



PROTECTING YOUR MONEY

Understanding Utah Mechanic's Lien Law & Construction Contracts

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WHAT'S ON TAP?

- Mechanic's Liens & Payment Bonds
 - What is a mechanic's lien?
 - Why are they important?
 - How do you preserve your lien rights?
 - How do you claim a lien?
 - When can you make a payment bond claim?
 - How do you make a payment bond claim?
 - What is Utah's Lien Recovery Fund and how does it work?
- Contracts
 - Why contracts?
 - What are some provisions to include in my contracts?
 - What are some clauses to watch out for?



Understanding Utah's Mechanic's Lien and Bond Law

WHAT IS A MECHANIC'S LIEN?

- An involuntary encumbrance against title to real property
- Purely statutory device (so the laws differ among states)

HOW DOES A MECHANIC'S LIEN WORK?

- What does a mechanic's lien gives the lien holder?
 - Provides a security interest in property for the benefit of those who have supplied labor, materials and/or equipment to improve the property.

HOW DOES A MECHANIC'S LIEN WORK?

- What is the ultimate possible outcome with a mechanic's lien?
 - The ability to force the property into foreclosure.
 - Foreclosure is a significant right
 - As a result, the Legislature has created rigid requirements.

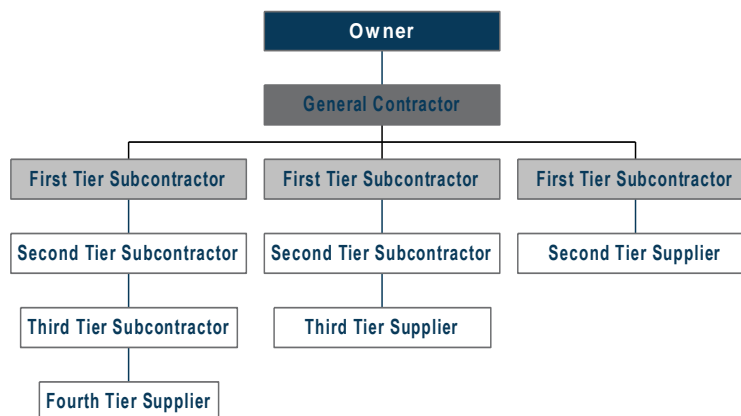
WHO CAN FILE A LIEN?

- Any person who performs preconstruction services or construction work for the improvement of real property.

CONSTRUCTION WORK DEFINED

- Construction work “means labor, material or equipment provided for the purpose and during the process of constructing, altering or repairing an improvement; and includes scheduling, estimating, staking, supervising, managing, materials testing, inspection, observation, and quality control or assurance involved in constructing, altering, or repairing an improvement.”
 - Utah Code Ann. § 38-1a-102(11)

WHO CAN FILE A LIEN?



WHAT DO I HAVE TO DO TO PRESERVE MY LIEN RIGHTS?

- File a preliminary notice within the time period fixed by statute.
- File a mechanic's lien within the time period fixed by statute.
- Give notice to the owner of the filing of your mechanic's lien.
- Commence legal action to enforce your lien within the time period fixed by statute.




HOW DO I FILE MY PRELIMINARY NOTICE?


- Utah, unlike other states, does not require that a design profession, contractor, subcontractor, or supplier sends its preliminary notice (or "prelien") to the property owner.
- Instead, a design profession, contractor, subcontractor, or supplier files their preliminary notice on a online database known as the Utah State Construction Registry (the "SCR")



UTAH STATE CONSTRUCTION REGISTRY (SCR.UTAH.GOV)


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 [SCR GUIDE](#)

Welcome to Utah's State Construction Registry
The Payment Network for Utah Construction Projects
Connecting owners and their money with the people working on their projects. Providing a comprehensive list of who is working on each construction project in Utah.

