

Representative Michael T. Morley proposes the following substitute bill:

CONSTRUCTION AMENDMENTS

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Michael T. Morley

Senate Sponsor: Wayne L. Niederhauser

LONG TITLE

General Description:

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

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ provides that, unless otherwise specified by contract, the interest rate applicable to a lien or bond claim is the statutory rate of 10% per annum;
- ▶ provides that the following are not exempt from providing preliminary notice of a payment bond claim or a lien:
 - a temporary labor service company;
 - a professional employer company or organization;
 - a union trust fund; or
 - any other entity that provides or collects for labor; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:



26 None

27 **Utah Code Sections Affected:**

28 AMENDS:

29 **14-1-19**, as enacted by Laws of Utah 1987, Chapter 218

30 **14-1-20**, as last amended by Laws of Utah 2011, Chapter 299

31 **14-2-1**, as last amended by Laws of Utah 2004, Chapter 111

32 **14-2-2**, as last amended by Laws of Utah 2004, Chapter 111

33 **14-2-5**, as last amended by Laws of Utah 2011, Chapter 299

34 **38-1-32.5**, as enacted by Laws of Utah 2011, Chapter 299

35 **63G-6-506**, as last amended by Laws of Utah 2011, Chapter 299

36 **63G-6-601**, as renumbered and amended by Laws of Utah 2008, Chapter 382

37 ENACTS:

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

39 **53A-20-109**, Utah Code Annotated 1953

40 **63G-6-506.5**, Utah Code Annotated 1953



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

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

44 **14-1-19. Failure of government entity to obtain payment bond -- Right of action**
45 **-- Notice.**

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

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

51 (a) shall have a direct right of action against the state or the political subdivision in any
52 court having jurisdiction in any county in which the contract was to be performed, upon giving
53 written notice to the state or political subdivision within 90 days from the date on which such
54 person performed the last of the labor or supplied the last of the material for which claim is
55 made[~~.-The person~~];

56 (b) shall state in the notice a designation of the construction project and its location, the

57 amount claimed, and the name of the party for whom the labor was performed or to whom the
58 material was supplied[~~-. The notice shall be served~~]; and

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

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

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

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

69 **14-1-20. Preliminary notice requirement.**

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

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

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

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

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

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

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

83 (b) a professional employer company or organization;

84 (c) a union trust fund; or

85 (d) any other entity that provides labor or collects for labor.

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

87 **14-2-1. Definitions -- Payment bond required -- Right of action -- Attorney fees.**

88 (1) For purposes of this chapter:

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

91 (i) a building;

92 (ii) a structure; or

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

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

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

100 (i) a building;

101 (ii) a structure; or

102 (iii) an improvement upon land.

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

104 (A) single family detached housing; or

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

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

107 (2) Before any original commercial contract exceeding \$50,000 in amount for the
108 construction, alteration, or repair of any building, structure, or improvement upon land is
109 awarded to any contractor, the owner shall obtain from the contractor a payment bond:

110 (a) complying with Subsection (3); and

111 (b) that becomes binding upon the award of the original commercial contract to the
112 contractor.

113 (3) The payment bond shall be:

114 (a) with a surety or sureties satisfactory to the owner for the protection of all persons
115 supplying labor, services, equipment, or material in the prosecution of the work provided for in
116 the commercial contract; and

117 (b) in a sum equal to the original commercial contract price.

118 (4) A person shall have a right of action on a payment bond under this chapter for any

119 unpaid amount due that person if that person:

120 (a) has furnished labor, services, equipment, or material in the prosecution of the work
121 provided for in the commercial contract for which the payment bond is furnished under this
122 chapter; and

123 (b) has not been paid in full within 90 days after the last day on which that person:

124 (i) performed the labor or service for which a claim is made; or

125 (ii) supplied the equipment or material for which the claim is made.

126 (5) (a) An action under this section shall be brought in a court of competent jurisdiction
127 in the county where the commercial contract was to be performed and not elsewhere.

128 (b) An action under this section is barred if not commenced within one year after the
129 last day on which the claimant:

130 (i) performed the labor or service on which the claim is based; or

131 (ii) supplied the equipment or material on which the claim is based.

132 (c) The obligee named in the payment bond need not be joined as a party to an action
133 under this section.

134 (d) In any action upon a payment bond under this section, the court may award
135 reasonable [~~attorneys'~~ attorney] fees to the prevailing party, which [~~attorneys'~~ attorney] fees
136 shall be taxed as costs in the action.

