

1987

# Johnson v. Gallegos Construction Company, Aetna Casualty & Surety Company, and Kiewit Western Company : Brief of Appellant

Utah Supreme Court

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Robert F. Babcock; Walstad & Babcock; Attorneys for Defendant-Respondents.

Gary H. Weight; Aldrich, Nelson, Weight & Esplin; Attorneys for Plaintiffs-Appellants.

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UTAH SUPREME COURT  
BRIEF

870104

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD JOHNSON and ROBERT  
JOHNSON, d/b/a JOHNSON  
BROTHERS, GENERAL CONTRACTORS,

Plaintiff-Appellant,

vs.

GALLEGOS CONSTRUCTION COMPANY,  
AETNA CASUALTY & SURETY  
COMPANY AND KIEWIT WESTERN  
COMPANY,

Defendants-Respondents.

Case No. 870104  
and 870108

Argument Priority No. 14B

L. P. BIORN, INC. OF WYOMING,

Plaintiff-Appellant,

vs.

GALLEGOS CONSTRUCTION COMPANY,  
AETNA CASUALTY & SURETY  
COMPANY AND KIEWIT WESTERN  
COMPANY,

Defendants-Respondents.

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT ENTERED IN THE DISTRICT  
COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

THE HONORABLE HOMER F. WILKINSON, JUDGE

ROBERT F. BABCOCK  
WALSTAD & BABCOCK  
Attorney for Defendants-  
Respondents  
185 South State, Suite 1000  
Salt Lake City, Utah 84111

GARY H. WEIGHT  
ALDRICH, NELSON, WEIGHT & ESPLIN  
Attorney for Plaintiffs-Appellants  
43 East 200 North  
P. O. Box "L"  
Provo, Utah 84603

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ROBERT F. BABCOCK  
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Attorney for Defendants-  
Respondents  
185 South State, Suite 1000  
Salt Lake City, Utah 84111

GARY H. WEIGHT  
ALDRICH, NELSON, WEIGHT & ESPLIN  
Attorney for Plaintiffs-Appellants  
43 East 200 North  
P. O. Box "L"  
Provo, Utah 84603

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STATEMENT OF ISSUES PRESENTED ON APPEAL

The District Judge in his ruling on February 2, 1987, found and concluded that the defendant Gallegos Construction Company was a materialman and not a sub-contractor of the contractor, Kiewit Western Company. The Court further found that materialmen do not fall within the scope of the provisions of Utah Code Annotated, Section 63-56-38 or Title 14, Chapter 1. Finally the Court concluded that as the plaintiffs, Johnson Brothers, provided equipment to a materialman, Gallegos Construction Company, that they did not have a cause of action on the payment

bond provided for the protection of sub-contractors. Plaintiffs contend that the Court committed error in these conclusions and therefore, respectfully raise the issues as follows:

Is Gallegos Construction Company a sub-contractor of Kiewit Western Company fully protected by the payment bond furnished by Aetna Casualty and Surety Company?

Is the bond, which was issued by Aetna Casualty and Surety Company governed by Section 14-1-1, Utah Code Annotated or Section 63-56-38, Utah Code Annotated?

Does the bond issued by Aetna Casualty and Surety Company cover rental equipment?

#### STATEMENT OF THE FACTS

The State of Utah hired the defendant Kiewit as the general contractor of the 2100 South Highway Project (R. 171) for a total contract price of \$11,491,141.40. Defendant Aetna supplied a payment bond on the project. The bond states on its face:

...this bond is executed pursuant to the provisions of Title 14, Chapter 1, Utah Code Annotated, 1953, as amended, and all liabilities on this bond to all such claimants shall be determined in accordance with said provisions to the same extent as if it were copied at length herein. (See Addendum "A")

During the course of the construction project, Kiewit hired Gallegos to supply gravel to the project (R. 216). Gallegos' contract with Kiewit required Gallegos to manufacture and deliver approximately 690,000 cubic yards of borrow, 260,000 tons of granular borrow, and 128,000 tons of base course with a contract value of about \$2.5 million. Gallegos used a commercial gravel pit, which was used primarily for this project (R. 192), to



manufacture the gravel to Utah Department of Transportation specifications.

In the course of manufacturing gravel from the pit and delivering it to the job site, Gallegos rented certain equipment from the plaintiff Johnson Brothers (R. 169-170) for which plaintiffs have not been paid in the amount of \$16,848.90 plus interest (R. 179).

Prior to filing this action, plaintiffs telephoned a representative of Aetna regarding the procedure for obtaining payment under the bond (R. 182). The telephone conversation took place within the 90 day period required for filing a claim on the contractor's bond as required in Sections 14-1-14 and 63-56-38 of the Utah Code Annotated (R. 183, 193, 195). During this telephone conversation, plaintiffs were directed by Aetna's representative to send a written notice of the plaintiff's claim as required under Section 14-1-14 of the Utah Code Annotated to Kiewit and that the claim would thereby be processed (R. 183). Within the 90 day period required under the Sections listed above, plaintiffs sent Kiewit a written notice as required under Section 14-1-14 of the Utah Code Annotated and as indicated on the payment bond (R. 182). Kiewit and Aetna refused and failed to pay the amount due plaintiffs from defendant Gallegos, plaintiffs therefore filed this Complaint (R. 5-12).

#### SUMMARY OF ARGUMENT

Gallegos Construction Company entered into a contract with the sub-contractor, Kiewit Western Company, to perform a

substantial portion of Kiewit Western's contract with the State of Utah. Gallegos Construction Company provided customized material for the job site. Thus, Gallegos Construction Company more appropriately can be classified or identified as a subcontractor of the general contractor Kiewit Western Company rather than as a materialman or supplier of Kiewit Western. Plaintiffs, Johnson Brothers General Contractors, rented equipment to Gallegos for use in preparing and delivering materials to the job site at the instance of Gallegos Construction Company and therefore are protected by the bond issues by Aetna Casualty and Surety Company and are entitled to have this Court reverse the decision of the District Court Judge and enter judgment against Aetna Casualty and Surety Company for all just amounts due to the plaintiffs.

#### ARGUMENT

##### POINT I

GALLEGOS IS A SUB-CONTRACTOR UNDER KIEWIT AND THEREFORE THE PAYMENT BOND COVERS GALLEGOS' INDEBTEDNESS TO THE PLAINTIFFS.