Utah's SCR Overview



scr.utah.gov

Login with your Utah.gov Account

Username:


Password:

Login


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 ADDRESS

 NAME

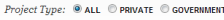
 PERMIT NUMBER


 DATE


 PARCEL NUMBER


 ENTRY NUMBER


VIEW A PROJECT


 I'm a:


 [Notice of Commencement](#)


 [Construction Loan](#)


 [Notice of Preconstruction Service](#)


 [Preliminary Notice](#)

 [Intent to Complete](#)

 [Remaining to Complete](#)

 [Notice of Completion](#)

 [Track a Project](#)

 [Loan Default](#)

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UTAH STATE CONSTRUCTION REGISTRY (SCR.UTAH.GOV)

- Applies to all projects
 - Public and private
 - Commercial and residential

UTAH STATE CONSTRUCTION REGISTRY (SCR.UTAH.GOV)

- Beyond preliminary notices, the SCR allows users to file other notices, including:
 - Notices of Commencement
 - Notices of Preconstruction Service
 - Notices of Construction Loan
 - Notices of Construction Loan Default
 - Notices of Completion

UTAH STATE CONSTRUCTION REGISTRY (SCR.UTAH.GOV)

- Notices filed on the SCR are also important to:
 - Payment bond claims on commercial and public projects; and
 - Claims against a project owner for failing to obtain a payment bond on commercial and public projects.



SCR REQUIREMENTS FOR PRIVATE PROJECTS

PRELIMINARY NOTICE

- Everyone required to file
- Filed on the SCR
- Deadline
 - Within 20 days after your first work
 - Effect of failure to timely file
 - You may file more than 20 days after your first work, but you can only lien for work furnished more than 5 days after the notice



PRELIMINARY NOTICE – CONTENTS

- Claimant's name, address, email address and telephone number
- Name and address of the person who contracted with claimant
- Name of the record or reputed owner of the project
- Name of the original contractor under which the work is performed
- Project address or a description of the location of the project



PRELIMINARY NOTICE – CONTENTS

- The name of the county where project is located
- One of the following:
 - The tax parcel identification number of each parcel included in the project
 - The entry number of a previously filed notice of construction loan
 - The entry number of a previously filed preliminary notice on the same project that includes the tax parcel identification number of each parcel included in the project
 - The entry number of the building permit issued for the project

THINGS TO LOOK FOR WHEN FILING PRELIMINARY NOTICE



THINGS TO LOOK FOR WHEN FILING PRELIMINARY NOTICE

- Notice of Construction Loan
 - After recording trust deed lender shall promptly, in conjunction with the closing of the construction loan, file a notice of construction loan
- Other Preliminary Notices
 - Make sure the information is correct
- Building Permit
 - City, county or town shall file within 15 days of issuance.
 - Building permits issued after August 1, 2011 must have
 - Name and Address of owner of each parcel of property on which the project will occur
 - The name and address of the contractor for the project
 - The county in which the property on which the project is built is located
 - The tax parcel identification number of each parcel of the property
- Notice of Preconstruction Service



NOTICE OF CONSTRUCTION LOAN DEFAULT

- Lender required to file on SCR within 5 business days after a notice of default is filed for recording
- No penalty if lender fails to file





NOTICE OF COMPLETION

NOTICE OF COMPLETION

- Deadline
 - After final completion
- Who may file
 - Original contractor, owner, lender, surety, or title company
- Effect of Notice
 - Shortens time for Preliminary Notice to 10 days from the date the Notice of Completion is filed
 - Shortens time for filing mechanic's lien

FINAL COMPLETION OCCURS AT:

- The issuance of a permanent certificate of occupancy, if required
- The date of final inspection by the local government entity, if a permanent certificate of occupancy is not required
- If neither a permanent certificate of occupancy nor final inspection are required, the date on which there remains no substantial work to be completed to finish work on the original contract
- If original contract is terminated before project completed, the last day on which substantial work was performed under the original contract



NOTICE OF COMPLETION (CONT'D)

- Private projects must include one of the following:
 - Tax parcel identification number of each parcel included in the project
 - Entry number of a preliminary notice on the same project that includes the tax parcel identification number
 - The entry number of the building permit issued for the project



NOTICE OF COMPLETION (CONT'D)

- Government project must include:
 - Government project-identifying information (lot or parcel number of each lot included in the project and the unique project number assigned by the SCR)



FILING AND PERFECTING CONSTRUCTION LIEN

LIEN FILING DEADLINES

- 90 days after a Notice of Completion filed
- Notice to owner 30 days after filing of Lien
- 180 days from Final Completion if no Notice of Completion is filed



