

**CONSTRUCTION AMENDMENTS**

2012 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Michael T. Morley**

Senate Sponsor: \_\_\_\_\_

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**LONG TITLE**

**General Description:**

This bill amends provisions of the Utah Code relating to construction contracting methods, 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;
- ▶ prohibits government entities, other than the Division of Facilities Construction and Management and the Utah Department of Transportation, from using a Construction Manager/General Contractor method of contracting or a design-build method of contracting; and
- ▶ makes technical changes.

**Money Appropriated in this Bill:**



28 None

29 **Other Special Clauses:**

30 None

31 **Utah Code Sections Affected:**

32 AMENDS:

33 **14-1-19**, as enacted by Laws of Utah 1987, Chapter 218

34 **14-1-20**, as last amended by Laws of Utah 2011, Chapter 299

35 **14-2-1**, as last amended by Laws of Utah 2004, Chapter 111

36 **14-2-2**, as last amended by Laws of Utah 2004, Chapter 111

37 **14-2-5**, as last amended by Laws of Utah 2011, Chapter 299

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

39 **63G-6-501**, as renumbered and amended by Laws of Utah 2008, Chapter 382

40 **63G-6-506**, as last amended by Laws of Utah 2011, Chapter 299

41 **63G-6-601**, as renumbered and amended by Laws of Utah 2008, Chapter 382

42 ENACTS:

43 **38-1-41**, Utah Code Annotated 1953

44 **53A-20-109**, Utah Code Annotated 1953

45 **63G-6-506.5**, Utah Code Annotated 1953



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

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

49 **14-1-19. Failure of government entity to obtain payment bond -- Right of action**  
50 **-- Notice.**

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

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

56 (a) shall have a direct right of action against the state or the political subdivision in any  
57 court having jurisdiction in any county in which the contract was to be performed, upon giving  
58 written notice to the state or political subdivision within 90 days from the date on which such

59 person performed the last of the labor or supplied the last of the material for which claim is  
60 made[~~-. The person~~];

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

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

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

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

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

74 **14-1-20. Preliminary notice requirement.**

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

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

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

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

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

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

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

88 (b) a professional employer company or organization;

89 (c) a union trust fund; or

90 (d) any other entity that provides labor or collects for 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;
- 175 (c) a union trust fund; or
- 176 (d) any other entity that provides labor or collects for labor.

177 Section 6. Section ~~38-1-32.5~~ is amended to read:

178 **38-1-32.5. Preliminary notice on government project.**

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

182 ~~[(a)]~~ (i) 20 days after the subcontractor commences the subcontractor's own work or

183 commences furnishing labor, service, equipment, or material to the construction project; and  
184 ~~(b)~~ (ii) 20 days after the filing of a notice of commencement, if the subcontractor's  
185 work commences before the filing of the first notice of commencement.

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

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

189 (ii) a professional employer company or organization;

190 (iii) a union trust fund; or

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

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

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

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

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

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

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

209 (a) the government project-identifying information;

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

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

- 214 (d) the name of the record or reputed owner of the project;
- 215 (e) the name of the original contractor under which the claimant is performing or will
- 216 perform its work; and
- 217 (f) the address of the project or a description of the location of the project.
- 218 (7) Upon request, an original contractor shall provide a subcontractor with the number
- 219 assigned to the project by the designated agent.

220 (8) A person who provides labor, service, equipment, or material before the filing of a

221 notice of commencement need not file a preliminary notice to maintain any right the person

222 would otherwise have, if the notice of commencement is filed more than 15 days after the day

223 on which the person begins work on the project.

224 (9) Subsections 38-1-32(2), (3), (4), (5), and (6) apply to a preliminary notice on a

225 government project under this section to the same extent that those subsections apply to a

226 preliminary notice on a private project under Section 38-1-32.

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

228 **38-1-41. Interest rate on lien.**

229 Unless otherwise specified in a lawful contract between the owner-builder and the

230 person claiming a lien under this chapter, the interest rate applicable to the lien is the rate

231 described in Subsection 15-1-1(2).

