

1987

L. P. Biorn, Inc. v. Gallegos Construction Company : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

IN ~~THE~~ ^{BRIEF} SUPREME COURT OF THE STATE OF UTAH

DOCKET NO. 8701081

L. P. BIORN, INC. OF WYOMING,

Plaintiff-Appellant-
Cross-Respondents

vs.

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

Defendants-Respondents-
Cross-Appellants.

Case No. 870108

14 b

BRIEF OF APPELLANT

APPEALED FROM THE ORDER AND JUDGMENT OF
THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
HONORABLE SCOTT DANIELS

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Clerk, Supreme Court, Utah

Case No. 870108

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JURISDICTION AND NATURE OF PROCEEDINGS BELOW

This Court has jurisdiction of this matter pursuant to Section 78-2-2(3)(i), Utah Code Annotated 1953, in that the matter is one over which the Court of Appeals does not have jurisdiction pursuant to Section 78-2a-3, Utah Code Annotated 1953.

Plaintiff L.P. Biorn, Inc. of Wyoming commenced this action against defendants seeking recovery of amounts owing it for rental equipment furnished Gallegos Construction Company and used by Gallegos to fulfill a gravel products subcontract with Kiewit Western, the prime contractor, for the State of Utah.

ISSUES PRESENTED FOR REVIEW

1. Did the court err in ruling that Biorn was required to strictly comply with the provision calling for notice to the surety of Section 63-56-38(3), Utah Code Annotated 1953 (as amended in April, 1985), in that Biorn had given notice within the ninety day period to Kiewit, the prime contractor, as required by the statute prior to April, 1985.

2. Did the trial court err in finding that Biorn failed to give notice to the surety within ninety days of the date the last labor and materials were provided on the job.

CONTROLLING STATUTES

1. Section 14-1-14, Utah Code Annotated 1953 (as amended in 1983 and prior to repeal in 1987).

See Appendix B.

2. Section 63-56-38(3), Utah Code Annotated 1953 (as amended in April, 1985).

See Appendix C.

3. Section 63-56-38(3), Utah Code Annotated 1953 (as amended in April, 1987).

See Appendix D.

STATEMENT OF THE CASE

Nature of the Case

This action was brought by L. P. Biorn, Inc. of Wyoming, to recover amounts owing it for rental equipment furnished Gallegos Construction Company and used to produce gravel products for the prime contractor, Kiewit Western Company, on a State of Utah highway construction project. Defendant Aetna Casualty & Surety Company provided the payment bond on the project (R. 37-46).

Judgment by default was entered against defendant Gallegos Construction on April 16, 1986 (R. 50, 52-53).

A nonjury trial involving the remaining parties was scheduled for September 29, 1986 (R. 71-72). At a pretrial conference on September 22, 1986, the Court indentified four legal issues which were briefed by the parties and subsequently argued to the Court, along with Kiewit and Aetna's motion for summary judgment, on August 29, 1986 (R. 73-114).

At the hearing on the motion for summary judgment on September 29, 1986, the Court held that rental equipment was part of the labor or materials covered by Section 63-56-38, Utah Code Annotated 1953; that a materialman is a subcontractor within the meaning of Section 63-56-38; that a ninety day notice requirement with regard to Aetna was subject to strict interpretation; and that Biorn was not entitled to recovery of attorney's fees against Aetna or Kiewit (R. 129-131).

The Court held that the following issues would be tried, namely the amount in controversy, whether or not the Biorn claim was barred by inadequate notice to Aetna, whether the rental

equipment was used on other projects besides the Kiewit project, and whether Biorn was entitled to recovery of penalty interest (R. 131-133).

At the conclusion of Biorn's case in chief on September 30, 1986, the attorney for Kiewit and Aetna moved the Court to dismiss the case on the basis that notice to Aetna was not given within the ninety day period set forth in Section 63-56-38 (R. 84-85). The Court granted the motion to dismiss and found that the last material and labor was provided by Biorn on May 13, 1985 and that notice received by Aetna on August 14, 1985 was inadequate (R. 135-137). This appeal followed.

STATEMENT OF FACTS

Between approximately March 1, 1987 and May 13, 1987, plaintiff Biorn rented certain equipment and materials to defendant Gallegos Construction Company, including an International H-90 front end loader, a 175 Clark loader, a water truck, a service truck, an air compressor, a welder, and a fuel tank (Exhibit P-2; R. 40-42).

The hours and amounts set forth in the invoices were reviewed and approved by Gallegos on May 13, 1985 (R. 193-196), but Gallegos failed to pay the invoices due and owing (R. 181)

Some of the Biorn equipment was removed from the job site on May 13, 1985, some on May 14, and some on May 17 (R. 171). The H-90 International, the water truck, and the service truck were removed on May 13 and 14, 1985 (R. 210-211). The air compressor and welder were picked up on May 17, 1985 (R. 212). The fuel tank provided by Biorn pursuant to a lease-purchase agreement was retained by Gallegos at the job site (R. 213-216, 218).

The 175 Clark loader referred to in the invoices was leased by Biorn from Foulger Equipment Company and was then subleased to Gallegos (R. 205-206).