LIEN PREPARATION

- Valid Form
- Contents
 - Name, address, and phone number of claimant
 - Owner's name
 - Debtor's name
 - Amount claimed
 - Property description
 - First and last dates of work or service
 - Lien Recovery Fund information acknowledgment



MISCELLANEOUS LIEN FILING ISSUES

- Effect of inaccuracies in lien
 - “Substantial compliance” is sufficient
- Where to file lien
 - File with county recorder where property is located
- Amendments to lien
 - Amended within original time frame for filing lien



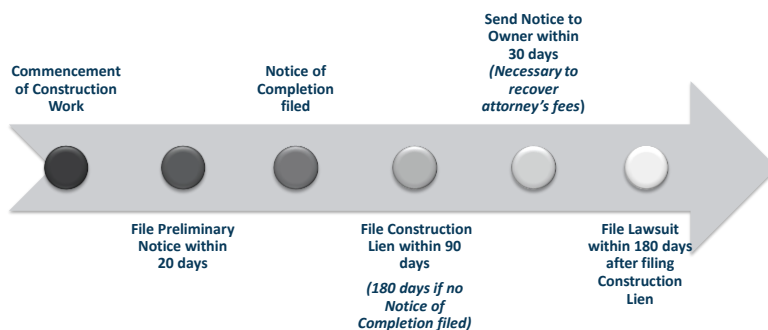
ENFORCEMENT OF LIENS

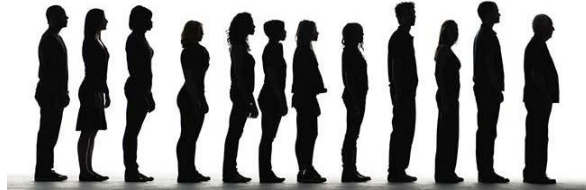
ACTION TO ENFORCE LIENS (LAWSUIT)

- Lawsuit: Must be filed within 180 days from the date the mechanic's lien was filed
 - Must be filed in the county where the property is located
- Lis Pendens: Must be filed with the county where the property is located within the time limits for filing a foreclosure action



CONSTRUCTION LIEN FILING TIMELINE





CONSTRUCTION LIEN PRIORITY

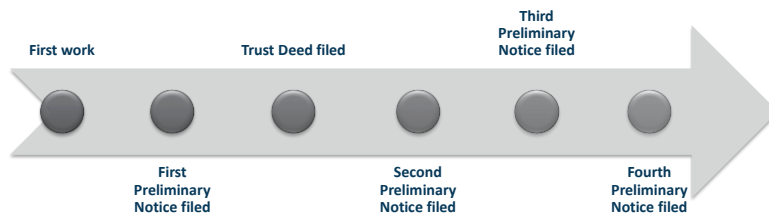
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CONSTRUCTION LIEN PRIORITY

- All mechanics' liens are on the same footing and have the same priority ("relation back" doctrine)
- Liens relate back to the time of the first preliminary notice filing, and have priority over subsequent encumbrances
- Order of sale proceeds:
 - Laborers;
 - Subcontractors and Suppliers; and
 - Original Contractor

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CONSTRUCTION LIEN PRIORITY



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CONSTRUCTION LIEN PRIORITY (CONT'D)

- Buy Out Option
 - Lender can acquire first priority position if each lien claimant who has a preliminary notice on file before the mortgage or trust was recorded receives payment in full for all construction work performed before lender's trust deed was recorded, regardless of whether the claimant receives full payment before or after the day on which the trust deed is recorded.
 - Only applies to Construction Loans

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ALTERNATE SECURITY

- Must file Notice of Release of Lien (and provide alternate security) within 90 days of being served with foreclosure lawsuit
- Alternate Security amount:
 - 150% if lien is \$25,000 or more
 - 175% if lien is between \$15,000 and \$25,000
 - 200% if lien is less than \$15,000



ALTERNATE SECURITY (CONT'D)

- Serve copy of Notice of Release of Lien upon lien claimant within 30 days of filing
- Lien claimant must amend lawsuit to include Alternate Security within 90 days of service
- If Notice of Release of Lien is not served, the lien claimant must amend the lawsuit within 6 months of discovering the Notice of Release of Lien, but, at the latest, must amend within two years from date Notice of Release of Lien was recorded