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

233 **53A-20-109. Prohibited contract methods and terms -- Required terms.**

234 (1) As used in this section:

235 (a) "Differing site conditions clause" means a clause in a construction contract that

236 provides for an equitable adjustment to the contract in the event that the contractor discovers,

237 and promptly reports to the government entity that contracted for the construction, the

238 existence on the construction site of any of the following that were not known by the contractor

239 at the time the contract was executed:

240 (i) subsurface or latent physical conditions that differ materially from the conditions

241 indicated in the contract; or

242 (ii) physical conditions of an unusual nature that differ materially from those ordinarily

243 encountered for the type of construction or for the location of the construction site.

244 (b) "No-damage-for-delay clause" means a clause in a construction contract that



245 prohibits a contractor from being compensated for damages caused by a delay that is the fault  
246 of the government entity that contracted for the construction.

247 (2) A school district may not use, directly or indirectly, a Construction  
248 Manager/General Contractor method of contracting, or a design-build method of contracting,  
249 for the construction of a school building.

250 (3) A contract for the construction of a school building:

251 (a) may not contain a no-damage-for-delay clause; and

252 (b) shall contain a differing site conditions clause.

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

254 **63G-6-501. Alternative methods of construction contracting management.**

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

257 (b) These rules shall:

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

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

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

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

268 (ii) the type of project;

269 (iii) the extent to which the requirements of the procuring agencies and the ways in  
270 which they are to be met are known;

271 (iv) the location of the project;

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

273 (vi) the source of funding and any resulting constraints necessitated by the funding  
274 source;

275 (vii) the availability, qualification, and experience of state personnel to be assigned to

276 the project and how much time the state personnel can devote to the project; and

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

279 (2) (a) ~~[Rules]~~ Except as provided in Subsection (4), rules adopted by state public  
280 procurement units ~~[and local public procurement units]~~ to implement this section may  
281 authorize the use of a Construction Manager/General Contractor as one method of construction  
282 contracting management.

283 (b) Those rules shall require that:

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

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

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

296 (4) The only public procurement units that are permitted to use a Construction  
297 Manager/General Contractor method of contracting or a design-build method of contracting are  
298 the Division of Facilities Construction and Management and the Utah Department of  
299 Transportation.

300 Section 10. Section **63G-6-506** is amended to read:

301 **63G-6-506. Preliminary notice requirement.**

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

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

306 (b) if a notice of commencement is not filed as prescribed in Section 38-1-31.5 for the

307 project or improvement for which labor, service, equipment, or material is furnished.

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

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

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

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

315 (b) a professional employer company or organization;

316 (c) a union trust fund; or

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

318 Section 11. Section **63G-6-506.5** is enacted to read:

319 **63G-6-506.5. Interest rate for bond claim.**

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

323 Section 12. Section **63G-6-601** is amended to read:

324 **63G-6-601. Required and prohibited contract clauses -- Computation of price**  
325 **adjustments -- Use of rules and regulations.**

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

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

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

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

336 (d) site conditions differing from those indicated in the construction contract, or  
337 ordinarily encountered, except that differing site conditions clauses required by the rules and

338 regulations need not be included in a construction contract when the contract is negotiated,  
339 when the contractor provides the site or design, or when the parties have otherwise agreed with  
340 respect to the risk of differing site conditions.

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

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

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

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

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

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

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

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

359 (a) liquidated damages as appropriate;

360 (b) specified excuses for delay or nonperformance;

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

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

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

368 (6) (a) As used in this Subsection (6):

369            (i) "Differing site conditions clause" means a clause in a construction contract that  
370 provides for an equitable adjustment to the contract in the event that the contractor discovers,  
371 and promptly reports to the public procurement unit that contracted for the construction, the  
372 existence on the construction site of any of the following that were not known by the contractor  
373 at the time the contract was executed:

374            (A) subsurface or latent physical conditions that differ materially from the conditions  
375 indicated in the contract; or

376            (B) physical conditions of an unusual nature that differ materially from those ordinarily  
377 encountered for the type of construction or for the location of the construction site.

378            (ii) "No-damage-for-delay clause" means a clause in a construction contract that  
379 prohibits a contractor from being compensated for damages caused by a delay that is the fault  
380 of the public procurement unit that contracted for the construction.

381            (b) Notwithstanding any provision of this chapter to the contrary, a contract for  
382 construction entered into by a public procurement unit:

383            (i) may not contain a no-damage-for-delay clause; and

384            (ii) shall contain a differing site conditions clause.

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**Legislative Review Note**  
as of 2-21-12 1:45 PM

**Office of Legislative Research and General Counsel**