Upon failure of Gallegos to pay for the subject equipment rentals, Biorn gave written notice to Kiewit on or about May 21, 1985 of Biorn's intent to sue on the payment bond on the project to recover \$44,428.93 (Exhibit P-4). On August 13, 1985, Biorn gave written notice to defendant Aetna, which notice was received by Aetna on August 14, 1985 (Exhibit P-3). The present

action was filed on or about September 13, 1985 (R. 12-13)
and an Amended Complaint, pursuant to stipulation of the parties,
was filed on or about March 3, 1986 (R. 37-43, 51).

SUMMARY OF ARGUMENTS

POINT I

During the course of Biorn's rental contract with Gallegos, an amendment by the Utah legislature to the controlling statute, Section 68-56-38(3), Utah Code Annotated 1953, became effective. Biorn asserts that the statute in effect at the time the subject payment bond was issued controlled the rights and obligations of the parties with respect to the payment bond, including notice of intent to claim against the bond.

In the event the court determines that Biorn was required to proceed under the amended statute, Biorn complied with the requirements by giving notice to the prime contractor within the ninety day period, as well as notice to the surety, even if the notice to the surety was beyond ninety days.

The legislature's subsequent amendment of Section 63-56-38(3) in April, 1987 deleting any notice provisions with respect to the surety demonstrates the legislature's intent that notice to the prime contractor was of paramount importance and notice to the surety was of secondary importance. Substantial compliance with the notice provision relating to the surety is adequate.

POINT II

Biorn provided a fuel storage tank used by Gallegos up to May 17, 1985 and thereafter. The tank was provided pursuant to a lease-purchase agreement with Gallegos which was not performed by Gallegos. The use of the tank by Gallegos extended the time in which Biorn could give notice of intent to proceed against the bond.

Biorn also provided a welder and air compressor which were available for use by Gallegos until May 17, 1987, also extending the time period during which notice relating to the bond could be given.

ARGUMENT

POINT I. BIORN HAS COMPLIED WITH THE NOTICE REQUIREMENTS IN EFFECT WHEN THE WORK WAS COMMENCED.

Plaintiff Biorn, in attempting to recover amounts owed it by defendant Gallegos for rental equipment, pursued its remedies under Utah's Public Bonding Statutes, namely Section 14-1-14 and Section 63-56-38(3), Utah Code Annotated 1953. The payment bond under which Biorn proceeded (R. 13, R. 43 and Appendix A) refers exclusively to Title 14, Chapter 1, Utah Code Annotated 1953, which at the time of the execution of the bond in January, 1985 comprised Sections 14-1-13 through 14-1-17. Pursuant to Section 14-1-14(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 materials supplied.

It appears, however, that the controlling statute with regard to this State of Utah highway construction project was found in Utah's Procurement Code, Section 63-56-36(3), which in January, 1985 read as follows:

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, shall have the right to sue on the payment bond for any amount unpaid at the time the suit is instituted and to prosecute the action for the amount due the person. However, 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 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 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. (See Appendix C)

The purpose for notice to the prime contractor is well explained in case law interpreting the Federal equivalent to Utah's Public Bonding Statutes, the Miller Act, 40 U.S.C. Sections 270a and 270b. For example, in United States v. A & L Mechanical Contractors, Inc., 677 F.2d 383 (1983), the United States Court of Appeals for the Fourth Circuit stated as follows:

The design of the [Miller Act] is to give contractors, such as Honeywell, ninety days after completion of their work within which to assert a claim against the general contractor and its surety. If it does not do so within that period, the contractor may make final payment to the subcontractor with impunity. It would be quite unfair to the general contractor to expose it to stale claims of which it had no notice during the ninety day period. Id. at 386, referring to Noland Company v. Allied Contractors, Inc., 273 F.2d 917, 920-21 (4th Cir. 1959).

Under the Miller Act, such notice to the general contractor and its surety is accomplished by giving written notice to the prime contractor. No specific notice requirement is included for the surety, apparently on the basis that the prime contractor will generally make any payments claimed under the bond and will be liable to the surety in the event the surety is required to make payments. Virtually all cases interpreting the purpose of the Miller Act refer to the prime contractor's ultimate

liability for any claims against the bond. See, for example, United States v. A & L Mechanical Contractors, Inc., supra at 386; Noland Company v. Allied Contractors, Inc., 273 F.2d 917, 920-21 (4th Cir. 1959); Frank Briscoe Company v. United States, 396 F.2d 847, 849 (10th Cir. 1968); McWaters & Bartlett v. United States for Use and Benefit of Wilson, 272 F.2d 291 (10th Cir.) (1959).

As stated by the District Court for the District of Idaho in United States ex rel and for Use and Benefit of Korosh v. Otis Williams & Co., 30 F. Supp 590 (1939), the ninety day notice applies to the contractor and not to the surety:

The ninety day notice required to be given by the Statute applies to the contractor and not to the surety whose liability is co-extensive with the original contractor. It is for the purpose of advising the contractor of any advances created by his sub-contractor so that he might be protected on the final settlement . . . Id. at 593.