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

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

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

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

144 **14-2-2. Failure of owner to obtain payment bond -- Liability.**

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

149 (2) An action to recover on the liability described in Subsection (1) may not be

150 commenced ~~[after the expiration of]~~ later than one year after the day on which:

151 (a) the last of the labor or service was performed; or

152 (b) the equipment or material was supplied by the person.

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

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

157 **14-2-5. Preliminary notice requirement.**

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

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

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

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

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

169 (b) a professional employer company or organization;

170 (c) a union trust fund; or

171 (d) any other entity that provides labor or collects for labor.

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

173 **38-1-32.5. Preliminary notice on government project.**

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

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

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

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

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

184 (ii) a professional employer company or organization;

185 (iii) a union trust fund; or

186 (iv) any other entity that provides labor or collects for labor.

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

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

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

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

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

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

204 (a) the government project-identifying information;

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

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

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

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

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

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

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

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

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

223 **38-1-41. Interest rate on lien.**

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

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

228 **53A-20-109. Required contract terms.**

229 (1) As used in this section, "differing site conditions clause" means a clause in a
230 construction contract that provides for an equitable adjustment to the contract in the event that
231 the contractor discovers, and promptly reports to the government entity that contracted for the
232 construction, the existence on the construction site of any of the following that were not known
233 by the contractor at the time the contract was executed:

234 (a) subsurface or latent physical conditions that differ materially from the conditions
235 indicated in the contract; or

236 (b) physical conditions of an unusual nature that differ materially from those ordinarily
237 encountered for the type of construction or for the location of the construction site.

238 (2) A contract for the construction of a school building shall contain a differing site
239 conditions clause.

240 Section 9. Section **63G-6-506** is amended to read:

241 **63G-6-506. Preliminary notice requirement.**

242 (1) Any person furnishing labor, service, equipment, or material for which a payment

243 bond claim may be made under this chapter shall provide preliminary notice to the designated
244 agent as prescribed by Section 38-1-32.5, except that this section does not apply:

- 245 (a) to [~~a person~~] an individual performing labor for wages; or
- 246 (b) if a notice of commencement is not filed as prescribed in Section 38-1-31.5 for the
247 project or improvement for which labor, service, equipment, or material is furnished.

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

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

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

- 254 (a) a temporary labor service company or organization;
- 255 (b) a professional employer company or organization;
- 256 (c) a union trust fund; or
- 257 (d) any other entity that provides labor or collects for labor.

258 Section 10. Section **63G-6-506.5** is enacted to read:

259 **63G-6-506.5. Interest rate for bond claim.**

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

263 Section 11. Section **63G-6-601** is amended to read:

264 **63G-6-601. Required contract clauses -- Computation of price adjustments -- Use**
265 **of rules and regulations.**

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

- 270 (a) the unilateral right of the state to order in writing changes in the work within the
271 scope of the contract and changes in the time of performance of the contract that do not alter
272 the scope of the contract work;
- 273 (b) variations occurring between estimated quantities of work in a contract and actual

274 quantities;

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

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

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

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

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

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

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

289 (e) in the absence of agreement by the parties, by a unilateral determination by the state
290 of the costs attributable to the events or situations under the clauses with adjustment of profit
291 or fee, all as computed by the state in accordance with applicable sections of the rules and
292 regulations issued under Subsection 63G-6-415(1) and subject to the provisions of Part 8,
293 Legal and Contractual Remedies.

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

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

299 (a) liquidated damages as appropriate;

300 (b) specified excuses for delay or nonperformance;

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

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

303 (5) The contract clauses promulgated under this section shall be set forth in rules and
304 regulations. However, the chief procurement officer or the head of a purchasing agency may

305 modify the clauses for inclusion in any particular contract. Any variations shall be supported
306 by a written determination that describes the circumstances justifying the variations, and notice
307 of any material variation shall be included in the invitation for bids or request for proposals.

308 (6) (a) As used in this Subsection (6), "differing site conditions clause" means a clause
309 in a construction contract that provides for an equitable adjustment to the contract in the event
310 that the contractor discovers, and promptly reports to the public procurement unit that
311 contracted for the construction, the existence on the construction site of any of the following
312 that were not known by the contractor at the time the contract was executed:

313 (i) subsurface or latent physical conditions that differ materially from the conditions
314 indicated in the contract; or

315 (ii) physical conditions of an unusual nature that differ materially from those ordinarily
316 encountered for the type of construction or for the location of the construction site.

317 (b) Notwithstanding any provision of this chapter to the contrary, a contract for
318 construction entered into by a public procurement unit shall contain a differing site conditions
319 clause.