Under a recent decision by this Court, Gallegos should be found to be a subcontractor rather than merely a materialman. In Jacobson Construction Company v. Industrial Indemnity Company, 657 P.2d 1325, (Utah 1983), this Court indicated some of the factors which should be considered in making such a determination. In its opinion, this Court accepted and approved the District Court's Jury Instruction No. 16, which reads:

A subcontractor means one who has contracted with the original contractor for the performance of all or a part of the work or services which such contractor has himself contracted to perform.

In support of this decision, this Court cited with approval a California Supreme Court decision, Theisen Free v. County of Los Angeles, 54 Cal.2d 170, 5 Cal. Rptr. 161, 352 P.2d 529 (1960), and in particular the following language:

[W]e conclude that one who agrees with the prime contractor to perform a substantial, specified portion of the work of construction, which is the subject of the general contract, in accord with the plans and specifications by which the prime contractor is bound...is a sub-contractor although he does not undertake on himself to incorporate such portion of the projected structure into the building. Id. at 1328, citing 5 Cal. Rptr. at 161, 352 P.2d at 537.

In the present action, Gallegos was required to manufacture borrow from its own pit according to the Utah Department of Transportation specifications. In a case strikingly similar to the present case, McElhose v. Universal Surety Company, 182 Neb 847, 158 N.W.2d 228 (1968), the middleman, a gravel company, had contracted with the general contractor, a highway construction company, to furnish and deliver gravel to the general contractor in a large quantity and on a daily basis. The middleman rented two tractors from the plaintiff for use at its gravel pits which were located 13, 16, and 28 miles from the project site. During the project period, the middleman continued to sell gravel to other customers. The Court concluded that the middleman was a subcontractor and thus covered by the payment bond. The court noted that:

the written contract between [the general contractor] and [the middleman] for furnishing gravel according to specifications and for delivering it to the project site in the quantity required points toward [the middleman] as a subcontractor and not a supplier. Id. at 233.

The Court further stated:

We point out that [the middleman] had a written contract with [the general contractor] to deliver about 33,424 cubic yards of gravel at the site of the project for the sum of \$97,709.50. We think this contract for the delivery of gravel in such a quantity and for such a price for material so essential to the construction of a highway makes [the middleman] a subcontractor. Id. at 234-235.

In the present action, Gallegos rented equipment from Johnson Brothers in order to fulfill its contractual obligation to Kiewit of providing 690,000 cubic yards of borrow, 260,000 tons of granular borrow, and 128,000 tons of base course (R. 169-170). The value of this contract was nearly \$2,500,000.00. The overall project was awarded to Kiewit for \$11,500,000.00. Gallegos' contract with Kiewit represented 21.74% of the overall price. As these figures suggest, Gallegos performed a substantial and specified portion of the construction project without which the project would not have proceeded. Gallegos' contractual obligation satisfies the test enunciated by this Court in Jacobsen that the subcontractor be a party who performs "all or a part of the work or services which [the general contractor] has himself contracted to perform." Jacobsen, at 1328. Gallegos' contractual obligation also satisfies the test announced in Theisen that the subcontractor be a party "who in the course of the performance of the prime contract constructs a definite, substantial part of the work." Theisen, at 537.

The facts in the present case are also very similar to those in Basich Brothers Construction Company v. United States, 159 F.2d 182 (9th Cir. 1946), in which the prime contractor, Basich

Brothers entered a contract with Duque and Frazzini to furnish labor, supplies and equipment required to comply with certain provisions of the Basich Brothers contract with the United States. Duque and Frazzini were to produce gravel, rock and sand and deliver it to Basich Brothers who in turn trucked it to the project. The Court found that Duque and Frazzini were subcontractors within the meaning of the Miller Act, basing its decision on the following language from MacEvoy v. United States:

The sub-contractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract,...  
Id. at 183.

The Court concluded as follows:

Duque and Frazzini, having performed for and taken from Basich Brothers a specific part of the labor and material requirements of [specific items of the] original contract, fully meet the requirements of that test and are, therefore, sub-contractors within the meaning and scope of the "Miller Act." Id. at 183.

The Basich case was cited with approval in Tiffany Construction v. Hancock and Kelly Construction Company, 24 Ariz. App. 504, 539 P.2d 978 (1975), as support for that Court's view that one factor to consider in determining whether a supplier was in fact a sub-contractor for the purposes of a bonding statute was whether the items the supplier provided was "customized."

Gallegos agreed with Kiewit to manufacture borrow and granular borrow to conform with the Utah Department of Transportation specifications. The material required a manufacturing process before being delivered to the job site. Therefore, contrary to the finding of the District Court, the

material supplied by Gallegos should be characterized as "customized." Therefore, this Court should hold that, as a supplier of "customized" material, Gallegos was a sub-contractor rather than a materialman.

## POINT II

### THE PROVISIONS OF UTAH CODE ANNOTATED, SECTION 14-1-14 GOVERN THE BOND ISSUED IN THIS CASE.

On January 7, 1985, Aetna furnished a bond at the instance of Kiewit pursuant to the requirements of the statutes of the State of Utah (See Addendum "A"). The bond, according to its own terms was issued under the provisions of Title 14, Chapter 1 of the Utah Code Annotated. At the top of the document and just under the title of the bond is set forth the title and chapter of the Utah Code Annotated under which this bond was issued. At the center of the printed matter of the bond is the following language:

Provided, however, that this bond is executed pursuant to the provisions of Title 14, Chapter 1, Utah Code Annotated, 1953, as amended, and all liabilities on this bond to all such claimants shall be determined in accordance with said provisions, to the same extent as if it were copied at length herein.

Section 14-1-14, Utah Code Annotated titled "Actions on Payment Bond" provides for the following notice requirements:

(2) Any person having a contract with a sub-contractor of the contractor, but no express or implied contract with the contractor furnishing the payment bond, shall have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which the last of the labor was performed or material was supplied...

The District Court held that rental equipment falls within

the scope of Section 63-56-38 of the Utah Code Annotated, as amended, effective April 29, 1985 as well as Section 14-1-1 plaintiff's remedy under the bond. The primary difference between the two sections is that Section 63-56-38, as amended in 1985, requires that the claimant on the bond to provide "written notice to the contractor and surety company within 90 days from the date on which the last of the labor was performed or material was supplied..." (Emphasis added.) Section 14-1-14 as quoted above does not require the written notice to be delivered to the surety company.

Although Section 63-56-38 applies to State projects generally, the contractors' payment bond indicates that obligations under the bond arise "pursuant to the provisions of Title 14, Chapter 1, Utah Code Annotated, 1953, as amended." Therefore, the District Court properly held that the notice provisions of that section should control rather than the notice provisions as required in Section 63-56-38.