AVOIDING CIVIL AND CRIMINAL PENALTIES

- “Abuse of lien”
 - UTAH CODE ANN. § 38-1a-308
 - Overstated claim
 - Damages: twice the amount by which the lien exceeds the amount actually due or the actual damages incurred by the owner of the property, whichever is greater
- Release of liens
 - Release within 15 days of receipt of Certificate of Compliance
 - Release within 10 days of payment



SCR REQUIREMENTS FOR GOVERNMENT PROJECTS (I.E., BOND CLAIMS)

NOTICE OF COMMENCEMENT



NOTICE OF COMMENCEMENT

- Original contractor or owner required to file notice of commencement with SCR within 15 days after commencement of physical work (but can file earlier)
 - Designated agent will assign each project a unique identifying number for subsequent SCR filings

NOTICE OF COMMENCEMENT (CONT'D)

- Effect of failure to timely file
 - Removes requirement for subcontractors/suppliers to file Preliminary Notices
- If duplicate Notices of Commencement are filed, they all relate back to the earliest filing
- All duplicate Notices of Commencement will automatically link

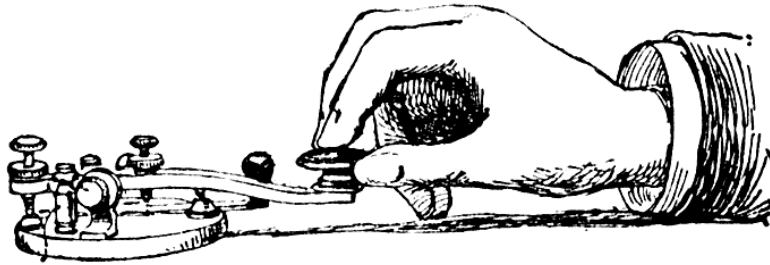


NOTICE OF COMMENCEMENT - CONTENTS

- Owner's name, address and email
- Original contractor's name, address and email
- Payment bond surety's name, address and email or a statement that a payment bond was not required
- Project's address, if it reasonably identifies the project, or the name and general description of the location of the project if the address does not reasonably identify the project
- General description of the project
- Government project-identifying information



PRELIMINARY NOTICE



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PRELIMINARY NOTICE (CONT'D)

- Required for everyone except those who contract directly with owner (different on private projects)
- Deadline
 - Within 20 days after your first work
 - Effect of failure to timely file
 - You may file more than 20 days after your first work, but you can only make a claim for work furnished more than 5 days after the notice

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PRELIMINARY NOTICE (CONT'D)

- May file Preliminary Notice to any Notice of Commencement
- Exceptions to Preliminary Notice requirement:
 - No valid notice of commencement
 - Persons working for wages
 - Those who provided labor, services, materials, equipment, etc. more than 15 days prior to the filing of a Notice of Commencement.



PRELIMINARY NOTICE - CONTENTS

- Government project-identifying information
- Claimant's name, address, and telephone number
- Name and address of the person who contracted for the labor, equipment, service, equipment, or materials
- Name of the record or reputed owner of the project
- Name of the original contract under which the work is performed
- Project address or a description of the location of the project.



PAYMENT BOND CLAIMS

- Entitled to make a claim against a payment bond if:
 - Furnished labor, service, equipment, or material for work provided for in the contract for which payment bond furnished; and
 - Have not been paid in full within 90 days after the last date on which performed labor or service or supplied the equipment or material for which claim is made



PERFECTING PAYMENT BOND CLAIMS

- In order to perfect a payment bond claim, must:
 - Timely file a Preliminary Notice on the SCR
 - Exceptions:
 - Person performing labor for wages; or
 - Notice of Commencement has not been filed
 - Give notice to the project owner
 - Give notice to the bonding company of intent to make a bond claim
 - Commence a lawsuit in any county where the construction contract was to be performed within 1 year after the last day on which performed labor or service or supplied the equipment or material on which the claim is based