In the present case, notice was given on or about May 21, 1985, well within the ninety day period, to Kiewit, the prime contractor (R. 42-43; Exhibit P-4). Defendants contend, however, that Biorn was required to give notice within the ninety day period to Aetna, the surety (R. 80-81), as set forth in Section 63-56-38(3) after its amendment on April 27, 1985. Biorn contends that its notice meets the requirements of the public bonding statutes applicable to its claim.

BIORN IS COVERED BY THE PUBLIC BONDING STATUTE
IN EFFECT WHEN HE FIRST PROVIDED EQUIPMENT

As indicated in the Statement of Facts, Biorn first provided equipment to Gallegos on or about March 1, 1985 (R. 146). The version of Section 63-56-38(3) in effect at that time required

only notice to the prime contractor within ninety days from the date the last labor or material was provided. The payment bond executed January 7, 1985 incorporated by reference the provisions of Section 14-1-13, et seq., Utah Code Annotated 1953 as it existed at that time (and by extension Section 63-56-38) and provided that "all liabilities on this bond to all such claimants shall be determined in accordance with said provisions, to the same extent as if they were copied at length herein." (Appendix A)

The Aetna payment bond thus fixed the rights and obligations of Kiewit and Aetna and the claimants on the bond and limited those rights and obligations to those provided in the bonding statute in effect on January 7, 1985. Pursuant to accepted principles of statutory construction, an amendment or repeal of the controlling statute after the rights and obligations of the parties are established does not destroy those rights or obligations. For example, the Model Uniform Statutory Construction Act provides as follows:

The reenactment, revision, amendment, or repeal of a statute does not, except as provided in Uniform Statutory Construction Act Section 25(b) [referring to reduced penalty, forfeiture, or punishment for any offense] (1) affect the prior operation of the statute or any prior action taken thereunder, (2) affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder, (3) affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal, or (4) affect any investigation, proceeding, or remedy in respect of any privilege, obligation, liability, penalty, forfeiture, or punishment; . . .
73 Am.Jur.2d, Section 350, p 52, 1983 pocket part.

Another element of general statutory construction is stated as follows:

Statutes framed in general terms ordinarily apply to cases and subjects within their terms subsequently arising, and unless plainly indicating the contrary, are to be construed prospectively, especially where substantive rights are involved. Accordingly, it is a usual rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their purview and scope coming into existence subsequent to their passage. 82 C.J.S. Section 319, p 558.

Utah law expressly provides that repeal of a statute does not affect an accrued right or proceeding then under way:

The repeal of a statute does not revive a statute previously repealed, or affect any right which has accrued, any duty imposed, any penalty incurred, or any action or proceeding commenced under or by virtue of the statute repealed.

The Utah Supreme Court cited the foregoing statute in City Electric v. Industrial Indemnity Co., 683 P.2d 1053, 1054n.1 (1984) in support of its conclusion that Section 14-1-5, et seq., although repealed prior to commencement of the action, applied to the matter because the provisions were in effect when the rights and obligations giving rise to the action accrued.

In an earlier decision by this Court, Buttrey v. Guaranteed Securities Co., 78 Utah 39, 300 P. 1040 (1931), the court interpreted the same statute and held that vested rights created by the statute could not be destroyed by repeal of the statute which had created the rights. Id. at 78 Utah 51.

Applying the foregoing principles to the present fact situation, Biorn's rights and obligations under the payment bond were fixed at the time the payment bond was executed, prior to his furnishing of rental equipment in March, 1985. The notice given by Biorn fully conforms with the requirements of Section

63-56-38 then in effect and by which all of the parties to the bond, including claimants, were governed.

REPEAL OF THE PROVISION FOR NOTICE TO
SURETY IN APRIL, 1987 DEMONSTRATES
LEGISLATIVE INTENT

Even if this Court determined that Biorn should be governed by the provisions of Section 63-56-38 as they were set forth after the April 27, 1985 amendments, the subsequent actions of the Utah legislature demonstrate that the provision calling for notice to the surety should not be given the same weight as the provision requiring notice to the prime contractor. A comparison of Section 68-56-38(3) in its April, 1985 form with its April, 1987 form shows that all provisions calling for notice to the surety which were added in 1985 were deleted in 1987. No similar provisions calling for notice to a surety were added to Section 14-1-14 prior to its repeal in April, 1987 nor has any similar requirement been added to the private bonding statutes, 41-2-1, et seq.

The similarities between the notice provisions of the Utah Bonding Statutes and the Miller Act, supra, demonstrate the Utah legislature's intent to pattern the state statute after the federal provision, which requires that ninety day notice be given to the prime contractor, but not the surety. The addition of a notice provision to the surety to Section 63-56-38(3) for a two year period, and its subsequent deletion indicate that the legislature considers and has considered notice to the prime contractor to be paramount. It is given that notice to the prime contractor under both Utah law and the Miller Act is a

condition precedent to a successful claim against the contractor and surety. The provision added to Section 68-56-38(3) between April, 1985 and April, 1987 calling for notice to the surety does not rise to the same level of importance. Substantial compliance with that provision should be acceptable.