Even if the District Court had held that the notice provisions contained in Section 63-56-38 applied to the instant case, the defendants should be estopped from claiming lack of notice because Aetna received actual notice of the claim. This argument is illustrated by a decision by this Court which applied the notice requirement contained in the Miller Act, 40 U.S.C.A. Section 270B, which has language similar to that in Section 14-1-14.

In Whiting Brothers Construction Company v. M. & S.

Construction & Engineering Company, 18 Utah 2d 43, 414 P.2d 961, (1966), the prime contractor Whiting Brothers, had been engaged to do construction work at the Cedar City, Utah Airport. It had sub-contracted a portion of this project to M. & S. Construction, which in turn had contracted with Hoyt & Smith for certain services and materials. When M. & S. Construction went out of business, they failed to pay their obligations to Hoyt & Smith. In an action against Whiting Brothers and the surety, the question before the Court was "whether Hoyt & Smith could recover from Whiting Brothers and their surety when they failed to strictly comply with the notice provisions of the Miller Act." Id. at 962. After the default of M. & S., Hoyt & Smith discussed their claims with responsible agents of Whiting Brothers and were assured something would be done to take care of them. In addition, Whiting's attorney wrote Hoyt & Smith acknowledging the default of M. & S. and advised that such steps were being taken to rectify the situation if possible.

This Court indicated:

The Miller Act's dominate purpose is to protect laborers and materialmen of sub-contractors and it should be liberally construed to effectuate this purpose. The purpose of the 90 day notice was to enable the prime contractor to protect himself and his surety against a delinquent or defaulting sub-contractor. Id. at 962.

This Court held that even though written notice was not given, Whiting Brothers were fully aware of the claim and would not have benefited by receipt of the notice. Therefore, the Court held that Whiting Brothers could not assert the defense of



failure by Hoyt and Smith to give the 90 day written notice.

In the instant case, the District Court found that plaintiffs called Aetna's representative and were given instructions on the procedure for establishing a claim on the contractor's bond (R. 183, 193, 195). Plaintiffs were told to send written notice to the prime contractor, Kiewit, to commence the claim procedure and that their remedy would follow. Plaintiffs did so within the 90 day period and complied with the written notice requirement entirely except for sending the written notice to Aetna (R. 182). Because Aetna was aware of the claim and had given specific instruction on the method to proceed on the claim, sending an additional written notice to Aetna would have accomplished nothing. Therefore, Aetna should be estopped from claiming that proper notice was not given as required by Utah Code Annotated, Section 14-1-14 (1983), and Utah Code Annotated, Section 63-56-38 (1985). This argument is strengthened by the fact that plaintiffs initiated their suit against Kiewit and Aetna prior to the expiration of the 90 day period in which notice must be given.

### POINT III

THE PLAINTIFFS' CLAIM FOR EQUIPMENT RENTED IS A VALID OBLIGATION UNDER THE APPLICABLE PAYMENT BOND STATUTE.

Kiewit was required under either Section 14-1-13 or Section 63-56-38(1)(b) to obtain a payment bond "in an amount equal to 100% of the price specified in the contract...for the protection of all persons supplying labor and material to the contractor or its sub-contractors for the performance of work provided for in

the contract." Section 63-56-38(1)(b), Utah Code Annotated. Kiewit obtained the requisite bond from Aetna.

As a general rule, a statutory bond of the type involved in this action is remedial in nature and is entitled to a liberal construction. The United States Supreme Court, in interpreting the Miller Act, 40 U.S.C.A. Section 270A et seq., language of which is similar to the Utah counterpart said that:

The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application to effectuate a congressional intent to protect those whose labor and materials go into public projects. Clifford F. MacEvoy Company v. United States, 322 U.S. 102, 88 L. Ed. 1163 (1943).

Although some jurisdictions have held otherwise, Judge Griffin Bell, then with the U. S. Court of Appeals for the Fifth Circuit, noted that the Miller Act and its predecessor statute have been "uniformly construed to include equipment rentals." J. W. Carruth v. Standard Accident Insurance, 329 F.2d 690, 693 (5th Cir. 1964).

The Utah counterpart to the Miller Act construed in the same liberal fashion would result in the same conclusion. J. F. Tolton Investment Company v. Maryland Casualty Company, 293 P. 611 (Utah 1930) was a case where a sub-contractor defaulted in payment to plaintiffs for materials and labor. Plaintiffs brought suit on the payment bond for various items including a claim for an amount due for rental of an engine used on the job. In that case, four of the five Justices held with regard to the claim for the rental that "under the liberal rule of interpretation to which we are committed, we conclude that the

charge in question is within the obligation of the bond, and the surety was properly held liable therefore." Id. at 615.

Even if the Court did not liberally construe the Utah statutes, a basic rule of statutory construction should lead this Court to the conclusion that "labor and material" includes rental equipment. As stated in a recent decision by this Court:

In construing legislative enactments or municipal ordinances, the primary responsibility of this Court is to give effect to the legislature's underlying intent. Murray City v. Hall, 663 P.2d 1314, 1317 (Utah 1983). See also Arizona Denite Builders, Inc. v. Continental, 105 Ariz. 99, 459 P.2d 724 (1969).

In attempting to determine the legislature's intent, the Court should look to other statutes which deal with the same subject matter. This Court in Murray City cited Sutherland Statutory Construction to this effect:

In the terms of legislative intent, it is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they should all be construed together.

Provisions in the act which are omitted in another act relating to the same subject matter will be applied in a proceeding under the other act, when not inconsistent with its purposes. Prior statutes relating to the same subject matter are to be compared with the new provisions; and if possible by reasonable construction, both are to be so construed that effect is given to every provision in all of them.

Statutes in pari materia, although in apparent conflict, are so far as reasonably possible construed to be in harmony with each other. But if there is an irreconcilable conflict between the new provisions and the prior statutes relating to the same subject matter, the new provision will control as it is the later expression of the legislature. Id. at 1318.

In addition to the subject matter, the doctrine of in pari

materia applies to "statutes which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose..." 82 CJS Statutes, Section 366, pp. 801-802. In applying this doctrine, the Utah Supreme Court has noted the similarity of the lien and bond statutes:

Because of the common purpose of these lien and contractor's bond statutes [referring to Sections 14-2-2 and 38-1-3, Utah Code Annotated (1953)], and their practically identical language, adjudications as to what is lienable under the former are helpful in determining the proper application of the latter. 13 Utah 2d 339, 341; 374 P.2d 254 (1962).

