

Chapter 8 Unenforceable Agreements

13-8-1 Construction industry -- Agreements to indemnify.

- (1) For purposes of this section:
- (a) "Construction contract" means a contract or agreement relative to the design, construction, alteration, repair, or maintenance of a building, structure, highway, appurtenance, appliance, or other improvement to real property, including moving, demolition, or excavating, connected to the construction contract between:
 - (i) a construction manager;
 - (ii) a general contractor;
 - (iii) a subcontractor;
 - (iv) a sub-subcontractor;
 - (v) a supplier; or
 - (vi) any combination of persons listed in Subsections (1)(a)(i) through (v).
 - (b) "Indemnification provision" means a covenant, promise, agreement or understanding in, in connection with, or collateral to a construction contract requiring the promisor to insure, hold harmless, indemnify, or defend the promisee or others against liability if:
 - (i) the damages arise out of:
 - (A) bodily injury to a person;
 - (B) damage to property; or
 - (C) economic loss; and
 - (ii) the damages are caused by or resulting from the fault of the promisee, indemnitee, others, or their agents or employees.
- (2) Except as provided in Subsection (3), an indemnification provision in a construction contract is against public policy and is void and unenforceable.
- (3) When an indemnification provision is included in a contract related to a construction project between an owner and party listed in Subsection (1)(a), in any action for damages described in Subsection (1)(b)(i), the fault of the owner shall be apportioned among the parties listed in Subsection (1)(a) pro rata based on the proportional share of fault of each of the parties listed in Subsection (1)(a), if:
- (a) the damages are caused in part by the owner; and
 - (b) the cause of the damages defined in Subsection (1)(b)(i) did not arise at the time and during the phase of the project when the owner was operating as a party defined in Subsection (1)(a).
- (4) This section may not be construed to affect or impair the obligations of contracts or agreements, that are in existence at the time this section or any amendment to this section becomes effective.

Amended by Chapter 113, 1997 General Session

13-8-2 Contractual limitations of liability arising from services of design professionals prohibited.

- (1) As used in this section:
- (a) "Agreement" means a contract, promise, covenant, or understanding.
 - (b) "Contractor" means any person engaged by an owner to develop or assist in the development of the owner's land.

- (c) "Design professional" means an architect, engineer, or land surveyor. It includes any other person who, for a fee or other compensation, performs services similar to the services of an architect, engineer, or land surveyor in connection with the development of land.
 - (d) "Development" means the construction, alteration, repair, maintenance, or improvement of land, including any related moving, demolition, or excavation.
 - (e) "Land" means any real property, including any building, fixture, improvement, appurtenance, structure, road, highway, or other development.
 - (f) "Liability" includes liability arising by contract, indemnity, contribution, tort, or otherwise.
 - (g) "Owner" means the holder of any legal or equitable title or interest in property.
 - (h) "Subcontractor" means any person engaged by a contractor to develop or assist in the development of land.
- (2) An agreement between an owner and a contractor may not limit the owner's or a design professional's liability to the contractor for any claim arising from services performed by the design professional in connection with the development of land. This subsection does not apply if the owner and the contractor are the same person or entity or are controlled by the same person or entity.
 - (3) An agreement between a contractor and a subcontractor may not limit the owner's or a design professional's liability to the subcontractor for any claim arising from services performed by the design professional in connection with the development of land.
 - (4) This section does not apply if the design professional is retained under a single contract to perform both the design and the construction of the project, such as in a design-build or turn-key project.
 - (5) This section may not be construed to affect any limitation of a design professional's liability to an owner or other design professional that may exist in an agreement between the owner and the design professional or between design professionals.
 - (6) This section does not affect or impair the obligations of agreements in existence as of May 1, 1988.

Enacted by Chapter 129, 1988 General Session

13-8-3 Construction contracts and purchase orders -- Venue.

- (1) As used in this section, "construction agreement" means a construction contract, subcontract, or purchase order for the design, construction, installation, or repair of an improvement to real property between a:
 - (a) construction manager;
 - (b) general contractor;
 - (c) subcontractor;
 - (d) sub-subcontractor;
 - (e) supplier; or
 - (f) any combination of the persons described under Subsections (1)(a) through (e).
- (2) A provision in a construction agreement requiring a dispute arising under the agreement to be resolved in a forum outside of this state is void and unenforceable as against the public policy of this state if:
 - (a) one of the parties to the agreement is domiciled in this state; and
 - (b) work to be done and the equipment and materials to be supplied under the agreement involves a construction project in this state.
- (3) This section applies to a construction agreement executed, renewed, or materially modified on or after May 5, 1997.

