

1                                   **CONSTRUCTION TRADE AMENDMENTS**

2   2017 GENERAL SESSION

3   STATE OF UTAH

4                                   **Chief Sponsor: D. Gregg Buxton**

5                                   House Sponsor: Mike Schultz

---

6

7   **LONG TITLE**

8   **General Description:**

9           This bill amends provisions related to the construction trade.

10   **Highlighted Provisions:**

11           This bill:

- 12           ▶ defines terms;
- 13           ▶ provides a maximum rate of interest for a lien filed against project property by a
- 14   person without privity of contract with the owner-builder; and
- 15           ▶ provides the director of the Division of Occupational and Professional Licensing
- 16   discretion to determine if a claimant has met certain requirements to recover from
- 17   the Residence Lien Recovery Fund.

18   **Money Appropriated in this Bill:**

19           None

20   **Other Special Clauses:**

21           None

22   **Utah Code Sections Affected:**

23   AMENDS:

24           **13-8-5**, as last amended by Laws of Utah 2012, Chapters 86 and 278

25           **38-1a-309**, as enacted by Laws of Utah 2012, Chapter 330

26           **38-11-204**, as last amended by Laws of Utah 2016, Chapter 238

---

27

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

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

30 **13-8-5. Definitions -- Limitation on retention proceeds withheld -- Deposit in**  
31 **interest-bearing escrow account -- Release of proceeds -- Payment to subcontractors --**  
32 **Penalty -- No waiver.**

33 (1) As used in this section:

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

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

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

49 (c) "Construction project" means an improvement to real property that is the subject of  
50 a construction contract.

51 [~~(e)~~] (d) "Contractor" means a person who, for compensation other than wages as an  
52 employee, undertakes any work in a construction trade, as defined in Section 58-55-102 and  
53 includes:

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

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

58 ~~[(d)]~~ (e) "Original contractor" ~~[has the same meaning as provided]~~ means the same as  
59 that term is defined in Section 38-1a-102.

60 ~~[(e)]~~ (f) "Owner" means the person who holds any legal or equitable title or interest in  
61 property. Owner does not include a construction lender unless the construction lender has an  
62 ownership interest in the property other than solely as a construction lender.

63 ~~[(f)]~~ (g) "Public agency" means any state agency or a county, city, town, school district,  
64 local district, special service district, or other political subdivision of the state that enters into a  
65 construction contract for an improvement of public property.

66 ~~[(g)]~~ (h) "Retention payment" means release of retention proceeds as defined in  
67 Subsection (1)~~[(h)]~~(i).

68 ~~[(h)]~~ (i) "Retention proceeds" means money earned by a contractor or subcontractor but  
69 retained by the owner or public agency pursuant to the terms of a construction contract to  
70 guarantee payment or performance by the contractor or subcontractor of the construction  
71 contract.

72 ~~[(i)]~~ (j) "Subcontractor" ~~[has the same meaning as]~~ means the same as that term is  
73 defined in Section 38-1a-102.

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

- 76 (i) an owner or public agency and an original contractor;
  - 77 (ii) an original contractor and a subcontractor; and
  - 78 (iii) subcontractors under a contract described in Subsection (2)(a)(i) or (ii).
- 79 (b) This section does not apply to a construction lender.

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

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

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

85 (iii) by a subcontractor.

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

88 (c) The percentage of the retention proceeds withheld and retained pursuant to a  
89 construction contract between the original contractor and a subcontractor or between  
90 subcontractors shall be the same retention percentage as between the owner and the original  
91 contractor if:

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

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

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

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

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

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

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

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

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

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

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

113 (a) the date the owner or public agency receives the billing statement from the  
114 contractor;

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

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

118 (ii) the owner or architect; or

119 (iii) the public agency;

120 (c) the date that a public agency or building inspector [~~having~~] that has the authority to  
121 issue [its own] a certificate of occupancy does not issue the certificate but permits partial or  
122 complete occupancy [of a newly constructed or remodeled building] or use of a construction  
123 project; or

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

125 (6) If only partial occupancy of a [~~building~~] construction project is permitted, any  
126 retention proceeds withheld and retained pursuant to this section and any accrued interest shall  
127 be partially released within 45 days under the same conditions as provided in Subsection (5) in  
128 direct proportion to the value of the part of the [~~building~~] construction project occupied or  
129 used.