FAILURE TO OBTAIN A BOND CLAIMS

- If state or political subdivision fails to obtain a payment bond, it shall, upon demand by a person who has furnished labor or supplied materials to the contractor or subcontractor for the work provided in the contract promptly make payment to that person
 - Direct right of action against the state or the political subdivision in any county in which the contract was to be performed



FAILURE TO OBTAIN A BOND CLAIMS (CONT'D)

- In order to pursue a failure to obtain a payment bond claim, must:
 - Give written notice to the state or political subdivision **within 90 days** from date on which person performed last labor or supplied the last material for which claim is made;
 - Serve notice by registered or certified mail on the state agency or political subdivision;
 - **Timely file a Preliminary Notice on the SCR**; and
 - Commence lawsuit within **1 year** after the last day on which performed labor or service or supplied the equipment or material on which the claim is based



PAYMENT BOND CLAIM ON PRIVATE JOBS

- When required?
 - If commercial project exceeding \$50,000 in amount for the construction, alteration, or repair of any building, structure, or improvement upon land, the owner shall obtain from the contractor a payment bond



PAYMENT BOND CLAIM ON PRIVATE JOBS (CONT'D)

- Who can make a claim?
 - Entitled to a make a claim against a payment bond if:
 - Furnished labor, service, equipment, or material for work provided for in the contract for which payment bond furnished; and
 - Have not been paid in full within 90 days after the last date on which performed labor or service or supplied the equipment or material for which claim is made



PERFECTING PAYMENT BOND CLAIMS ON PRIVATE PROJECTS

- In order to perfect a payment bond claim, must:
 - Timely file a Preliminary Notice on the SCR!
 - Exceptions:
 - Person performing labor for wages; or
 - Give notice to the project owner
 - Give notice to the bonding company of intent to make a bond claim
 - Commence a lawsuit in any county where the construction contract was to be performed within 1 year after the last day on which performed labor or service or supplied the equipment or material on which the claim is based



FAILURE TO OBTAIN A BOND CLAIMS AGAINST PRIVATE OWNER

- If owner fails to obtain a payment bond, it is liable to each person who has furnished labor or supplied equipment or materials under the commercial contract for the reasonable value of the labor or service performed or the equipment or materials furnished up to but not exceeding the commercial contract price



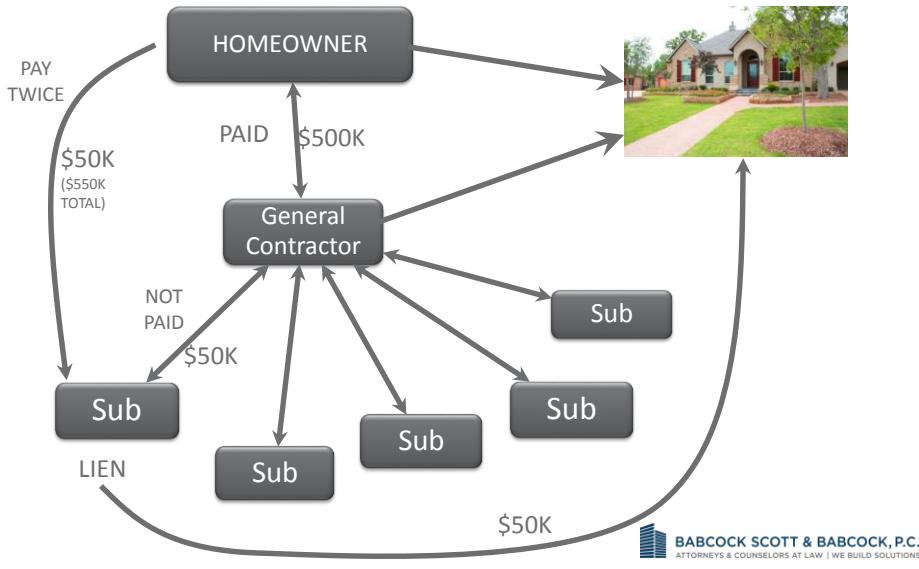
FAILURE TO OBTAIN A BOND CLAIMS AGAINST PRIVATE OWNER (CONT'D)

- In order to pursue a failure to obtain a payment bond claim, must:
 - **Timely file a Preliminary Notice on the SCR**
 - Commence lawsuit within **1 year** after the last day on which performed labor or service or supplied the equipment or material on which the claim is based



UTAH'S LIEN RECOVERY FUND

THE PROBLEM



WHAT DOES THE LIEN RECOVERY FUND DO?

