

Senator D. Gregg Buxton proposes the following substitute bill:

**CONSTRUCTION TRADE AMENDMENTS**

2017 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: D. Gregg Buxton**

House Sponsor: Mike Schultz

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**LONG TITLE**

**General Description:**

This bill amends provisions related to the construction trade.

**Highlighted Provisions:**

This bill:

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

**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 2012, Chapters 86 and 278

**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

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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 on lien.**

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

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

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

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

182 **38-11-204. Claims against the fund -- Requirements to make a claim --**  
183 **Qualifications to receive compensation -- Qualifications to receive a certificate of**  
184 **compliance.**

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

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

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

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

190 (i) that the person meets the requirements of Subsection (4) or (6);

191 (ii) that the person was a qualified beneficiary or laborer during the construction on the  
192 owner-occupied residence; and

193 (iii) the basis for the claim.

194 (2) To recover from the fund, the application required by Subsection (1) shall be filed  
195 no later than one year:

196 (a) from the date the judgment required by Subsection (4)(d) is entered;

197 (b) from the date the nonpaying party filed bankruptcy, if the claimant is precluded  
198 from obtaining a judgment or from satisfying the requirements of Subsection (4)(d) because the  
199 nonpaying party filed bankruptcy within one year after the entry of judgment; or

200 (c) from the date the laborer, trying to recover from the fund, completed the laborer's  
201 qualified services.

202 (3) The issuance of a certificate of compliance is governed by Section [38-11-110](#).

203 (4) To recover from the fund, regardless of whether the residence is occupied by the  
204 owner, a subsequent owner, or the owner or subsequent owner's tenant or lessee, a qualified  
205 beneficiary shall establish that:

206 (a) (i) the owner of the owner-occupied residence or the owner's agent entered into a  
207 written contract with an original contractor licensed or exempt from licensure under Title 58,  
208 Chapter 55, Utah Construction Trades Licensing Act:

209 (A) for the performance of qualified services;

210 (B) to obtain the performance of qualified services by others; or

211 (C) for the supervision of the performance by others of qualified services in

212 construction on that residence;

213 (ii) the owner of the owner-occupied residence or the owner's agent entered into a  
214 written contract with a real estate developer for the purchase of an owner-occupied residence;  
215 or

216 (iii) the owner of the owner-occupied residence or the owner's agent entered into a  
217 written contract with a factory built housing retailer for the purchase of an owner-occupied  
218 residence;

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

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

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

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

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

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

241 (B) 270 days from the completion of the original contract pursuant to Subsection  
242 [38-1a-502\(1\)](#);



243 (ii) the qualified beneficiary has obtained a judgment against the nonpaying party who  
244 failed to pay the qualified beneficiary under an agreement to provide qualified services for  
245 construction of that owner-occupied residence;

246 (iii) the qualified beneficiary has:

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

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

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

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

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

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

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

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

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

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

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

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

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

274 contractor who:

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

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

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