The Utah Mechanic's Lien law was amended in 1981 to include language specifically referring to rental materials or equipment used in construction or improvements. See Section 38-1-3. The legislature amended the provisions relating to private contracts in 1985 to include similar language about rental equipment. See Section 14-2-1. The public contracts and procurement code bonding sections (See Sections 14-1-13 and 63-56-38) have not been amended to include rental language but it is clear that all of the statutes referred to deal with the same class of persons, namely those who have furnished labor, materials and equipment on construction projects. The Court should construe the statutes effecting this class of claims in a rational manner consistent with the legislature's intent. Its intent with regard to inclusion of those renting equipment is clear from the language of the mechanic's lien and private bonding statutes. The legislature intended to provide broad coverage and this intent should be applied by the court in interpreting the Utah public

contracts bonding statutes.

In R. C. Stanhope v. Roanoke Construction Company, 539 F.2d 992 (4th Cir. 1976), Roanoke was the prime contractor and sub-contracted to Lockwood. Lockwood rented certain equipment from Stanhope and then defaulted on the rental payments and also failed to return some of the equipment rented. The only issue on appeal was whether Stanhope's rental charges and the value of missing rental equipment constituted materials furnished within the meaning of the Virginia payment bond statute. The Court held that both the rental charges and missing rental equipment constituted "materials furnished" under the Code. Chief Judge Haynsworth concurred in part and dissented in part. He dissented with regard to the missing rental equipment and felt that those items were not covered by the term "materials furnished." However, he cited a recent amendment to the Virginia Mechanic's Lien Statute to include the reasonable rental or use value of equipment. He said:

There is nothing to indicate that the general assembly ever intended to provide greater protection for materialmen and sub-contractors on private construction projects than that furnished to such suppliers on public projects. He indicates that the Court's logic "strongly suggests the legislative intention to equate materialmen and sub-contractors on public projects with the statutory protections afforded such supplies on private projects. The statement by the Supreme Court of Virginia that [its law] is remedial and must be given a liberal construction convinces me that whatever doubts might arise from the adoption in 1968 of the amendment to [mechanic's lien laws] should be resolved in favor of a construction of the [payment bond statute] so as to include the rental value of rental equipment furnished within the meaning of "materials."

Furthermore, this also logically follows from the requirement in the Public Bonding Statutes that the payment bond cover "100% of the price specified in the contract." On any large public construction project, it is very likely that some the costs will include costs of rental equipment. If rental equipment is not included in the bond, then the Utah statutes require an excess of bonding coverage beyond that necessary to protect the sub-contractors, materialmen and laborers.

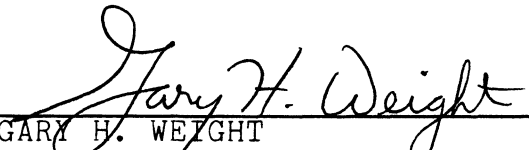
Because the payment bond statutes are remedial in nature, their provisions should be construed liberally to include rental equipment within the definition of "materials" furnished on the project.

#### CONCLUSION

The State of Utah hired the defendant Kiewit Western Company as general contractor of the 2100 South Highway Project for a total contract price of \$11,491,141.40. Within the course of the construction project, Kiewit Western Company hired Gallegos Construction Company as a sub-contractor to manufacture and deliver approximately 690,000 cubic yards of borrow, 260 tons of granular borrow and 128 tons of base course pursuant to a contract with a value of about \$2.5 million dollars. Gallegos Construction Company entered into an agreement with the Plaintiffs, Johnson Brothers General Contractors, to lease equipment from plaintiffs for the preparation and delivery of the borrow and base course materials to the project job site. Aetna Casualty and Surety Company provided a 100% performance and

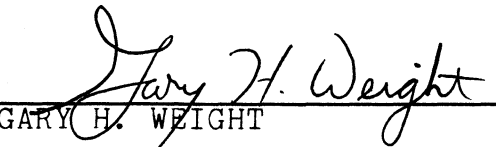
payment bond for the project pursuant to the requirements of Section 14-1-14, Utah Code Annotated. Plaintiffs were not paid sums which they had earned pursuant to their agreement with Gallegos Construction Company. The sum due the plaintiffs is \$16,848.90 together with interest, attorney's fees and costs. Plaintiffs gave proper notice of their claim to the general contractor, Kiewit Western Company and the surety, Aetna Casualty and Surety Company. Thus, plaintiffs contend that they are entitled to have judgment entered in their favor against Aetna Casualty and Surety Company in an amount as proven at the time of trial.

Respectfully submitted this 17<sup>th</sup> day of July, 1987.

  
GARY H. WEIGHT  
Attorney for Plaintiffs-Appellants

#### DELIVERY CERTIFICATE

I hereby certify that I delivered the four true and correct copies of the foregoing Brief of Appellants to Defendants' attorney, Mr. Robert F. Babcock of Walstad & Babcock at 185 South State Street, Suite 1000, Salt Lake City, Utah 84111 this 17<sup>th</sup> day of July, 1987.

  
GARY H. WEIGHT

## ADDENDUM



Robert F. Babcock ((#0158)  
Mary Louise LeCheminant (#4869)  
WALSTAD & BABCOCK  
Attorneys for Defendants,  
Kiewit Western and Aetna Casualty  
185 South State, Suite 1000  
Salt Lake City, Utah 84111  
Telephone: (801) 531-7000



FILED IN CLERK'S OFFICE  
Salt Lake County, Utah

FEB 2 1987

H. Dixon  
By *[Signature]*  
Deputy Clerk

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

RICHARD JOHNSON and ROBERT JOHNSON,  
dba JOHNSON BROTHERS, GENERAL  
CONTRACTORS,

Plaintiffs,

vs.

GALLEGOS CONSTRUCTION COMPANY,  
AETNA CASUALTY & SURETY COMPANY  
AND KIEWIT WESTERN COMPANY,

Defendants.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND JUDGEMENT

Civil No. C85-7945

Judge Homer F. Wilkinson

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This case came on for non-jury trial on November 19, 1986 before the Court. Richard and Robert Johnson ("Plaintiffs") were present and represented by their attorney, Gary H. Weight. Defendant Kiewit Western Company was present and both Aetna Casualty & Surety Company and Kiewit Western Company ("Defendants") were represented by their attorneys, Robert F. Babcock and Mary Louise LeCheminant.

FINDINGS AND CONCLUSIONS

Upon consideration of the evidence and the arguments of counsel the Court enters the following findings of fact and conclusions of law:

A. Findings of Fact

1. The State of Utah hired Kiewit Western Company ("Kiewit") as the general contractor for the 2100 South Highway Project.
2. Aetna Casualty & Surety Company ("Aetna") supplied a bond on

the project issued pursuant to Utah Code Annotated, Title 14, Chapter 1 (1953, as amended) according to the language found at the top of the bond and within the body of the bond.