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

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

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

137 or

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

141 (A) in accordance with the construction contract documents, plans, and specifications;

142 or

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

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

147 (9) (a) Except as provided in Subsection (9)(b), an original contractor or subcontractor  
148 who receives retention proceeds shall pay each of its subcontractors from whom retention has  
149 been withheld each subcontractor's share of the retention received within 10 days from the day  
150 that all or any portion of the retention proceeds is received:

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

152 (ii) by the subcontractor from:

153 (A) the original contractor; or

154 (B) a subcontractor.

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

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

160 (i) attorney fees; and

161 (ii) other allowable costs.

162 (b) (i) Any owner, public agency, original contractor, or subcontractor who knowingly  
163 and wrongfully withholds a retention shall be subject to a charge of 2% per month on the

164 improperly withheld amount, in addition to any interest otherwise due.

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

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

169 Section 2. Section **38-1a-309** is amended to read:

170 **38-1a-309. Interest rate -- Preconstruction service or construction contract --**  
171 **Lien.**

172 [~~Unless otherwise specified in a lawful contract between the owner-builder and the~~  
173 ~~person claiming a lien under this chapter, the interest rate applicable to the lien is the rate~~  
174 ~~described in Subsection 15-1-1(2).]~~

175 (1) Subject to Subsection (2), the interest rate that applies to a lawful contract for  
176 preconstruction service or construction work on or for a project property, or to a lien claimed  
177 under this chapter against the project property, is, unless otherwise provided in the lawful  
178 contract, the rate described in Subsection 15-1-1(2).

179 (2) If a person that claims a lien against project property under this chapter is not in  
180 privity of contract with the owner or owner-builder, the interest rate that applies to the person's  
181 lien may not exceed the rate described in Subsection 15-1-1(2).

182 Section 3. Section **38-11-204** is amended to read:

183 **38-11-204. Claims against the fund -- Requirements to make a claim --**  
184 **Qualifications to receive compensation -- Qualifications to receive a certificate of**  
185 **compliance.**

186 (1) To claim recovery from the fund a person shall:

187 (a) meet the requirements of Subsection (4) or (6);

188 (b) pay an application fee determined by the division under Section 63J-1-504; and

189 (c) file with the division a completed application on a form provided by the division  
190 accompanied by supporting documents establishing:

- 191 (i) that the person meets the requirements of Subsection (4) or (6);  
192 (ii) that the person was a qualified beneficiary or laborer during the construction on the  
193 owner-occupied residence; and  
194 (iii) the basis for the claim.
- 195 (2) To recover from the fund, the application required by Subsection (1) shall be filed  
196 no later than one year:
- 197 (a) from the date the judgment required by Subsection (4)(d) is entered;  
198 (b) from the date the nonpaying party filed bankruptcy, if the claimant is precluded  
199 from obtaining a judgment or from satisfying the requirements of Subsection (4)(d) because the  
200 nonpaying party filed bankruptcy within one year after the entry of judgment; or  
201 (c) from the date the laborer, trying to recover from the fund, completed the laborer's  
202 qualified services.
- 203 (3) The issuance of a certificate of compliance is governed by Section [38-11-110](#).
- 204 (4) To recover from the fund, regardless of whether the residence is occupied by the  
205 owner, a subsequent owner, or the owner or subsequent owner's tenant or lessee, a qualified  
206 beneficiary shall establish that:
- 207 (a) (i) the owner of the owner-occupied residence or the owner's agent entered into a  
208 written contract with an original contractor licensed or exempt from licensure under Title 58,  
209 Chapter 55, Utah Construction Trades Licensing Act:
- 210 (A) for the performance of qualified services;  
211 (B) to obtain the performance of qualified services by others; or  
212 (C) for the supervision of the performance by others of qualified services in  
213 construction on that residence;
- 214 (ii) the owner of the owner-occupied residence or the owner's agent entered into a  
215 written contract with a real estate developer for the purchase of an owner-occupied residence;  
216 or  
217 (iii) the owner of the owner-occupied residence or the owner's agent entered into a



218 written contract with a factory built housing retailer for the purchase of an owner-occupied  
219 residence;

220 (b) the owner has paid in full the original contractor, licensed or exempt from licensure  
221 under Title 58, Chapter 55, Utah Construction Trades Licensing Act, real estate developer, or  
222 factory built housing retailer under Subsection (4)(a) with whom the owner has a written  
223 contract in accordance with the written contract and any amendments to the contract;

