383 requirements of this section:

384 (a) a temporary labor service company or organization;

385 (b) a professional employer company or organization; or

386 (c) any other entity that provides labor.

387 Section 12. Section **63G-6-506.5** is enacted to read:

388 **63G-6-506.5. Interest rate for bond claim.**

389 Unless otherwise specified in a lawful contract between a public procurement unit and
390 the person making a bond claim against the public procurement unit, the interest rate applicable
391 to the bond claim is the rate described in Subsection 15-1-1(2).

392 Section 13. Section **63G-6-601** is amended to read:

393 **63G-6-601. Required contract clauses -- Computation of price adjustments -- Use**

394 **of rules and regulations.**

395 (1) Rules and regulations shall require for state construction contracts and may permit
396 or require for state contracts for supplies and services the inclusion of clauses providing for
397 adjustments in prices, time of performance, or other appropriate contract provisions, and
398 covering the following subjects:

399 (a) the unilateral right of the state to order in writing changes in the work within the
400 scope of the contract and changes in the time of performance of the contract that do not alter
401 the scope of the contract work;

402 (b) variations occurring between estimated quantities of work in a contract and actual
403 quantities;

404 (c) suspension of work ordered by the state; and

405 (d) site conditions differing from those indicated in the construction contract, or
406 ordinarily encountered, except that differing site conditions clauses required by the rules and
407 regulations need not be included in a construction contract when the contract is negotiated,
408 when the contractor provides the site or design, or when the parties have otherwise agreed with
409 respect to the risk of differing site conditions.

410 (2) Adjustments in price pursuant to clauses promulgated under Subsection (1) shall be
411 computed in one or more of the following ways:

412 (a) by agreement on a fixed price adjustment before commencement of the pertinent
413 performance or as soon thereafter as practicable;

414 (b) by unit prices specified in the contract or subsequently agreed upon;

415 (c) by the costs attributable to the events or situations under the clauses with
416 adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;

417 (d) in any other manner as the contracting parties may mutually agree; or

418 (e) in the absence of agreement by the parties, by a unilateral determination by the state
419 of the costs attributable to the events or situations under the clauses with adjustment of profit
420 or fee, all as computed by the state in accordance with applicable sections of the rules and
421 regulations issued under Subsection 63G-6-415(1) and subject to the provisions of Part 8,

422 Legal and Contractual Remedies.

423 (3) A contractor shall be required to submit cost or pricing data if any adjustment in
424 contract price is subject to the provisions of Section 63G-6-415.

425 (4) Rules and regulations shall require for state construction contracts and may permit
426 or require for state contracts for supplies and services the inclusion of clauses providing for
427 appropriate remedies and covering at least the following subjects:

428 (a) liquidated damages as appropriate;

429 (b) specified excuses for delay or nonperformance;

430 (c) termination of the contract for default; and

431 (d) termination of the contract in whole or in part for the convenience of the state.

432 (5) The contract clauses promulgated under this section shall be set forth in rules and
433 regulations. However, the chief procurement officer or the head of a purchasing agency may
434 modify the clauses for inclusion in any particular contract. Any variations shall be supported
435 by a written determination that describes the circumstances justifying the variations, and notice
436 of any material variation shall be included in the invitation for bids or request for proposals.

437 (6) A contract for construction entered into by a public procurement unit shall contain a
438 clause that addresses the rights of the parties when, after the contract is executed, site
439 conditions are discovered that:

440 (a) the contractor did not know existed, and should not have known existed, at the time
441 that the contract was executed; and

442 (b) materially impacts the costs of construction.

443 **Section 14. Mountain View Corridor Construction.**

444 The Department of Transportation may issue a request for proposals to construct
445 Mountain View Corridor from 5400 South to I-80. The request for proposals may include the
446 provision of financing by the contractor for the construction project.