3. Kiewit hired Gallegos Construction Company ("Gallegos") to supply gravel which (a) was readily available in the market as a stock in trade item and (b) could be sold to others in the ordinary course of business without material sacrifice if it were not used on the 2100 South Highway Project.

4. Plaintiffs entered into a lease agreement with Gallegos for the lease of certain equipment and all equipment from the Plaintiffs used by Gallegos at the commercial gravel pit was either rented or leased.

5. The Plaintiffs called Aetna within ninety days from the last day Plaintiffs provided labor or materials to Gallegos to obtain payment under the bond and were told to send written notice of their claim to Kiewit.

6. The Plaintiffs sent Kiewit written notice and filed this action within ninety days from the last day Plaintiffs provided labor or materials to Gallegos.

B. Conclusions of Law

1. Defendants are estopped from claiming (a) proper notice was not given as required by Utah Code Annotated, Section 63-56-38 (1985) and (b) Utah Code Annotated, Section 14-1-14 (1983) is not the applicable statute in this matter.

2. Leased and rental equipment fall within the scope of the provisions of Utah Code Annotated, Section 63-56-38 (1985) and Title 14, Chapter 1 (1953, as amended).

3. Gallegos was a materialman and not a subcontractor of Kiewit.

4. Materialmen do not fall within the scope of the provisions of Utah Code Annotated, Section 63-56-38 (1985) or Title 14, Chapter 1 (1953, as amended).

5. As Plaintiffs provided equipment to Gallegos, a materialman, they

have no cause of action on the payment bond provided for the protection of subcontractors.

JUDGEMENT

WHEREFORE, the Court hereby orders, adjudges and decrees based upon the foregoing findings and conclusions, that the Plaintiffs have no cause of action on the payment bond and thus the Court finds in favor of the Defendants, with costs to the Defendants.

DATED this 2 day of Feb. 1987.

BY THE COURT:

ATTEST  
H. DIXON HEDLEY  
CLERK.  
G.A. Childs  
Deputy Clerk  
Homer F. Wilkinson  
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Order, on this 22nd day of

January, 1987 to:

Gary H. Weight  
Attorney for Plaintiffs  
43 East 200 North  
P.O. Box "L"  
Provo, Utah 84603

James H. Hinkle

## LEASE AGREEMENT

Lease # #1-CAT-D8.

AGREEMENT of lease made and entered into this 1st day of June, 1985,  
by and between Johnson Brothers  
hereinafter called LESSOR and Gallegos Construction Co.  
hereinafter called LESSEE.

Subject to the terms and conditions hereinafter set forth, LESSOR does hereby lease to LESSEE the following described vehicle:

### 1. DESCRIPTION OF VEHICLE:

Make CAT Year 1966 Model D8H Serial No. 46A7659 Motor No. \_\_\_\_\_ Special Equipment \_\_\_\_\_

### 2. TERMS OF LEASE:

The commencement date of this Lease shall be as indicated above and this Lease shall expire on the 1st day of June, 1985, or fifteen days after written notice by LESSOR of default and expiration.

### 3. LEASE PAYMENTS:

In consideration of the lease of said vehicle, LESSEE shall pay to LESSOR the total sum of \$ Indeterminate, ~~payable in advance at the rate of \$ 550 per month~~, plus ~~Utah State sales tax~~. The first such monthly payment shall be due and owing on the 1st day of the calendar month following the date of execution of this Agreement and the remainder of such payments shall be due and owing on the 1st day of each month thereafter during the term of this Agreement. LESSEE deposits with LESSOR on execution of this Agreement the sum of \$ NONE, to be held in escrow to guarantee completion of lease. In the event such monthly payments are fifteen days past due, the LESSOR shall have the right to charge LESSEE a penalty fee equal to five (5%) per cent of such past due payment.

### 4. ADDITIONAL RENT:

In the event that such vehicle shall be operated in excess of NOT APL miles in any year of this Lease, then LESSEE agrees to pay to LESSOR an amount equal to N.A. cents per mile for each mile such vehicle is driven in excess of said aforementioned mileage figure during any such year of this Lease. LESSEE further agrees to provide LESSOR with a report each month at the time monthly payments are made of the mileage driven during the month preceding such payment.

## 5. INSURANCE

LESSEE agrees it shall, at its sole cost and expense, maintain in full force on such vehicle during the term of this Agreement automobile bodily injury liability insurance coverage with minimum limits of \$100,000—\$300,000 dollars and automobile property damage liability insurance of a minimum amount of \$25,000 for each such vehicle, together with actual cash value comprehensive insurance and collision insurance subject to \$100 deductible on each such vehicle in an insurance company acceptable to LESSOR. LESSEE shall furnish to LESSOR a copy of such insurance policies prior to taking delivery of such vehicle, and LESSEE shall cause LESSOR to be named as an additional insured in such policies of insurance and name Johnson Brothers as Loss Payee; and, further, LESSEE agrees to indemnify and to save LESSOR harmless from and against any and all loss, damages, claims, liabilities and expense in any manner arising out of the claims, injury or damage to persons or property as a result of LESSEE'S operation of such vehicle.

## 6. RETURN OF VEHICLE: NA

LESSEE agrees that upon expiration of the period for which such vehicle has been leased or upon expiration of the rights of LESSEE under the terms and conditions of this Agreement, such vehicle shall be returned to the LESSOR in as good condition as such vehicle was when received by LESSEE, reasonable wear and tear excepted; and, further, delivery and return of such vehicle shall be made at the office of the LESSOR at Salt Lake City, Utah.

## 7. OPERATION OF VEHICLE:

NA a. LESSEE agrees that such vehicle will be operated in a careful manner by licensed drivers, and that each such driver shall be selected, employed and controlled by the LESSEE solely, and such driver shall be presumed conclusively to be the agent and/or employee of the LESSEE.

b. LESSEE agrees that such vehicle shall not be operated or used in violation of any federal, state or municipal law or regulation.

NA c. LESSEE may at his sole cost and expense paint or affix to said vehicle any appropriate advertisement; provided, however, that LESSEE shall on the termination of this Agreement pay to LESSOR an amount equal to the cost and expense of removal of such advertisement and restore the finish of such vehicle to its original condition.

NA d. LESSEE agrees to maintain and pay all repairs made on said automobile not covered by factory warranty.

NA e. All repairs for physical damage to such vehicle whenever possible shall be made at LESSOR'S place of business, or the permission of LESSOR shall be first had and obtained to make such repairs elsewhere.

