

RETENTION PROCEEDS REVISIONS

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Scott K. Jenkins

House Sponsor: Michael T. Morley

LONG TITLE

General Description:

This bill modifies provisions in the Utah Code relating to retention proceeds under a construction contract.

Highlighted Provisions:

This bill:

- ▶ clarifies the meaning of public agency;
- ▶ modifies how retention money is held and accounted for; and
- ▶ limits the amount a local school board may retain until a school construction project

is completed and accepted by the board to 5% of the contract price.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

13-8-5, as last amended by Laws of Utah 2001, Chapter 9

53A-20-101, as last amended by Laws of Utah 2008, Chapter 382

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **13-8-5** is amended to read:

13-8-5. Definitions -- Limitation on retention proceeds withheld -- Deposit in interest-bearing escrow account -- Release of proceeds -- Payment to subcontractors --

30 **Penalty -- No waiver.**

31 (1) As used in this section:

32 (a) (i) "Construction contract" means a written agreement between the parties relative
33 to the design, construction, alteration, repair, or maintenance of a building, structure, highway,
34 appurtenance, appliance, or other improvements to real property, including moving,
35 demolition, and excavating for nonresidential commercial or industrial construction projects.

36 (ii) If the construction contract is for construction of a project that is part residential
37 and part nonresidential, this section applies only to that portion of the construction project that
38 is nonresidential as determined pro rata based on the percentage of the total square footage of
39 the project that is nonresidential.

40 (b) "Construction lender" means any person, including a bank, trust company, savings
41 bank, industrial bank, land bank, safe deposit company, private banker, savings and loan
42 association, credit union, cooperative bank, small loan company, sales finance company,
43 investment company, or any other financial institution that advances money to a borrower for
44 the purpose of making alterations or improvements to real property. A construction lender
45 does not include a person or entity who is acting in the capacity of contractor, original
46 contractor, or subcontractor.

47 (c) "Contractor" means a person who, for compensation other than wages as an
48 employee, undertakes any work in a construction trade, as defined in Section 58-55-102 and
49 includes:

50 (i) any person engaged as a maintenance person who regularly engages in activities set
51 forth in Section 58-55-102 as a construction trade; or

52 (ii) a construction manager who performs management and counseling services on a
53 construction project for a fee.

54 (d) "Original contractor" is as provided in Section 38-1-2.

55 (e) "Owner" means the person who holds any legal or equitable title or interest in
56 property. Owner does not include a construction lender unless the construction lender has an
57 ownership interest in the property other than solely as a construction lender.

58 (f) "Public agency" means any state agency or a county, city, town, school district, local
59 district, special service district, or other political subdivision of the state that enters into a
60 construction contract for an improvement of public property.

61 (g) "Retention payment" means release of retention proceeds as defined in Subsection
62 (1)(h).

63 (h) "Retention proceeds" means money earned by a contractor or subcontractor but
64 retained by the owner or public agency pursuant to the terms of a construction contract to
65 guarantee payment or performance by the contractor or subcontractor of the construction
66 contract.

67 (i) "Subcontractor" is as defined in Section 38-1-2.

68 (j) "Successful party" has the same meaning as it does under Section 38-1-18.

69 (2) (a) This section is applicable to all construction contracts relating to construction
70 work or improvements entered into on or after July 1, 1999, between:

71 (i) an owner or public agency and an original contractor;

72 (ii) an original contractor and a subcontractor; and

73 (iii) subcontractors under a contract described in Subsection (2)(a)(i) or (ii).

74 (b) This section does not apply to a construction lender.

75 (3) (a) Notwithstanding Section 58-55-603, the retention proceeds withheld and
76 retained from any payment due under the terms of the construction contract may not exceed 5%
77 of the payment:

78 (i) by the owner or public agency to the original contractor;

79 (ii) by the original contractor to any subcontractor; or

80 (iii) by a subcontractor.

81 (b) The total retention proceeds withheld may not exceed 5% of the total construction
82 price.