Utah courts have applied the doctrine of substantial compliance to mechanic's lien cases. In Graff v. Boise Cascade Corporation, 660 P.2d 721, 722 (1983), the court reaffirmed that "the doctrine of substantial compliance has validity and it has application in an appropriate case." Biorn submits that the present case is an appropriate one for application of the doctrine with regard to notice to Aetna. The purpose for the notice requirement, namely notice to the prime contractor, was accomplished in this case. Notice to the surety should be considered a secondary requirement and Biorn submits that the notice to Aetna, even if determined to be beyond the ninety day time period, was substantially complied with.

In support of Biorn's position with regard to interpretation of the hastily withdrawn provision concerning notice to the surety, a longstanding rule of statutory construction provides that subsequent amendments to a statute may be used by the court in construing the prior statute:

The interpretation of a statute by the legislative department of the government may go far to remove doubt as to its meaning. This fact is recognized by the courts, which regard it as proper to take into consideration, in determining the meaning of a statute, subsequent action of the legislature, or the interpretation which the legislature subsequently places upon the statute. It has been said that there are no principles of construction which prevent the utilization by the courts of

subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute, and it is very common for a court, in construing a statute, to refer to subsequent legislation as impliedly confirming the view which the court has decided to adopt. Indeed, it has been held that if it can be gathered from a subsequent statute in pari materia what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning and will govern the construction of the first statute. 73 Am.Jur.2d, Section 178, p 380-381.

Although dealing with interpretation of DUI ordinances and statutes, this Court in Murray City v. Hall, 663 P.2d 1314, 1318 (1983), cited with approval a similar principle of statutory construction relating to construction of two different statutes:

In 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 all should be construed together. Citing 2A C. Sands, Sutherland Statutory Construction Section 51.02, at 290 (4th ed. 1973).

A review of Utah Public Bonding Statutes, including Title 14, Chapter 1 in its versions prior to 1983, and prior to repeal in 1987, and 63-56-38, both before and after the 1985 and 1987 amendments, demonstrates clearly the significance placed by the legislature on notice to the prime contractor by materialmen or subcontractors claiming against payment bonds. Equally clear is the legislature's intent that notice to the surety is of secondary importance, even during the period such provision was included in the Section 68-56-38(3) period. The legislative history thus supports Biorn's position that the trial court committed error in holding that Biorn was required to comply

strictly with the provisions of Section 63-56-38(3) as amended in April, 1985 requiring notice to the surety, where notice to the prime contractor had been given in a timely manner.

POINT II. NOTICE TO AETNA WAS GIVEN WITHIN
NINETY DAYS OF THE DATE EQUIPMENT
WAS LAST USED ON THE JOB.

Even if the Court holds that Biorn was required to strictly comply with the statute as amended in April, 1987 and is required to strictly comply with the provision concerning nine day notice to the surety, the facts establish that Biorn complied with the provision.

The evidence is undisputed that a large water tank supplied by Biorn to Gallegos remained on the job at least through August, 1985 (R. 172-173). Biorn testified that the tank was furnished to Gallegos pursuant to a lease-purchase arrangement (R. 159-160), that the replacement cost of the tank was approximately \$67,000.00, and that the reasonable monthly rental rate for such a tank was \$400.00 to \$500.00 a month (R. 197). The fuel tank was full of fuel on Monday, May 13 and was used to fuel the Gallegos equipment during that week and thereafter (R.213-214). The lease extended for the duration of the job, or approximately six months, at the rate of \$1,500.00 (R. 215).

The courts interpreting the Miller Act, *supra*, have frequently dealt with the issue of when the ninety day notice period begins to run with regard to rental equipment. The Ninth Circuit Court of Appeals in United States ex rel. Carter-Schneider-Nelson, Inc. v. Campbell, 293 F.2d 816 (1961), held that: "The notice period runs from the time the equipment was

last available for use on the project." Id. at 820. The court in Campbell held that ninety day notice to the prime contractor had not been given where no leased equipment was present on the job site after December 5, 1956 and the notice to the prime contractor was dated March 8, 1957 and mailed on March 12, 1957.

In the present situation, the fuel tank was clearly available for use on the project after Biorn removed the last of his equipment on May 17, 1987. And although title to the tank would have passed to Gallegos had he made a total of \$1,500.00 in payments, the tank clearly had not been sold to Gallegos but was leased to him until such time as he performed the conditions precedent to sale.

Another case interpreting the date of commencement of the ninety day notice period is United States v. F.D. Rich Company, 190 F.Supp. 939 (D.Ct. 4n. D. Fla. 1961), in which the court held that the last day equipment was furnished under a rental contract was the last day of the rental term. Id. at 940-941. In the Rich case, the subcontractor rented a crane from August 30, 1960 to September 30, 1960, after which the crane lay idle at the construction site. The court held that notice to the prime contractor given after April 20, 1961, when the equipment was removed from the construction site, was inadequate, since the notice was more than ninety days beyond the end of the rental term. In this case, it is significant that the rental term extended through August, 1985 and that the fuel tank was used by Gallegos for the duration of the job. Biorn testified that he attempted to remove the tank several times after May 17, 1987,

but was unable to do so because it contained fuel.