NA f. Such vehicle shall be used only within the boundaries of the continental United States.

NA g. LESSEE agrees that he shall not overload such vehicle beyond its rated capacity, and in the event of overloading, LESSEE agrees to pay all damages to such vehicle and tires resulting from overloading.

NA h. LESSEE assumes and agrees to pay all towing charges and any other cost and expense relating to operation of such vehicle unless such costs and expenses are incurred with the LESSOR'S written consent.

## 8. OWNERSHIP OF VEHICLE:

At all times during the term of this Lease such vehicle shall be the property of LESSOR, and the LESSEE shall have the sole right to use the same, subject to the terms and conditions of this Agreement; and LESSEE shall have no property interest in and to such vehicle.

## 9. DEFAULT BY LESSEE:

In the event LESSEE files or there is caused to be filed a petition in bankruptcy or shall make or have made an assignment for the benefit of creditors, or if a receiver shall be appointed for LESSEE, or if LESSEE shall have permitted or suffered any attachment, levy, execution to be made, levied or entered against or in any respect of any or all of LESSEE'S property, then upon giving five days written notice to LESSEE, the rights of LESSEE under this Agreement shall expire.

In the event that LESSEE fails to make any payment due and owing hereunder for a period of fifteen days after such payment is due, then the rights of LESSEE under this Agreement shall expire.

In the event that LESSEE shall fail to perform any of the terms and conditions required of LESSEE to perform under this Agreement, and upon fifteen days written notice of such failure to perform, then the rights of LESSEE under this Agreement shall expire.

## 10. DAMAGES:

In the event that LESSEE fails to perform in accordance with the terms and conditions of this Agreement and the rights of LESSEE hereunder expire then LESSEE agrees to pay to LESSOR any and all amounts of unpaid monthly payments computed to the date of return of such vehicle together with any loss or damage which LESSOR may suffer as a result of the breach of this Agreement by LESSEE, it being mutually agreed between the LESSOR and the LESSEE that the minimum amount of such loss as a result of any such breach as liquidated damages due and payable on the date of expiration of this Lease shall be a sum equal to one-third of the monthly payments that would have been paid if the Lease had continued in full force and effect for the period set forth in paragraph two above without consideration of the shortening of the term by reason of default.

## 11. ATTORNEY'S FEE:

LESSEE agrees to pay LESSOR a reasonable attorney's fee in the event that an attorney is employed to enforce any of the provisions of this Agreement by LESSOR.

## 12. NOTICES:

Any notice required to be given hereunder shall be deemed completed two days after posting with postage prepaid in regular U. S. mail to each of the parties at the respective addresses indicated in the initial paragraph of this lease Agreement.

## 13. AMENDMENTS:

Any amendment in this Agreement must be made in writing and attached to this Agreement. This Agreement contains all of the agreements between the parties hereto and no representations either oral or written made before this Agreement shall be considered a part of this Agreement unless included herein.

## 14. BENEFIT:

This Agreement shall be binding upon and enure to the benefit of the legal representatives, heirs, successors, and assigns of the parties hereto; provided, however, that LESSEE shall not have the right to assign or sublet the vehicle leased hereunder. Whenever herein the singular number is used, the same shall include the plural and the masculine gender shall include the neuter.

## 15. ELECTION OF REMEDIES:

The LESSOR shall have the sole right of enforcement of the terms and conditions of this Agreement at its sole discretion and the failure to exercise any rights of the LESSOR hereunder shall not constitute a waiver of such rights, it being mutually agreed between the parties that the remedies of the LESSOR hereunder are cumulative.

16. Customer agrees to purchase and pay property taxes and license fees for all years pertaining to this lease except the originating license fees.

17. This lease and any cars leased thereunder will be subject to any rights and interest in and to said cars under any respective contract of/or contracts that any lending institution may hold on the same.

The undersigned hereby assigns to \_\_\_\_\_  
all rentals and funds due and to become due the undersigned assignment is made and given as security for any and all obligations due or to become due from the undersigned to said bank.

~~DAVARIAN MOTORS~~

By:

Date:

18. ADDITIONAL CONDITIONS:

IN WITNESS WHEREOF, the parties hereto have executed this instrument, in triplicate, this day and year first above written.

LESSEE

LESSOR

By Randy J. Jellison By \_\_\_\_\_  
Title Owner Title \_\_\_\_\_  
Address 5516 West Richmond Address \_\_\_\_\_

Taxpayer  
Account No. 87-0335018

## MATERIAL CONTRACT

IRA Murray, UT  
No. 1-A  
Co 15 Phoenix  
Job Number 4080

THIS AGREEMENT, made this 27th day of March, 1985, by and betweenGallegos Construction Co., Inc.; 5566 West Highwood Dr.; Kearns, UT 84118

(Seller's Name, Address and Phone No.)

801-966-8893, hereinafter called the Seller, and Kiewit Western Co.; P.O. Box 7780;

(Contractor Name, Address and Phone No.)

Murray, Utah 84107-0780 801-266-8879, hereinafter called the Contractor, WITNESSETH:

Section 1. The Seller agrees to furnish all material set forth in "Section 2" hereof necessary in the construction of State  
Route 201, 2100 South Freeway, 3850 to  
5600 West, Project No.F-018(25) for Utah Department of Transportation

(Name of Project)

(Owner)

hereinafter called the Owner, at Salt Lake City, Utah, in accordance with the terms and  
(Location of Project)

provisions of the Contract between the Owner and the Contractor, dated December 28, 1984, and the Generaland Special Conditions, Drawings and Specifications prepared by Utah Department of Transportation

(Architect or Engineer)

hereinafter called the Architect or Engineer, forming a part of the Contract between the Contractor and the Owner, all of which shall be  
considered part of this Agreement by reference thereto, and the Seller agrees to be bound to the Contractor by the terms and pro-  
visions thereof.