83 (c) The percentage of the retention proceeds withheld and retained pursuant to a
84 construction contract between the original contractor and a subcontractor or between
85 subcontractors shall be the same retention percentage as between the owner and the original

86 contractor if:

87 (i) the retention percentage in the original construction contract between an owner and
88 the original contractor is less than 5%; or

89 (ii) after the original construction contract is executed but before completion of the
90 construction contract the retention percentage is reduced to less than 5%.

91 (4) (a) If any payment on a contract with a private contractor, firm, or corporation to do
92 work for an owner or public agency is retained or withheld by the owner or the public agency,
93 as retention proceeds, it shall be placed in an interest-bearing account and accounted for
94 separately from other amounts paid under the contract.

95 (b) The interest accrued under Subsection (4)(a) shall be:

96 (i) for the benefit of the contractor and subcontractors; and

97 (ii) paid after the project is completed and accepted by the owner or the public agency.

98 (c) The contractor shall ensure that any interest accrued on the retainage is distributed
99 by the contractor to subcontractors on a pro rata basis.

100 (d) Retention proceeds and accrued interest retained by an owner or public agency:

101 (i) are considered to be in a constructive trust for the benefit of the contractor and
102 subcontractors who have earned the proceeds; and

103 (ii) are not subject to assignment, encumbrance, attachment, garnishment, or execution
104 levy for the debt of any person holding the retention proceeds and accrued interest.

105 (5) Any retention proceeds retained or withheld pursuant to this section and any
106 accrued interest shall be released pursuant to a billing statement from the contractor within 45
107 days from the later of:

108 (a) the date the owner or public agency receives the billing statement from the
109 contractor;

110 (b) the date that a certificate of occupancy or final acceptance notice is issued to:

111 (i) the original contractor who obtained the building permit from the building inspector
112 or public agency;

113 (ii) the owner or architect; or

114 (iii) the public agency;

115 (c) the date that a public agency or building inspector having authority to issue its own
116 certificate of occupancy does not issue the certificate but permits partial or complete occupancy
117 of a newly constructed or remodeled building; or

118 (d) the date the contractor accepts the final pay quantities.

119 (6) If only partial occupancy of a building is permitted, any retention proceeds withheld
120 and retained pursuant to this section and any accrued interest shall be partially released within
121 45 days under the same conditions as provided in Subsection (5) in direct proportion to the
122 value of the part of the building occupied.

123 (7) The billing statement from the contractor as provided in Subsection (5)(a) shall
124 include documentation of lien releases or waivers.

125 (8) (a) Notwithstanding Subsection (3):

126 (i) if a contractor or subcontractor is in default or breach of the terms and conditions of
127 the construction contract documents, plans, or specifications governing construction of the
128 project, the owner or public agency may withhold from payment for as long as reasonably
129 necessary an amount necessary to cure the breach or default of the contractor or subcontractor;
130 or

131 (ii) if a project or a portion of the project has been substantially completed, the owner
132 or public agency may retain until completion up to twice the fair market value of the work of
133 the original contractor or of any subcontractor that has not been completed:

134 (A) in accordance with the construction contract documents, plans, and specifications;
135 or

136 (B) in the absence of plans and specifications, to generally accepted craft standards.

137 (b) An owner or public agency that refuses payment under Subsection (8)(a) shall
138 describe in writing within 45 days of withholding such amounts what portion of the work was
139 not completed according to the standards specified in Subsection (8)(a).

140 (9) (a) Except as provided in Subsection (9)(b), an original contractor or subcontractor
141 who receives retention proceeds shall pay each of its subcontractors from whom retention has

142 been withheld each subcontractor's share of the retention received within 10 days from the day
143 that all or any portion of the retention proceeds is received:

144 (i) by the original contractor from the owner or public agency; or

145 (ii) by the subcontractor from:

146 (A) the original contractor; or

147 (B) a subcontractor.