The court ruled that the fuel tank would not be considered an item of rental equipment because it was part of the lease-sale agreement:

So I guess the question arises when was the last day that the labor was performed or the materials supplied? I would hold as a matter of fact that the water (sic) tank is not part of the material which comes under this contract since it was the one item that was not leased or rented, but was under a lease-sale agreement. (R. 135-136)

Having found that the fuel tank was part of a lease-sale agreement, the issue arises as to whether the supplying of equipment on a project under a lease-sale arrangement precludes its inclusion as an item of rental equipment. It is undisputed that, with the exception of certain payments made to Foulger Equipment Company by Gallegos, no payments were made to Biorn for the items of equipment furnished Gallegos. Thus no payments were applied to purchase of the tank. As indicated by the Tenth Circuit Court of Appeals in United States for Use and Benefit of Eddies Sales & Leasing, Inc. v. Federal Insurance Company, 634 F.2d 1050 (1980), fair rental charge for use of equipment is within the scope of the Miller Act, but purchase of the equipment is not covered. Biorn would submit that the lease-purchase agreement became, in fact, a lease when Gallegos failed to make any payments under the agreement and retained the tank for use during the course of the project.

In addition to the fuel tank, a welder and air compressor remained at Gallegos's shop until May 17, 1985, when they were removed by Biorn. Biorn testified that the compressor and

welder had been used at the job site on an as needed basis through May 11, 1985 (R. 171), and that they would have been used by Gallegos during the week of May 13 through 17 if they were needed, although use of the equipment was not physically observed (R. 212-213). Biorn submits that the equipment was available for use during this period and, pursuant to the provisions of United States ex rel. Carter-Schneider-Nelson, Inc. v. Campbell, supra, the ninety day notice period should be construed to commence on May 17, 1985 when that equipment was removed.

CONCLUSION

Biorn submits that the rights and obligations of the parties to this action with regard to the public bonding requirements of Title 14, Chapter 1 and Section 63-56-38 were fixed at the time the bond was executed on or about January 7, 1985. The parties had the right to rely on the statutory provision then in effect. The trial court in this matter improperly applied the requirements of Section 63-56-38(3) as amended on April 27, 1985. The court's holding that Biorn did not comply with the requirements of the amended statute should be reversed.

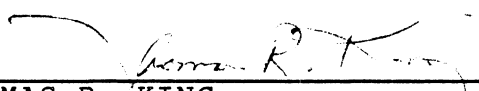
In the event the notice provisions in the 1985 amendment of Section 63-56-38(3) are found to apply in this action, the trial court erred in finding that Biorn was required to comply strictly with the provision calling for notice within ninety days to the surety. Biorn requests the court to reverse the

court's holding.

With regard to the timeliness of Biorn's notice to the surety, Biorn requests the court to reverse the trial court's holding that the fuel tank could not be considered as part of the rental equipment supplied to Gallegos because the tank was part of the lease-purchase arrangement. Biorn submits that, under the facts of the case, the tank should be considered part of the equipment rented by Gallegos.

RESPECTFULLY SUBMITTED this 14 day of August, 1987.

DWIGHT L. KING & ASSOCIATES, P.C.



THOMAS R. KING
Attorney for Plaintiff-Appellant
L.P. Biorn, Inc. of Wyoming

ADDENDUM

Title 14, Chapter 1, Sec. 5, U.C.A., 1953, as Amended

KNOW ALL MEN BY THESE PRESENTS:

That, Kiewit Western Co.

"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

"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 this7th... day ofJanuary....., 19...85...

WITNESS OR ATTESTATION:

Veronica Maldonado
Veronica Maldonado

WITNESS:

Gerrilynn A. Kremer
Gerrilynn A. Kremer
STATE OF ~~UTAH~~ NEBRASKA
COUNTY OF ~~SALT LAKE~~ DOUGLAS

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 this7th... day ofJanuary... 19...85

My commission expires: 11/14/87

APPROVED AS TO FORM:

[Signature]
Assistant Attorney General

Kiewit Western Co. (Seal)

Frank M. Blank (Seal)

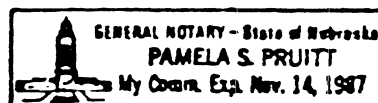
Frank M. Blank Vice President (Seal)
Principal

The Aetna Casualty and Surety Company

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

Jacki R. Johnston
Jacki R. Johnston

Pamela S. Pruitt
Notary Public - Pamela S. Pruitt



TITLE 14

CONTRACTORS' BONDS

Chapter

1. Public Contracts.
2. Private Contracts.

CHAPTER 1

PUBLIC CONTRACTS

Section

14-1-1. Repealed.
14-1-1.1. Repealed.
14-1-2 to 14-1-4. Repealed.
14-1-5 to 14-1-12. Repealed.
14-1-13. Performance and payment bonds on public projects — Conditions and terms.

Section

14-1-14. Actions on payment bonds.
14-1-15. Liability of state or political subdivision failing to obtain bond.
14-1-16. Attorney's fees.
14-1-17. Exemption of entities subject to Procurement Code.

14-1-1. Repealed.

Repeals. — Section 14-1-1 (L. 1909, ch. 68, § 1; 1917, ch. 36, § 2; C.L. 1917, § 3753; R.S. 1933 & C. 1943, § 17-1-1), providing for bond

to protect mechanics and materialmen, was repealed by Laws 1963, ch. 15, § 6.

