

Jason Robinson, Esq. and
Jason Dutson, Esq.



Using Utah's State Construction Registry to Protect Your Money

It is becoming an all too common situation on Utah construction projects where contractors and subcontractors become insolvent without paying downstream subcontractors and suppliers for their labor, services, materials, or equipment. In cases of insolvency, a contract claim against the debtor may be worthless. In such cases, unpaid subcontractors and suppliers frequently look to mechanic's lien and payment bond claims as alternate sources of payment.

Because mechanic's lien and payment bond claims may result in an owner or contractor paying twice, Utah, like many other states, requires certain notice be given as a condition of making such claims. In Utah, notice is given on the "State Construction Registry" (SCR).

In a nutshell, the SCR is an online "bulletin board" designed to keep owners informed of all contractors and suppliers working on their projects. Through the SCR, contractors and suppliers notify owners—in the form of a "Preliminary Notice"—they will be providing construction services for the improvement of the owner's project. Owners can use the bulletin board to take action to make certain that all contractors and suppliers are paid. Contractors and suppliers who meet certain requirements to appear on the bulletin board, and who are not paid, may pursue mechanic's lien and payment bond claims. Those who do not appear on the bulletin board typically cannot make such claims.

Notice of Commencement

An original contractor is defined as one having a contract with the owner of the project. For the Preliminary Notice provisions to be in effect on a public project, the contractor or owner must file a Notice of Commencement no later than 15 days after commencement of physical construction work on the project. If the project is privately owned, there is no requirement to file a Notice of Commencement.

Preliminary Notice

Contractors and suppliers of any tier who desire to claim a construction lien or payment bond claim on a construction project must demonstrate they timely filed a Preliminary Notice on the SCR. If a contractor or supplier fails to timely file a Preliminary Notice on the SCR, the contractor or supplier risks waiving their right to later file lien and payment bond claims.



The timeframe to file a Preliminary Notice is no later than 20 days after the first day the contractor or supplier commences construction work on the real property. If contractors and suppliers fail to timely file their Preliminary Notices within 20 days of first commencing work on the project, they waive their lien or payment bond claims for any work or services furnished prior to the date the Preliminary Notice was filed, plus any work or materials furnished five days thereafter.

To illustrate, if a contractor or supplier untimely files a Preliminary Notice 24 days after first commencing work on the project, the contractor or supplier is not precluded from filing the Preliminary Notice, but it will not become effective until five days later—on day 29. Thus, if the contractor or supplier is not paid for its work or services, they are only entitled to bring lien or bond claims for work or services provided five days after day 24.

The burden to prove a Preliminary Notice was timely filed and that it substantially meets the filing requirements is on the contractor or supplier filing the Preliminary Notice. The contractor or supplier is required to file only one Preliminary Notice for each project. As described below, the 20-day Preliminary Notice timeframe changes once a Notice of Completion is filed.

Notice of Completion

Upon final completion of a project, an owner, original contractor, lender, surety, or title company related to the project may file a Notice of Completion on the SCR. "Final completion" means: (1) the date of issuance of a permanent certificate of occupancy, if required; (2) the

date of final inspection by the local government entity, if a permanent certificate of occupancy is not required; (3) 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 under the original contract; or (4) the last day on which substantial work was performed under the original contract, if, as a result of termination of the original contract before the project is completed, the governing agency does not issue a certificate of occupancy or perform a final inspection. Final completion does not occur if work remains to be completed for which the owner is holding payment to ensure completion of that work.

If a subcontractor performs substantial work—that is, work other than repair or warranty work—after the date of final completion, the subcontract agreement shall be considered an original contract for determining the timeframe for filing a construction lien, but only to the extent the original contractor is responsible for that subcontractors' work.

If you are not paid, your appearance on the bulletin board gives you the right to pursue collection efforts through the mechanic's lien and payment bond claim process.

Upon filing a Notice of Completion, the timeframes for filing Preliminary Notices change so that any subsequent Preliminary Notices shall be filed within 10 days from the date on which the Notice of Completion is filed.

Notice of Intent to File Notice of Final Completion

An owner of a nonresidential construction project that is registered with the SCR, or a contractor of a commercial nonresidential construction project that is also registered with the SCR, must file a Notice of Intent to Obtain Final Completion before filing a Notice of Completion if: (1) the performance time under the original contract is more than 120 days; (2) the amount of the original contract exceeds \$500,000; and (3) the contractor or owner has not obtained a payment bond.

The Notice of Intent to Obtain Final Completion must be filed at least 45 days before the day on which the owner or contractor files or could have filed a Notice of Completion. A person furnishing work or services to an owner or contractor who filed a Notice of Intent to Obtain Final Completion shall, no later than 20 days after the day on which the owner or contractor files a Notice of Intent to Obtain Final Completion, amend his Preliminary Notice, if one is filed, to include: (1) a good faith estimate of the total amount remaining due to finish the contract; (2) the identification of each contractor or subcontractor with whom the person has a contract on the project; and (3) a separate statement of all known amounts or categories of work that is disputed.

A person who amends his Preliminary Notice may, no later than 10 days after the day on which the person files the Amended Preliminary Notice, demand a statement of adequate assurance from the owner, contractor, or subcontractor with whom the person contracted. The demand must be served on the owner and the contractor or subcontractor with

The burden to prove that a Preliminary Notice was timely filed and that it substantially meets the filing requirements is on the contractor or supplier filing the Preliminary Notice.

whom the person contracted (1) by hand delivery with a responsible party's acknowledgment of receipt; (2) by certified mail with a return receipt; or (3) in accordance with Utah Rule of Civil Procedure 4. If the owner, contractor, or subcontractor fails to provide adequate assurance, the person seeking the adequate assurance may bring a legal action, including a request for injunctive or declaratory relief, to determine the adequacy of the owner's, contractor's or subcontractor's funds.

Conclusion

The SCR is an important tool. Use it. Before commencing a project in Utah, get on the SCR and file a Preliminary Notice. Doing so gets you on the bulletin board and gives owners and contractors notice that you are working on their projects and expect to be paid. If you are not paid, your compliance in filing these notices will give you the right to pursue mechanic's lien and payment bond claims. Subcontractors and suppliers with questions about the SCR or who are ready to take the next step to file mechanic's liens or payment bond claims should consult with competent legal counsel. ■

Jason H. Robinson, Esq. and Jason N. Dutson, Esq., are attorneys at the law firm of Babcock Scott & Babcock, P.C. in Salt Lake City, Utah, where they practice construction collections law. They may be reached at 801-531-7000 or by email at jason@babcockscott.com or jdutson@babcockscott.com.

**This is reprinted from Business Credit magazine, a publication of the National Association of Credit Management. This article may not be forwarded electronically or reproduced in any way without written permission from the Editor of Business Credit magazine.*