148 (b) Notwithstanding Subsection (9)(a), if a retention payment received by the original
149 contractor is specifically designated for a particular subcontractor, payment of the retention
150 shall be made to the designated subcontractor.

151 (10) (a) In any action for the collection of the retained proceeds withheld and retained
152 in violation of this section, the successful party is entitled to:

153 (i) attorney's fees; and

154 (ii) other allowable costs.

155 (b) (i) Any owner, public agency, original contractor, or subcontractor who knowingly
156 and wrongfully withholds a retention shall be subject to a charge of 2% per month on the
157 improperly withheld amount, in addition to any interest otherwise due.

158 (ii) The charge described in Subsection (10)(b)(i) shall be paid to the contractor or
159 subcontractor from whom the retention proceeds have been wrongfully withheld.

160 (11) A party to a construction contract may not require any other party to waive any
161 provision of this section.

162 Section 2. Section **53A-20-101** is amended to read:

163 **53A-20-101. Construction and alteration of schools and plants -- Advertising for**
164 **bids -- Payment and performance bonds -- Contracts -- Bidding limitations on local**
165 **school boards -- Interest of local school board members.**

166 (1) As used in this section, the word "sealed" does not preclude acceptance of
167 electronically sealed and submitted bids or proposals in addition to bids or proposals manually
168 sealed and submitted.

169 (2) (a) Prior to the construction of any school or the alteration of any existing school

170 plant, if the total estimated accumulative building project cost exceeds \$80,000, a local school
171 board shall advertise for bids on the project at least 10 days before the bid due date.

172 (b) The board shall have the advertisement published in a newspaper having general
173 circulation throughout the state and in appropriate construction trade publications that offer
174 free listings.

175 (c) A similar advertisement is required in a newspaper published or having general
176 circulation in any city or county that would be affected by the proposed project.

177 (d) The advertisement shall:

178 (i) require sealed proposals for the building project in accordance with plans and
179 specifications furnished by the local school board;

180 (ii) state where and when the proposals will be opened and shall reserve the right of the
181 board to reject any and all proposals; and

182 (iii) require a certified check or bid bond of not less than 5% of the bid to accompany
183 the bid.

184 (3) (a) The board shall meet at the time and place specified in the advertisement and
185 publicly open and read all received proposals.

186 (b) If satisfactory bids are received, the board shall award the contract to the lowest
187 responsible bidder.

188 (c) If none of the proposals are satisfactory, all shall be rejected.

189 (d) The board shall again advertise in the manner provided in this section.

190 (e) If, after advertising a second time no satisfactory bid is received, the board may
191 proceed under its own direction with the required project.

192 (4) (a) The check or bond required under Subsection (2)(d) shall be drawn in favor of
193 the local school board.

194 (b) If the successful bidder fails or refuses to enter into the contract and furnish the
195 additional bonds required under this section, then the bidder's check or bond is forfeited to the
196 district.

197 (5) A local school board shall require payment and performance bonds of the

198 successful bidder as required in Section 63G-6-505.

199 (6) (a) A local school board may require in the proposed contract that [~~at least 10%~~] up
200 to 5% of the contract price be withheld until the project is completed and accepted by the
201 board.

202 (b) If money is withheld, the board shall place it in an interest bearing account, and the
203 interest accrues for the benefit of the contractor and subcontractors.

204 (c) This money shall be paid upon completion of the project and acceptance by the
205 board.

206 (7) (a) A local school board may not bid on projects within the district if the total
207 accumulative estimated cost exceeds \$80,000.

208 (b) The board may use its resources if no satisfactory bids are received under this
209 section.

210 (8) If the local school board determines in accordance with Section 63G-6-501 to use a
211 construction manager/general contractor as its method of construction contracting management
212 on projects where the total estimated accumulative cost exceeds \$80,000, it shall select the
213 construction manager/general contractor using one of the source selection methods provided
214 for in Sections 63G-6-401 through 63G-6-501.

215 (9) A local school board member may not have a direct or indirect financial interest in
216 the construction project contract.