14-1-1.1. Repealed.

Repeals. — Section 14-1-1.1 (L. 1953, ch. 23, § 1), relating to security in connection with bids, was repealed by Laws 1980, ch. 75, § 5.

For present comparable provisions, see § 63-56-1 et seq.

14-1-2 to 14-1-4. Repealed.

Repeals. — Sections 14-1-2 to 14-1-4 (L. 1909, ch. 68, §§ 1, 2; 1917, ch. 36, § 2; C.L. 1917, §§ 3753 to 3755; R.S. 1933 & C. 1943, 17-1-2 to 17-1-4; L. 1961, ch. 27, § 1), relating

to recovery on bonds to protect mechanics and materialmen, were repealed by Laws 1963, ch. 15, § 6.

14-1-5 to 14-1-12. Repealed.

Repeals. — Sections 14-1-5 to 14-1-12 (L. 1963, ch. 15, §§ 1 to 5; 1969, ch. 36, §§ 1 to 3), relating to bonding of contractors for public

buildings and public works, were repealed by Laws 1980, ch. 75, § 5. For present comparable provisions, see § 63-56-1 et seq.

14-1-13. Performance and payment bonds on public projects — Conditions and terms.

(1) Before any contract for the construction, alteration or repair of any public building, public work or public improvement of the state or its political subdivisions is awarded to any person, that person shall furnish to the appropriate political entity the following bonds:

(a) a performance bond in an amount equal to 100% of the price specified in the contract upon the faithful performance of the contract, solely for the protection of the political entity awarding the contract; and

(b) a payment bond in an amount equal to 100% of the price specified in the contract, solely for the protection of persons supplying labor or materials to the contractor or his subcontractors for the performance of work provided for in the contract.

(2) Each bond shall be:

(a) binding upon the award of the contract to the person;

(b) executed by a surety company or companies duly authorized to do business in this state;

(c) payable to the appropriate political entity; and

(d) filed in the office of the political entity awarding the contract.

(3) Nothing in this chapter shall be construed to limit the authority of the state or its political subdivisions to require additional performance bonds or other security.

History: L. 1983, ch. 61, § 1.

NOTES TO DECISIONS

ANALYSIS

Liability for failure to exact bond.

Necessity for furnishing bond.

Purpose and construction.

Liability for failure to exact bond.

Failure of a school district to require bond from contractor did not render it liable to contractor's assignee whose right to money was subordinate to claims for labor and materials. *South High School Dist. v. McMillan Paper & Supply Co.*, 49 Utah 477, 164 P. 1041 (1917); *Joseph Nelson Supply Co. v. Leary*, 49 Utah 493, 164 P. 1047 (1917), applying Laws 1909, ch. 68.

This section merely required contractor to execute the bond mentioned therein, but did not impose the duty upon any particular person to exact such a bond. *New York Blower Co. v. Carbon County High School*, 50 Utah 342, 167 P. 670 (1917).

School district was not liable to parties supplying labor and material to construct high school building for failure to require the bond mentioned herein. *New York Blower Co. v.*

Carbon County High School, 50 Utah 342, 167 P. 670 (1917).

School trustees were not personally liable for failure to require the bond mentioned herein. *New York Blower Co. v. Carbon County High School*, 50 Utah 342, 167 P. 670 (1917).

Necessity for furnishing bond.

Under statute anyone interested could demand that a bond be executed or required, and thereafter a refusal to do so would be willful. *Joseph Nelson Supply Co. v. Leary*, 49 Utah 493, 164 P. 1047 (1917).

Purpose and construction.

Statute was highly remedial for the benefit of and to provide security for all persons furnishing labor and materials on public work. *Campbell Bldg. Co. v. District Court of Millard County*, 90 Utah 552, 63 P.2d 255 (1936).

Statute was not for the benefit of the con-

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.

History: L. 1983, ch. 61, § 3.

14-1-16. Attorney's fees.

The prevailing party shall be awarded reasonable attorney's fees.

History: L. 1983, ch. 61, § 4.

14-1-17. Exemption of entities subject to Procurement Code.

This chapter shall apply only to those political entities not subject to the provisions of Chapter 56, Title 63.

History: L. 1983, ch. 61, § 5.

CHAPTER 2

PRIVATE CONTRACTS

Section	Section
14-2-1. Bond to protect mechanics and materialmen.	14-2-3. Action on bond to protect mechanics and materialmen — Attorney's fee.
14-2-2. Failure to require bond — Direct liability — Limitation of actions.	14-2-4. Exceptions — Mortgagees, beneficiaries, trustees.

14-2-1. Bond to protect mechanics and materialmen.

The owner of any interest in land entering into a contract, involving \$2,000 or more, for the construction, addition to, alteration, or repair of any building, structure, or improvement upon land shall, before any such work is commenced, obtain from the contractor a bond in a sum equal to the contract price, with good and sufficient sureties, conditioned for the faithful performance of the contract and prompt payment for material furnished, equipment and materials rented, and labor performed under the contract. This bond runs to the owner and to all other persons as their interest may appear. Any person who has furnished or rented any equipment or materials, or performed labor for or upon any such building, structure, or improvement, for which payment has not been made, has a direct right of action against the sureties upon such bond for the reasonable value of the rented materials or equipment furnished, for the reasonable value of the materials furnished, or for labor performed, not exceeding the prices agreed upon. This right of action accrues 40 days after the completion, abandonment, or default in the performance of the work provided for in the contract.