ROUTE ALL PAYMENT F.R.S

Section 2. It is agreed that the materials to be furnished by the Seller are as follows: TO SALES AND USE TAX DESK

Approx.  
Quantity Material  
400,000 CY Borrow

BEFORE FILING Unit Price  
\$2.40/CY

BOND APPROVED
DATE
BY

All material furnished under this Agreement is to be delivered F.O.B. Jobsitewith freight allowed to Jobsite

Section 3. The Contractor agrees to pay the Seller for the materials to be furnished, as aforesaid, the sum of Nine Hundred  
Sixty Thousand and no/100 Dollars (\$960,000.00), subject  
to additions and deductions for changes as may result from operation of Contractor's contract with Owner, as follows:

Partial payments will be made to the Seller each month in an amount equal to 90% of the value of materials delivered  
to the site, computed on the basis of the prices set forth above, of the quantity as estimated by the Architect or Engineer, less the  
aggregate of previous payments made hereunder, but such partial payments shall not become due to Seller until 10 days after the Con-  
tractor receives payment for such materials from the Owner. If the Contractor receives payment from the Owner for less than the full  
value of materials delivered to the site but not yet incorporated into the work, the amount due to the Seller on account of such materials  
delivered to the site shall be proportionately reduced. No partial payment to the Seller shall operate as approval or acceptance of the  
materials furnished hereunder. Upon complete performance of this Material Contract by the Seller and final approval and acceptance  
of the materials by the Owner, the Contractor will make final payment to the Seller of the balance due him under this Material Contract

within 30 days after full payment for such materials has been received by the Contractor from the Owner. If at any time  
prior to final payment hereunder, the Owner reduces the amount of retainage withheld from the Contractor, the Contractor may, at its  
discretion, reduce accordingly the retained percentage withheld from the Seller.

The Contractor may deduct from any amounts due or to become due to the Seller, any sum or sums owing by the Seller to the  
Contractor; and in the event of any breach by the Seller of any part of this Agreement, or in the event of any lien, claim or other lia-  
bility asserted against the Contractor, arising out of the Seller's performance hereunder, which the Seller hereby agrees to



KNOW ALL MEN BY THESE PRESENTS:

That, Kiewit Western Co. hereinafter referred to as the  
"Principal," and The Aetna Casualty and Surety Company  
a corporation organized and existing under the laws of the State of Connecticut  
with its principal office in the City of Hartford Connecticut hereinafter referred to as the  
"Surety," are held and firmly bound unto the State of Utah by and through the Utah Department of Transportation,  
hereinafter referred to as the "Obligee," in the amount of Eleven Million Four Hundred Ninety-  
one Thousand One Hundred Forty-one and 40/100----- Dollars (\$11,491,141.40)  
for the payment whereof, the said Principal and Surety bind themselves, their heirs, administrators, executors,  
successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered into a certain written contract with the Obligee, dated the .....  
day of ....., 19....., to construct Grading, Drainage, Surfacing and  
Signing

in the County of Salt Lake State of Utah, Project No. F-018(25)  
for the approximate sum of Eleven Million Four Hundred Ninety-one Thousand One Hundred  
Forty-one and 40/100----- Dollars (\$11,491,141.40), which contract is hereby referred  
to and made a part hereof as fully and to the same extent as if copied at length herein.

NOW, THEREFORE, the condition of this obligation is such, that if the said Principal shall pay all claimants  
supplying labor or materials to him or his subcontractors in the prosecution of the work provided for in said  
contract, then, this obligation shall be void, otherwise to remain in full force and effect.

PROVIDED, HOWEVER, that this bond is executed pursuant to the provisions of Title 14, Chapter 1, Utah  
Code Annotated, 1953, as amended, and all liabilities on this bond to all such claimants shall be determined in  
accordance with said provisions, to the same extent as if it were copied at length herein.

IN WITNESS WHEREOF, the said Principal and Surety have signed and sealed this instrument this .....7th.....  
day of .....January..... 19.....85..

WITNESS OR ATTESTATION:

Veronica Maldonado  
Veronica Maldonado

WITNESS:

Merrilynn A. Kremer  
Merrilynn A. Kremer  
STATE OF NEBRASKA  
COUNTY OF SALT LAKE DOUGLAS

Kiewit Western Co. (Seal)

Frank M. Blank (Seal)

Frank M. Blank Vice President (Seal)  
Principal

The Aetna Casualty and Surety Company

Jacki R. Johnston  
Attorney-in-Fact  
Jacki R. Johnston

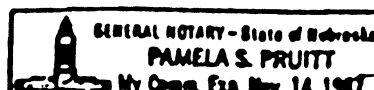
Jacki R. Johnston being first duly sworn on oath deposes and says, that she is the  
Attorney-in-Fact of The Aetna Casualty and Surety Company  
and that she is duly authorized to execute and deliver the foregoing obligation, that said Company is authorized  
to execute the same, and has complied in all respects with the laws of Utah in reference to becoming sole surety  
upon bonds, undertakings, and obligations.

Subscribed and sworn to before me this .....7th..... day of .....January..... 19.....85

Jacki R. Johnston  
Jacki R. Johnston  
Pamela S. Pruitt  
Notary Public - Pamela S. Pruitt

My commission expires: .....11/14/87.....

APPROVED AS TO FORM:



tractor but for the benefit of the state, the creditors and the surety. State ex rel. McBride v. Campbell Bldg. Co., 94 Utah 326, 77 P.2d 341 (1938).

## COLLATERAL REFERENCES

Utah Law Review. — Utah Legislative Survey — 1983, 1984 Utah L. Rev. 115, 127.

Am. Jur. 2d. — 17 Am. Jur. 2d Contractors' Bonds § 43 et seq.; 64 Am. Jur. 2d Public Works and Contracts § 99.

C.J.S. — 81A C.J.S. States § 119.

A.L.R. — Duty of public authority to disclose to contractor information, allegedly in its possession, affecting cost or feasibility of project, 86 A.L.R.3d 182.

Key Numbers. — States ⇐ 101.

**14-1-14. Actions on payment bonds.**

(1) Any person who has furnished labor or material to the contractor or subcontractor for the work provided in the contract for which a payment bond is furnished under this chapter, and has not been paid in full within 90 days from the date on which the last of the labor was performed or material was supplied, shall have the right to sue on the payment bond for any amount unpaid at the time the suit is filed and to sue on the contract for the amount due.

(2) Any person having a contract with a subcontractor of the contractor, but no express or implied contract with the contractor furnishing the payment bond, shall have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which the last of the labor was performed or material was supplied. The person shall state in the notice the amount claimed and the name of the party for whom the labor was performed or to whom the material was supplied. The notice shall be served personally or by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts business.

(3) Any person may obtain from the appropriate political entity a certified copy of a bond upon payment of the cost of reproduction of the bond and postage. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original.

(4) Any action instituted on the payment bond shall be brought in the appropriate court in the political subdivision in which the contract was to be performed. The action shall be commenced within one year after the furnishing of materials or labor, except if the claimant is a subcontractor of the contractor, the action shall be commenced within one year from the date on which final payment under the subcontract became due.

**History:** L. 1983, ch. 61, § 2.

## NOTES TO DECISIONS

## ANALYSIS

Abandonment of contract.  
Claims of creditors against contractor.