224 (c) (i) the original contractor, licensed or exempt from licensure under Title 58,  
225 Chapter 55, Utah Construction Trades Licensing Act, the real estate developer, or the factory  
226 built housing retailer subsequently failed to pay a qualified beneficiary who is entitled to  
227 payment under an agreement with that original contractor or real estate developer licensed or  
228 exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, for  
229 services performed or materials supplied by the qualified beneficiary;

230 (ii) a subcontractor who contracts with the original contractor, licensed or exempt from  
231 licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, the real estate  
232 developer, or the factory built housing retailer failed to pay a qualified beneficiary who is  
233 entitled to payment under an agreement with that subcontractor or supplier; or

234 (iii) a subcontractor who contracts with a subcontractor or supplier failed to pay a  
235 qualified beneficiary who is entitled to payment under an agreement with that subcontractor or  
236 supplier;

237 (d) (i) unless precluded from doing so by the nonpaying party's bankruptcy filing  
238 within the applicable time, the qualified beneficiary filed an action against the nonpaying party  
239 to recover money owed to the qualified beneficiary within the earlier of:

240 (A) 180 days from the date the qualified beneficiary filed a notice of claim under  
241 Section 38-1a-502; or

242 (B) 270 days from the completion of the original contract pursuant to Subsection  
243 38-1a-502(1);

244 (ii) the qualified beneficiary has obtained a judgment against the nonpaying party who

245 failed to pay the qualified beneficiary under an agreement to provide qualified services for  
246 construction of that owner-occupied residence;

247 (iii) the qualified beneficiary has:

248 (A) obtained from a court of competent jurisdiction the issuance of an order requiring  
249 the judgment debtor, or if a corporation any officer of the corporation, to appear before the  
250 court at a specified time and place to answer concerning the debtor's or corporation's property;

251 (B) received return of service of the order from a person qualified to serve documents  
252 under the Utah Rules of Civil Procedure, Rule 4(b);

253 (C) made reasonable efforts to obtain asset information from the supplemental  
254 proceedings; and

255 (D) if assets subject to execution are discovered as a result of the order required under  
256 this Subsection (4)(d)(iii) or for any other reason, obtained the issuance of a writ of execution  
257 from a court of competent jurisdiction; and

258 (iv) if the nonpaying party has filed bankruptcy, the qualified beneficiary timely filed a  
259 proof of claim where permitted in the bankruptcy action;

260 (e) the qualified beneficiary is not entitled to reimbursement from any other person;  
261 and

262 (f) the qualified beneficiary provided qualified services to a contractor, licensed or  
263 exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act.

264 (5) The requirements of Subsections (4)(d)(ii) and (iii) need not be met if the qualified  
265 beneficiary is prevented from compliance because the nonpaying party files bankruptcy.

266 (6) To recover from the fund a laborer shall:

267 (a) establish that the laborer has not been paid wages due for the work performed at the  
268 site of a construction on an owner-occupied residence; and

269 (b) provide any supporting documents or information required by rule by the division.

270 (7) A fee determined by the division under Section [63J-1-504](#) shall be deducted from  
271 any recovery from the fund received by a laborer.

272           (8) The requirements of Subsections (4)(a) and (b) may be satisfied if an owner or  
273 agent of the owner establishes to the satisfaction of the director that the owner of the  
274 owner-occupied residence or the owner's agent entered into a written contract with an original  
275 contractor who:

276           (a) was a business entity that was not licensed under Title 58, Chapter 55, Utah  
277 Construction Trades Licensing Act, but was solely or partly owned by an individual who was  
278 licensed under Title 58, Chapter 55, Utah Construction Trades Licensing Act; or

279           (b) was a natural person who was not licensed under Title 58, Chapter 55, Utah  
280 Construction Trades Licensing Act, but who was the sole or partial owner and qualifier of a  
281 business entity that was licensed under Title 58, Chapter 55, Utah Construction Trades  
282 Licensing Act.

283           (9) The director shall have equitable power to determine if the requirements of  
284 Subsections (4)(a) [~~and~~], (b), and (f) have been met, but any decision by the director under this  
285 chapter shall not alter or have any effect on any other decision by the division under Title 58,  
286 Occupations and Professions.