Enacted by Chapter 60, 1997 General Session

13-8-4 Obligation to pay under construction contracts -- Rights of parties under contingent payment provisions.

- (1) For purposes of this section:
 - (a) "Construction contract" means a contract or agreement to provide services, labor, or materials for the design, construction, installation, or repair of an improvement to real property located in Utah.
 - (b) "Contingent payment contract" means a construction contract between a contractor and a subcontractor that makes a payment from the contractor to the subcontractor contingent on the contractor receiving a corresponding payment from any other public or private party, including a private owner.
 - (c) "Contractor" means a person who is or may be awarded a contract for the construction, alteration, or repair of any building, structure, or improvement to real property.
 - (d) "Subcontractor" means any person engaged by a contractor to provide services, labor, or materials for the design, construction, installation, or repair of an improvement to real property and includes a trade contractor or specialty contractor.
- (2) A party to a construction contract shall make all scheduled payments under the terms of the construction contract.
- (3)
 - (a) The existence of a contingent payment contract is not a defense to a claim to enforce a preconstruction or construction lien under Title 38, Chapter 1a, Preconstruction and Construction Liens.
 - (b) Subsection (3) does not apply to contracts for private construction work for the building, improvement, repair, or remodeling of residential property consisting of four units or less.
- (4) If a construction contract is a contingent payment contract:
 - (a) the subcontractor may request from the contractor the financial information that the contractor has received from the public or private party regarding:
 - (i) the project financing; and
 - (ii) the public or private party; and
 - (b) if information is requested by the subcontractor under Subsection (4)(a), the contractor shall provide the information prior to the subcontractor signing the construction contract between the contractor and the subcontractor.
- (5) This section applies to a contract executed on or after May 5, 1997.

Amended by Chapter 278, 2012 General Session

13-8-5 Definitions -- Limitation on retention proceeds withheld -- Deposit in interest-bearing escrow account -- Release of proceeds -- Payment to subcontractors -- Penalty -- No waiver.

- (1) As used in this section:
 - (a)
 - (i) "Construction contract" means a written agreement between the parties relative to the design, construction, alteration, repair, or maintenance of a building, structure, highway, appurtenance, appliance, or other improvements to real property, including moving, demolition, and excavating for nonresidential commercial or industrial construction projects.
 - (ii) If the construction contract is for construction of a project that is part residential and part nonresidential, this section applies only to that portion of the construction project that is

nonresidential as determined pro rata based on the percentage of the total square footage of the project that is nonresidential.

- (b) "Construction lender" means any person, including a bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, credit union, cooperative bank, small loan company, sales finance company, investment company, or any other financial institution that advances money to a borrower for the purpose of making alterations or improvements to real property. A construction lender does not include a person or entity who is acting in the capacity of contractor, original contractor, or subcontractor.
 - (c) "Construction project" means an improvement to real property that is the subject of a construction contract.
 - (d) "Contractor" means a person who, for compensation other than wages as an employee, undertakes any work in a construction trade, as defined in Section 58-55-102 and includes:
 - (i) any person engaged as a maintenance person who regularly engages in activities set forth in Section 58-55-102 as a construction trade; or
 - (ii) a construction manager who performs management and counseling services on a construction project for a fee.
 - (e) "Original contractor" means the same as that term is defined in Section 38-1a-102.
 - (f) "Owner" means the person who holds any legal or equitable title or interest in property. Owner does not include a construction lender unless the construction lender has an ownership interest in the property other than solely as a construction lender.
 - (g) "Public agency" means any state agency or a county, city, town, school district, special district, special service district, or other political subdivision of the state that enters into a construction contract for an improvement of public property.
 - (h) "Retention payment" means release of retention proceeds as defined in Subsection (1)(i).
 - (i) "Retention proceeds" means money earned by a contractor or subcontractor but retained by the owner or public agency pursuant to the terms of a construction contract to guarantee payment or performance by the contractor or subcontractor of the construction contract.
 - (j) "Subcontractor" means the same as that term is defined in Section 38-1a-102.
- (2)
- (a) This section is applicable to all construction contracts relating to construction work or improvements entered into on or after July 1, 1999, between:
 - (i) an owner or public agency and an original contractor;
 - (ii) an original contractor and a subcontractor; and
 - (iii) subcontractors under a contract described in Subsection (2)(a)(i) or (ii).
 - (b) This section does not apply to a construction lender.
- (3)
- (a) Notwithstanding Section 58-55-603, the retention proceeds withheld and retained from any payment due under the terms of the construction contract may not exceed 5% of the payment:
 - (i) by the owner or public agency to the original contractor;
 - (ii) by the original contractor to any subcontractor; or
 - (iii) by a subcontractor.
 - (b) The total retention proceeds withheld may not exceed 5% of the total construction price.
 - (c) The percentage of the retention proceeds withheld and retained pursuant to a construction contract between the original contractor and a subcontractor or between subcontractors shall be the same retention percentage as between the owner and the original contractor if:

- (i) the retention percentage in the original construction contract between an owner and the original contractor is less than 5%; or
 - (ii) after the original construction contract is executed but before completion of the construction contract the retention percentage is reduced to less than 5%.
- (4)
- (a) If any payment on a contract with a private contractor, firm, or corporation to do work for an owner or public agency is retained or withheld by the owner or the public agency, as retention proceeds, it shall be placed in an interest-bearing account and accounted for separately from other amounts paid under the contract.
 - (b) The interest accrued under Subsection (4)(a) shall be:
 - (i) for the benefit of the contractor and subcontractors; and
 - (ii) paid after the project is completed and accepted by the owner or the public agency.
 - (c) The contractor shall ensure that any interest accrued on the retainage is distributed by the contractor to subcontractors on a pro rata basis.
 - (d) Retention proceeds and accrued interest retained by an owner or public agency:
 - (i) are considered to be in a constructive trust for the benefit of the contractor and subcontractors who have earned the proceeds; and
 - (ii) are not subject to assignment, encumbrance, attachment, garnishment, or execution levy for the debt of any person holding the retention proceeds and accrued interest.
- (5) Any retention proceeds retained or withheld pursuant to this section and any accrued interest shall be released pursuant to a billing statement from the contractor within 45 days from the later of:
- (a) the date the owner or public agency receives the billing statement from the contractor;
 - (b) the date that a certificate of occupancy or final acceptance notice is issued to:
 - (i) the original contractor who obtained the building permit from the building inspector or public agency;
 - (ii) the owner or architect; or
 - (iii) the public agency;
 - (c) the date that a public agency or building inspector that has the authority to issue a certificate of occupancy does not issue the certificate but permits partial or complete occupancy or use of a construction project; or
 - (d) the date the contractor accepts the final pay quantities.
- (6) If only partial occupancy of a construction project is permitted, any retention proceeds withheld and retained pursuant to this section and any accrued interest shall be partially released within 45 days under the same conditions as provided in Subsection (5) in direct proportion to the value of the part of the construction project occupied or used.
- (7) The billing statement from the contractor as provided in Subsection (5)(a) shall include documentation of lien releases or waivers.
- (8)
- (a) Notwithstanding Subsection (3):
 - (i) if a contractor or subcontractor is in default or breach of the terms and conditions of the construction contract documents, plans, or specifications governing construction of the project, the owner or public agency may withhold from payment for as long as reasonably necessary an amount necessary to cure the breach or default of the contractor or subcontractor; or
 - (ii) if a project or a portion of the project has been substantially completed, the owner or public agency may retain until completion up to twice the fair market value of the work of the original contractor or of any subcontractor that has not been completed:

- (A) in accordance with the construction contract documents, plans, and specifications; or
 - (B) in the absence of plans and specifications, to generally accepted craft standards.
- (b) An owner or public agency that refuses payment under Subsection (8)(a) shall describe in writing within 45 days of withholding such amounts what portion of the work was not completed according to the standards specified in Subsection (8)(a).
- (9)
- (a) Except as provided in Subsection (9)(b), an original contractor or subcontractor who receives retention proceeds shall pay each of its subcontractors from whom retention has been withheld each subcontractor's share of the retention received within 10 days from the day that all or any portion of the retention proceeds is received:
 - (i) by the original contractor from the owner or public agency; or
 - (ii) by the subcontractor from:
 - (A) the original contractor; or
 - (B) a subcontractor.
 - (b) Notwithstanding Subsection (9)(a), if a retention payment received by the original contractor is specifically designated for a particular subcontractor, payment of the retention shall be made to the designated subcontractor.
- (10)
- (a) In any action for the collection of the retained proceeds withheld and retained in violation of this section, the successful party is entitled to:
 - (i) attorney fees; and
 - (ii) other allowable costs.
 - (b)
 - (i) Any owner, public agency, original contractor, or subcontractor who knowingly and wrongfully withholds a retention shall be subject to a charge of 2% per month on the improperly withheld amount, in addition to any interest otherwise due.
 - (ii) The charge described in Subsection (10)(b)(i) shall be paid to the contractor or subcontractor from whom the retention proceeds have been wrongfully withheld.
- (11) A party to a construction contract may not require any other party to waive any provision of this section.