1. Provides qualifying homeowners with protection against mechanic's liens; and
2. Creates a fund of last resort to pay contractors and suppliers who are prevented from recovering through the mechanic's lien process.

THE FUND PROTECTS HOMEOWNERS

- To be protected by the act, a homeowner must:
 - Written contract
 - Licensed contractor
 - “Original” contractor
 - Single family or duplex residence
 - Pay “original” contractor in full
 - Homeowner must occupy residence as a primary or secondary residence within 180 days of construction
 - “Spec” homes that are unoccupied for more than 180 days won’t qualify



THE FUND PROVIDES A FUND OF LAST RESORT

- To recover from the fund, a contractor must:
 1. Provide “qualified services”
 - » Broad definition
 2. Pay required fee
 - » Required for licensure (suppliers must “opt in”)
 - » Currently \$325 (does not give you a “right” to recover – still must follow very specific requirements)
 3. Be Currently Licensed
 4. Fulfill requirements
 - » e.g., notice to homeowner, certificate of compliance, civil judgment, attempt to execute on judgment, apply to fund, etc.



WHAT DOES THE LIEN RECOVERY FUND NOT DO?

- Protect homeowners who do not pay a contractor with whom they contract directly;
 - This could be many of you.
- Assist contractors or suppliers in collecting accounts receivable from homeowners or other entities;
 - Must exhaust other options first.
- Reimburse homeowners who pay mechanic's liens for any reason;
- Apply to multi-family residential or commercial projects.



ADDITIONAL DETAILS REGARDING THE LIEN RECOVERY FUND

- Can recover interest on unpaid balance – up to 10%.
- Attorney's fees up to 15% of "qualified services."
 - Contingent vs. hourly?
- If more than \$75,000 was unpaid on project, then claimants share pro-rata.
- Members of lien fund may be required to periodically pay a "special assessment."



LIEN RECOVERY FUND TAKEAWAYS

- If you're not paid, there is recourse!
 - Protect yourself:
 - Keep license current
 - Written contracts
 - Preserve lien rights by filing preliminary notices
- Important:
 - There are deadlines
 - We've discussed the basics
 - Many more details



Understanding Construction Contracting



WHAT IS A CONTRACT



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WHAT IS A CONTRACT

- An agreement creating obligations enforceable by law.
 - These obligations might be obligations to do or not to do certain things
- A contract forms a relationship between parties
 - Each party will have certain responsibilities, risks, obligations, liabilities, etc. as part of this relationship

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ELEMENTS OF A CONTRACT

- What do you need to form a contract:
 - Offer
 - Acceptance
 - Consideration
 - Mutuality, i.e. a “meeting of the minds”
- Does NOT have to be in writing

KNOW YOUR CONTRACT



KNOW YOUR CONTRACT

- Typical categories of provisions in construction contracts:
 - Incorporation by reference (i.e. flow down clauses)
 - Scope of work
 - Change order or extra work
 - Delays
 - Notice
 - Insurance requirements
 - Payment
 - Retainage
 - Termination
 - Indemnity
 - Attorney fee
 - Dispute resolution

WHO ARE YOU DEALING WITH?



WHO ARE YOU DEALING WITH? (CONT'D)

- Parties to the Contract
 - Person or entity (corporation, partnership, limited liability company, sole proprietor)
- Know the Financial Status of Entity/Person
 - AIA allows contractor to request financial information before work commences
 - Examples of financial verification: loan commitment, government appropriation, etc.
- Personal Guarantee

FLOW DOWN CLAUSES



FLOW DOWN CLAUSES

- Typically included in a contract between a general contractor and a subcontractor
- Incorporates terms of the general contractor's contract with the owner into the subcontractor
- Example language:
 - “The subcontractor binds itself to the Contractor for the performance of a Subcontractor's work in the same manner as the Contractor is bound to the Owner for such performance under the Contractor's contract with the Owner.”

WHEN DO I GET PAID?