This bond shall be exhibited to any person interested, upon request.

History: L. 1915, ch. 91, §§ 1 to 3; C.L. 1917, §§ 3759 to 3761; R.S. 1933 & C. 1943, 17-2-1; L. 1977, ch. 56, § 3; 1985, ch. 219, § 1. Amendment Notes. — The 1985 amendment inserted "equipment and materials rented," after "material furnished" near the end of the first sentence of the first paragraph of the section; divided the second sentence into

catalog of goods and services provided by the Correctional Industries Division. The catalog shall include a description and price of each item offered for sale. The catalog shall be updated and revised during the year as the director deems necessary.

(3) State departments, agencies, and institutions may not purchase any goods or services provided by the Correctional Industries Division from any other source unless it has been determined in writing by the director of Correctional Industries and the state procurement officer or in the case of institutions of higher education, the institutional procurement officer, that purchase from the Correctional Industries Division is not feasible due to one of the following circumstances:

(a) the good or service offered by the division does not meet the reasonable requirements of the purchasing agency;

(b) the good or service cannot be supplied within a reasonable time by the division; or

(c) the cost of the good or service, including basic price, transportation costs, and other expenses of acquisition, is not competitive with the cost of procuring the item from another source. In cases of disagreement, the decision may be appealed to a board consisting of the director of the Department of Corrections, the director of Administrative Services, and a neutral third party agreed upon by the other two members or, in the case of institutions of higher education, the president of the involved institution shall make the final decision.

History: C. 1953, 63-56-35.6, enacted by L. 1955, ch. 201, § 2.

63-56-35.7. Counties and municipalities eligible to participate in state agreements, contracts and surplus property program. Counties and municipalities of this state are eligible to purchase from or otherwise participate in state public procurement unit agreements and contracts and may participate in the state surplus property program administered by the Division of Surplus Property.

History: C. 1953, 63-56-35.7, enacted by L. 1983, ch. 296, § 1; L. 1984, ch. 65, § 12.

Compiler's Notes.

The 1984 amendment added "and may participate in the state surplus property program administered by the Division of Surplus Property."

Title of Act.

An act relating to the Procurement Code; providing that certain political subdivisions may participate in state procurement agreements and contracts.

This act enacts Section 63-56-35.7, Utah Code Annotated 1953. — Laws 1983, ch. 296.

Cross-References.

Division of Surplus Property, 63-17-1 et seq.

PART E

PROCUREMENT OF CONSTRUCTION

Section

63-56-36. Alternative methods of construction contracting management.

63-56-37. Bid security requirements.

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

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

63-56-36. Alternative methods of construction contracting management. Rules and regulations shall provide for as many alternative methods of construction contracting management as determined to be feasible. These rules and regulations shall:

(1) Set forth criteria to be used in determining which method of construction contracting management is to be used for a particular project;

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

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

History: C. 1953, 63-56-36, enacted by L. 1980, ch. 75, § 1.

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.

History: C. 1953, 63-56-37, enacted by L. 1980, ch. 75, § 1.

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 ~~[and regulations]~~ 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, ~~[shall have the right to]~~ may sue on the payment bond for any amount unpaid at the time the suit is instituted and ~~[to]~~ may prosecute the action for the amount due the person. ~~[However,]~~ 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]~~ 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 ~~[personally or]~~ by registered or certified mail, postage prepaid, ~~[in an envelope addressed to]~~ 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; ~~but no suit shall be commenced later than one year from the date on which the last of the labor was performed or material was supplied by the person bringing the suit.~~ 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.

History: C. 1953, 63-56-38, enacted by L. 1980, ch. 75, § 1, L. 1985, ch. 202, § 1.

DECISIONS UNDER FORMER LAW

Burden of proof.

In action by materialman on payment bond, materialman did not have the burden to prove that the materials furnished were actually delivered to the job site or that they were actually incorporated into the structure, but only that the materials were furnished in connection with the particular project. *City Electric v. Industrial Indemnity Co.* (1984) 683 P 2d 1053.

Timeliness of action.

The appropriate test for determining whether an action on a payment bond was brought within the required statutory time period was not the "substantial completion" date; it was rather whether the material in

question was supplied as a part of the original contract or for the purpose of correcting defects or making repairs following inspection of the project. *City Electric v. Industrial Indemnity Co.* (1984) 683 P 2d 1053.

Work performed without contract.

Where construction company proceeded to demolish race track and install a soccer field for Utah Golden Spikers and state of Utah without an executed agreement and without compliance with § 64-1-4, there was no contract with the state of Utah by which it was obliged to require the Golden Spikers to furnish performance and payment bonds. *Breitling Bros. Construction, Inc. v. Utah Golden Spikers, Inc.* (1979) 597 P 2d 869

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.