Amended by Chapter 16, 2023 General Session

13-8-6 Definitions -- Motor carrier indemnity agreements void.

- (1) As used in this section, "motor carrier transportation contract" means any written agreement for:
- (a) the transportation of personal property for compensation or hire;
 - (b) entry on real property for the purpose of packing, loading, unloading, or transporting personal property for compensation or hire; or
 - (c) a service incidental to an activity described in Subsection (1)(a) or (b) including storage of personal property for compensation or hire.
- (2) Except as provided in Subsection (3), any provision in a motor carrier transportation contract that requires either party or either party's surety or insurer to indemnify or hold harmless the other party against liability for death, personal injury, or property damage caused in whole or in part by the negligence or intentional acts or omissions of the other party is void.
- (3) This section does not affect any provision in a motor carrier transportation contract that requires either party or either party's surety or insurer to indemnify another person against liability for death, personal injury, or property damage that arises out of the fault of:
- (a) the indemnitor; or

- (b) the indemnitor's agents or representatives.

Enacted by Chapter 287, 2011 General Session

13-8-7 Contract for design professional services -- Agreements to indemnify.

(1) As used in this section:

(a) "Design professional" means:

(i) an individual licensed under:

(A) Title 58, Chapter 3a, Architects Licensing Act;

(B) Title 58, Chapter 22, Professional Engineers and Professional Land Surveyors Licensing Act; or

(C) Title 58, Chapter 53, Landscape Architects Licensing Act; or

(ii) a nongovernmental entity engaged in the business of providing services that require a license described in Subsection (1)(a)(i).

(b) "Design professional services" means:

(i) professional services within the scope of the practice of architecture as defined in Section 58-3a-102;

(ii) professional engineering or professional land surveying as defined in Section 58-22-102; or

(iii) professional services within the scope of the practice of landscape architecture as defined in Section 58-53-102.

(c)

(i) "Design professional services contract" means a contract under which a design professional agrees to provide design professional services:

(A) to a governmental entity; or

(B) for an improvement owned or to be owned by a governmental entity.

(ii) "Design professional services contract" does not include a construction contract, as defined in Section 13-8-1.

(d) "Indemnification provision" means a covenant, promise, agreement, or understanding in, in connection with, or collateral to, a design professional services contract that requires the design professional to:

(i) indemnify or hold harmless any person from or against liability for damages other than liability for damages to the extent caused by or resulting from:

(A) the design professional's breach of contract, negligence, recklessness, or intentional misconduct; or

(B) the design professional's subconsultant's negligence;

(ii) defend any person from or against a claim alleging liability for damages, including a claim alleging:

(A) the design professional's breach of contract, negligence, recklessness, or intentional misconduct; or

(B) the design professional's subconsultant's negligence; or

(iii) reimburse any person for attorney fees or other costs incurred by the person in defending against a claim alleging liability for damages, except to the extent the attorney fees or costs were incurred due to:

(A) the design professional's breach of contract, negligence, recklessness, or intentional misconduct; or

(B) the design professional's subconsultant's negligence.

(e) "Governmental entity" means the same as that term is defined in Section 63G-7-102.

(f) "Improvement" means the same as that term is defined in Section 78B-2-225.

- (g) "Subconsultant" means a person with whom a design professional contracts to provide a service related to or part of the design professional services that the design professional agrees to perform under a design professional services contract.
- (2) An indemnification provision is void.
- (3)
 - (a) A design professional shall perform design professional services under a design professional services contract consistent with the professional skill and care ordinarily provided by other design professionals:
 - (i) with the same or similar professional license; and
 - (ii) providing the same or similar design professional service:
 - (A) in the same or similar locality;
 - (B) at the same or similar time; and
 - (C) under the same or similar circumstances.
 - (b)
 - (i) Except as provided in Subsection (3)(b)(ii), a design professional services contract may not establish a standard of care different from the standard of care described in Subsection (3)(a).
 - (ii) A design professional services contract may require a design professional to perform design professional services consistent with a specialized design expertise if the nature of the project that is the subject of the design professional services contract reasonably requires the specialized design expertise.
 - (c) A provision in a design professional services contract that purports to waive or conflicts with a provision of Subsection (3)(b) is void.
- (4) The provisions of this section apply to a design professional services contract executed on or after May 8, 2018.

Enacted by Chapter 222, 2018 General Session