CONTINGENT PAYMENT CLAUSES

- Paid When Paid
 - No shift of the risk of payment
 - Sample Provision: “Prime contractor shall pay subcontractor within 10 days of receipt of payment from owner.”
 - No Utah law
- Paid If Paid
 - Payment risk shifts if there is clear and unambiguous language (*e.g.*, payment from owner to general contractor is condition precedent to subcontractor receiving payment)
 - No Utah law in contract actions
 - Not enforceable in many states



UTAH'S PROMPT PAYMENT ACTS

- Utah's Private Prompt Payment Act
 - Contractors must pay subcontractors within 30 days of receiving payment or after the last day payment is due under the terms of the contract, whichever is later
 - If contractor “unreasonably” fails to make payment, contractor must pay INTEREST at 12% per annum and ATTORNEY FEES AND COSTS
- Utah's Public Prompt Payment Act
 - State must pay by date specified or within 60 days after receipt of invoice.
 - Contractors must pay subcontractors within 30 days of receiving payment from State



RETAINAGE



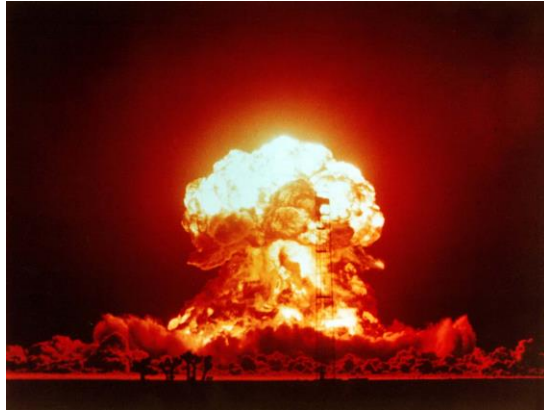
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RETAINAGE (CONT'D)

- Held by owner in Utah
- To be placed in interest bearing account
- Limited to maximum of 5%
- Penalties for wrongful retention
 - Interest at 2% per month in addition to any interest otherwise due
 - Attorney fees and costs for prevailing party

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PRICE ESCALATION



PRICE ESCALATION (CONT'D)

- Establish baseline price
- Generally no profit or overhead
- Equitable adjustment may be capped
- Equitable adjustment of time

NO DAMAGES FOR DELAY CLAUSES



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NO DAMAGES FOR DELAY CLAUSES (CONT'D)

- Limit the exposure of the owner for delay claims (*e.g.*, differing site condition, design errors, etc.)
 - Exception for egregious behavior
- Generally upheld by the courts
- Generally not included in industry contracts
- Time extension is the sole remedy

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CHANGE ORDERS



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CHANGE ORDERS (CONT'D)

- Follow change order procedure in contract (regardless, make sure everything is documented)
- Constructive Change Orders
 - Prolonged failure to make changes in writing
 - If owner requested the work
 - If contractor performed the work and expected payment for the work
 - If the owner knew the contractor expected to be paid for the work
- Time and/or money component

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MUTUAL WAIVER OF CONSEQUENTIAL DAMAGES



MUTUAL WAIVER OF CONSEQUENTIAL DAMAGES

- Consequential damages are damages that do not flow from or may not otherwise be contemplated by the alleged breach
- Generally, owners do not want them waived, while contractors do
- Examples of owner's consequential damages: rental expenses, loss of income, loss of profit, increased financing costs, etc.
- Examples of contractor's consequential damages: loss of working capital, overhead expenses, direct costs, lost profits, etc.

LIQUIDATED DAMAGES



LIQUIDATED DAMAGES (CONT'D)

- Must be a reasonable forecast of damages (difficult or impossible to calculate at time of contracting)
- Cannot be a penalty
- Cuts off actual damages
- Should cease upon substantial completion, not final completion
- Reverse liquidated damages

INDEMNITY



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INDEMNITY (CONT'D)

- One party is required to pay for the damages and legal expenses incurred by another party for claims related to the construction project
- In Utah, indemnification clauses are unenforceable if required to indemnify for someone else's fault (exception for owners in concurrent negligence)
- Utah statute trumps contract language
- "To the extent allowed by law."

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DISPUTE RESOLUTION



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DISPUTE RESOLUTION (CONT'D)



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