Last day material furnished.  
 Lien of laborers or materialmen.  
 Purpose and construction of act.  
 Timeliness of notice.

#### **Abandonment of contract.**

A contract could not be regarded as abandoned if its terms and conditions were performed by surety company instead of by the contractor. *Mellen v. Vondor-Horst Bros.*, 44 Utah 300, 140 P. 130 (1914).

#### **Claims of creditors against contractor.**

The statute dealt only with actions against the surety; claims of creditors against the contractor were not affected thereby and could be asserted at any time within the general statute of limitations. *State ex rel. McBride v. Campbell Bldg. Co.*, 94 Utah 326, 77 P.2d 341 (1938).

#### **Last day material furnished.**

Date on which the last of material was furnished was the delivery date for purposes of this section and it was not extended by subsequent substitution of new and different controls to correct the supplier's error. *A.A. Maycock, Inc. v. General Ins. Co. of Am.*, 24 Utah 2d 369, 472 P.2d 424 (1970).

#### **Liens of laborers or materialmen.**

Although a workman or materialman could not acquire a lien on a public building for labor or material furnished in the construction of such building in view of § 38-1-1, he might have a preferential right to money in the hands of the public corporation to be used in the construction of the building under this section. *Mountain States Supply Co. v. Nuttall-Allen Co.*, 63 Utah 384, 225 P. 811 (1924).

#### **Purpose and construction of act.**

Former law, insofar as it allowed "any person" supplying labor or materials to sue, was highly remedial, and was, in furtherance of justice, to receive a liberal construction and application so as to accomplish its real object and purpose. *Mellen v. Vondor-Horst Bros.*, 44 Utah 300, 140 P. 130 (1914), applying Comp. Laws 1907, § 1400x, now repealed.

The purpose of the former statute was to enable creditors of or claimants against contractor on public buildings to collect for work and materials furnished by them ratably and equitably from contractor and his bondsmen in all cases to the full amount and extent of the surety bond. *Board of Educ. v. West*, 55 Utah 357, 186 P. 114 (1919).

#### **Timeliness of notice.**

Materialman having delivered goods to subcontractor of state-owned bridge project could not hold the prime contractor or surety liable for payment where he had no contractual relationship with the prime contractor and did not give ninety-day notice to the contractor; under the prior law, plaintiff had no action against the prime contractor or surety because the action was not commenced within one year of the date of final settlement of the bridge contract by the state. *American Oil Co. v. General Contracting Corp.*, 17 Utah 2d 330, 411 P.2d 486 (1966).

### **COLLATERAL REFERENCES**

**Am. Jur. 2d.** — 17 Am. Jur. 2d Contractors' Bonds § 114 et seq.

**C.J.S.** — 81A C.J.S. States § 125.  
**Key Numbers.** — States — 101.

### **14-1-15. Liability of state or political subdivision failing to obtain bond.**

If the state or one of its political subdivisions fails to obtain a payment bond, it shall, upon demand by a person who has supplied materials or performed labor under the applicable contract, promptly make payment to that person, and the creditor shall have a direct right of action on his account against the appropriate political entity in any court having jurisdiction in the county in which the contract was to be performed. The action shall be commenced within one year after the furnishing of materials or labor.

particular method of construction contracting management for each project. 1900

#### 63-56-37. Bid security requirements.

(1) Bid security in amount equal to at least 5% of the amount of the bid shall be required for all competitive sealed bidding for construction contracts. Bid security shall be a bond provided by a surety company authorized to do business in this state, the equivalent in cash, or any other form satisfactory to the state.

(2) When a bidder fails to comply with the requirement for bid security set forth in the invitation for bids, the bid shall be rejected unless, pursuant to rules and regulations, it is determined that the failure to comply with the security requirements is nonsubstantial.

(3) After the bids are opened, they shall be irrevocable for the period specified in the invitation for bids, except as provided in section 63-56-20(6). If a bidder is permitted to withdraw a bid before award, no action shall be taken against the bidder or the bid security. 1900

#### 63-56-38. Bonds necessary when contract is awarded.

(1) When a construction contract is awarded, the following bonds or security shall be delivered to the state and shall become binding on the parties upon the execution of the contract:

(a) a performance bond satisfactory to the state, in an amount equal to 100% of the price specified in the contract, executed by a surety company authorized to do business in this state or any other form satisfactory to the state; and

(b) a payment bond satisfactory to the state, in an amount equal to 100% of the price specified in the contract, executed by a surety company authorized to do business in this state or any other form satisfactory to the state, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract.

(2) Rules may provide for waiver of the requirement of a performance or payment bond where a bond is deemed unnecessary for the protection of the state.

(3) Any person who has furnished labor or material to the contractor or subcontractor for the work provided in the contract, in respect of which a payment bond is furnished under this section, who has not been paid in full within 90 days from the date on which the last of the labor was performed or material was supplied by the person for whom the claim is made, may sue on the payment bond for any amount unpaid at the time the suit is instituted and may prosecute the action for the amount due the person. Any person having a contract with a subcontractor of the contractor, but no express or implied contract with the contractor furnishing the payment bond, has a right of action upon the payment bond upon giving written notice to the contractor and surety company within 90 days from the date on which the last of the labor was performed or material was supplied by the person for whom the claim is made. The person shall state in the notice the amount claimed and the name of the party for whom the labor was performed or to whom the material was supplied. The notice shall be served by registered or certified mail, postage prepaid, on the contractor and surety company at any place the contractor or surety company maintains an office or conducts business.

(4) Any suit instituted upon a payment bond shall be brought in the district court of the county in which the construction contract was to be performed. No suit may be commenced by a claimant under this section more than 180 days after a surety finally denies that claimant's claim. The obligee named in the bond need not be joined as a party in the suit.

#### 63-56-39. Form of bonds - Effect of certified copy.

The form of the bonds required by this part shall be established by rules and regulations. Any person may obtain from the state a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original.

### Part F. Contract Clauses

#### 63-56-40. Required contract clauses - Computation of price adjustments - Use of rules and regulations.

#### 63-56-41. Certification of change order.

#### 63-56-40. Required contract clauses -

Computation of price adjustments - Use of rules and regulations.

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

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

(b) Variations occurring between estimated quantities of work in a contract and actual quantities;

(c) Suspension of work ordered by the state and

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

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

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

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

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

(d) In any other manner as the contracting parties may mutually agree, or;

(e) In the absence of agreement by the parties, by a unilateral determination by the state of the costs attributable to the events or situations under the clauses with adjustment of profit or fee, all as computed by the state in accordance with applicable sections of the rules and regulations issued under