History: C. 1953, 63-56-39, enacted by L. 1980, ch. 75, § 1.

PART F

CONTRACT CLAUSES

Section

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 materials and services the inclusion of clauses providing for adjustments in prices of materials, performance, or other appropriate contract provisions, and covering the following subjects:

1987 amend.

63-56-5

STATE AFFAIRS IN GENERAL

ment July 1, 1987" and in chapter 33 omitted the reference to "Governor's Advisory Council on Community Affairs July 1, 1985"; in Subsection (16)(b) changed the termination date of Division of Construction and Division of Preconstruction both from July 1, 1987 to July 1, 1997; in Subsection (18) changed the termination date from July 1, 1987 to July 1, 1997; in Subsection (19) changed the termination date of Animal Identification and Agricultural Development and Conservation both from July 1,

1987 to July 1, 1997 and added a termination date for the Division of Marketing and Promotion of July 1, 1992; in Subsection (20) changed the termination date of Division of Parks and Recreation from July 1, 1987 to July 1, 1997; in Subsection (21) changed the termination dates of the Division of Alcoholism and Drugs and the Division of Mental Health both from July 1, 1987 to July 1, 1997; and made some minor changes in phraseology and punctuation throughout the section.

CHAPTER 56

UTAH PROCUREMENT CODE

Part E

Procurement of Construction

Section

- 63-56-37. Bid security requirements.
63-56-38. Bonds necessary when contract is awarded.

Part H

Legal and Contractual Remedies

- 63-56-46. Effect of timely protest.

Section

- 63-56-60. Effect of prior determination by agents of state.

Part I

Intergovernmental Relations

- 63-56-69. Chief procurement officer to collect information as to supplies, etc.

63-56-5. Definitions.

COLLATERAL REFERENCES

A.L.R. — What constitutes "public work" within statute relating to contractor's bond, 48 A.L.R.4th 1170.

PART E

PROCUREMENT OF CONSTRUCTION

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, 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 Subsection 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.

History: C. 1953, 63-56-37, enacted by L. 1980, ch. 75, § 1; 1987, ch. 92, § 125.

Amendment Notes. — The 1987 amendment deleted "and regulations" following "rules" in Subsection (2) and corrected a statutory reference in Subsection (3).

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 for in the contract, in respect of which a payment bond is furnished under this section, who has not been paid in full therefor within 90 days from the date on which the last of the labor was performed by him or material was supplied by him for which 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 him. 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 within 90 days from the date on which such person performed the last of the labor or supplied the last of the material for which 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 at any place the contractor maintains an office or conducts business.

(4) Any suit instituted upon a payment bond shall be brought in the district court of any county in which the construction contract was to be performed. No suit may be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by the person bringing the suit. The obligee named in the bond need not be joined as a party in the suit.

History: C. 1953, 63-56-38, enacted by L. 1980, ch. 75, § 1; L. 1985, ch. 202, § 1; 1987, ch. 218, § 10.

Amendment Notes. — The 1987 amendment, in Subsection (3), deleted "and surety company" following "contractor" in the second sentence and twice in the fourth sentence; in Subsection (4), substituted the present second sentence for "No suit may be commenced by claimant under this section more than 180

days after a surety finally denies the claimant's claim."; and made various stylistic and phraseology changes throughout the section.

Applicability. — Laws 1987, ch. 218, § 12 provides that Chapter 218 applies only to contracts executed on or after April 27, 1987, and to persons and bonds in connection with such contracts.

NOTES TO DECISIONS

Materialman.

Inasmuch as a materialman is precluded under § 38-1-1 from placing a lien on public property, the defense which may be asserted under § 58A-1a-12 does not apply to a claim of a materialman furnishing materials or labor to a bonded public construction project. Thus, the

materialman who has not been paid in full within the time period required by this section may proceed directly against the bonding company without encountering such a defense against its claim. *Geneva Pipe Co. v. S & H Ins. Co.*, 714 P.2d 648 (Utah 1986).

COLLATERAL REFERENCES

A.L.R. — What constitutes "public work" within statute relating to contractor's bond, 48 A.L.R.4th 1170.

PART H

LEGAL AND CONTRACTUAL REMEDIES

63-56-46. Effect of timely protest.

In the event of a timely protest under Subsection 63-56-45(1), 63-56-54(1), or 63-56-59(1), the state shall not proceed further with the solicitation or with the award of the contract until all administrative and judicial remedies have been exhausted or until the chief procurement officer, after consultation with the head of the using agency or the head of a purchasing agency, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the state.

History: C. 1953, 63-56-46, enacted by L. 1980, ch. 75, § 1; 1987, ch. 92, § 126.

Amendment Notes. — The 1987 amend-

ment corrected the statutory reference at the beginning of the section.

63-56-60. Effect of prior determination by agents of state.

In any judicial action under § 63-56-59, determinations by employees, agents, or other persons appointed by the state shall be final and conclusive only as provided in §§ 63-56-32 and 63-56-50, and Subsection 63-56-57(2).

History: C. 1953, 63-56-60, enacted by L. 1980, ch. 75, § 1; 1987, ch. 92, § 127.

Amendment Notes. — The 1987 amendment corrected the statutory references.