

HB0395S01 compared with HB0395

~~{deleted text}~~ shows text that was in HB0395 but was deleted in HB0395S01.

Inserted text shows text that was not in HB0395 but was inserted into HB0395S01.

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Representative Marc K. Roberts proposes the following substitute bill:

STATE CONSTRUCTION REGISTRY AMENDMENTS

2019 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Marc K. Roberts

Senate Sponsor: _____

LONG TITLE

General Description:

This bill amends and enacts provisions related to notices filed with the State Construction Registry.

Highlighted Provisions:

This bill:

- ▶ amends definitions;
- ▶ expands the applicability of a notice of intent to complete to include additional construction projects;
- ▶ creates a new filing with the registry for a notice of intent to finance;
- ▶ creates a new registry ~~{filings}~~ filing of ~~{a progress waiver and}~~ a final lien waiver for a subcontractor to respond to a notice of intent to finance; and
- ▶ makes technical changes.

HB0395S01 compared with HB0395

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides a special effective date.

Utah Code Sections Affected:

AMENDS:

38-1a-102, as last amended by Laws of Utah 2015, Chapter 258

38-1a-506, as renumbered and amended by Laws of Utah 2012, Chapter 278

ENACTS:

38-1a-603, Utah Code Annotated 1953

38-1a-604, Utah Code Annotated 1953

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

Section 1. Section **38-1a-102** is amended to read:

38-1a-102. Definitions.

As used in this chapter:

(1) "Alternate means" means a method of filing a legible and complete notice or other document with the registry other than electronically, as established by the division by rule.

(2) "Anticipated improvement" means the improvement:

(a) for which preconstruction service is performed; and

(b) that is anticipated to follow the performing of preconstruction service.

(3) "Applicable county recorder" means the office of the recorder of each county in which any part of the property on which a claimant claims or intends to claim a preconstruction or construction lien is located.

(4) "Bona fide loan" means a loan to an owner or owner-builder by a lender in which the owner or owner-builder has no financial or beneficial interest greater than 5% of the voting shares or other ownership interest.

(5) "Claimant" means a person entitled to claim a preconstruction or construction lien.

(6) "Compensation" means the payment of money for a service rendered or an expense incurred, whether based on:

(a) time and expense, lump sum, stipulated sum, percentage of cost, cost plus fixed or

HB0395S01 compared with HB0395

percentage fee, or commission; or

(b) a combination of the bases listed in Subsection (6)(a).

(7) "Construction lender" means a person who makes a construction loan.

(8) "Construction lien" means a lien under this chapter for construction work.

(9) "Construction loan" does not include a consumer loan secured by the equity in the consumer's home.

(10) "Construction project" means an improvement that is constructed pursuant to an original contract.

(11) "Construction work":

(a) means labor, service, material, or equipment provided for the purpose and during the process of constructing, altering, or repairing an improvement; and

(b) includes scheduling, estimating, staking, supervising, managing, materials testing, inspection, observation, and quality control or assurance involved in constructing, altering, or repairing an improvement.

(12) "Contestable notice" means a notice of preconstruction service under Section 38-1a-401, a preliminary notice under Section 38-1a-501, or a notice of completion under Section 38-1a-506.

(13) "Contesting person" means an owner, original contractor, subcontractor, or other interested person.

(14) "Designated agent" means the third party the division contracts with as provided in Section 38-1a-202 to create and maintain the registry.

(15) "Division" means the Division of Occupational and Professional Licensing created in Section 58-1-103.

(16) "Entry number" means the reference number that:

(a) the designated agent assigns to each notice or other document filed with the registry; and

(b) is unique for each notice or other document.

(17) "Final completion" means:

(a) the date of issuance of a permanent certificate of occupancy by the local government entity having jurisdiction over the construction project, if a permanent certificate of occupancy is required;

HB0395S01 compared with HB0395

(b) the date of the final inspection of the construction work by the local government entity having jurisdiction over the construction project, if an inspection is required under a state-adopted building code applicable to the construction work, but no certificate of occupancy is required;

(c) unless the owner is holding payment to ensure completion of construction work, the date on which there remains no substantial work to be completed to finish the construction work under the original contract, if a certificate of occupancy is not required and a final inspection is not required under an applicable state-adopted building code; or

(d) the last date on which substantial work was performed under the original contract, if, because the original contract is terminated before completion of the construction work defined by the original contract, the local government entity having jurisdiction over the construction project does not issue a certificate of occupancy or perform a final inspection.

(18) "Final lien waiver" means a form that complies with Subsection 38-1a-802(4)(c).

(18) (19) "First preliminary notice filing" means a preliminary notice that:

(a) is the earliest preliminary notice filed on the construction project for which the preliminary notice is filed;

(b) is filed on a construction project that, at the time the preliminary notice is filed, has not reached final completion; and

(c) is not cancelled under Section 38-1a-307.

(19) (20) "Government project-identifying information" has the same meaning as defined in Section 38-1b-102.

(20) (21) "Improvement" means:

(a) a building, infrastructure, utility, or other human-made structure or object constructed on or for and affixed to real property; or

(b) a repair, modification, or alteration of a building, infrastructure, utility, or object referred to in Subsection (20) (21)(a).

(21) (22) "Interested person" means a person that may be affected by a construction project.

(22) (23) "Notice of commencement" means a notice required under Section 38-1b-201 for a government project, as defined in Section 38-1b-102.

(23) (24) "Original contract":

HB0395S01 compared with HB0395

(a) means a contract between an owner and an original contractor for preconstruction service or construction work; and

(b) does not include a contract between an owner-builder and another person.

~~[(24)]~~ [(25)] "Original contractor" means a person, including an owner-builder, that contracts with an owner to provide preconstruction service or construction work.

~~[(25)]~~ [(26)] "Owner" means the person that owns the project property.

~~[(26)]~~ [(27)] "Owner-builder" means an owner, including an owner who is also an original contractor, who:

(a) contracts with one or more other persons for preconstruction service or construction work for an improvement on the owner's real property; and

(b) obtains a building permit for the improvement.

~~[(27)]~~ [(28)] "Preconstruction lien" means a lien under this chapter for a preconstruction service.

~~[(28)]~~ [(29)] "Preconstruction service":

(a) means to plan or design, or to assist in the planning or design of, an improvement or a proposed improvement:

(i) before construction of the improvement commences; and

(ii) for compensation separate from any compensation paid or to be paid for construction work for the improvement; and

(b) includes consulting, conducting a site investigation or assessment, programming, preconstruction cost or quantity estimating, preconstruction scheduling, performing a preconstruction construction feasibility review, procuring construction services, and preparing a study, report, rendering, model, boundary or topographic survey, plat, map, design, plan, drawing, specification, or contract document.

~~[(29)]~~ [(30)] "Private project" means a construction project that is not a government project.

~~[(30)]~~ [(31)] "Project property" means the real property on or for which preconstruction service or construction work is or will be provided.

~~[(31)]~~ [(32)] "Registry" means the State Construction Registry under Part 2, State Construction Registry.

~~[(32)]~~ [(33)] "Required notice" means:

HB0395S01 compared with HB0395

- (a) a notice of preconstruction service under Section 38-1a-401;
- (b) a preliminary notice under Section 38-1a-501 or Section 38-1b-202;
- (c) a notice of commencement;
- (d) a notice of construction loan under Section 38-1a-601;
- (e) a notice under Section 38-1a-602 concerning a construction loan default;
- (f) a notice of intent to obtain final completion under Section 38-1a-506; ~~{}~~or~~{}~~
- (g) a notice of completion under Section 38-1a-507~~{}~~;or

~~(h) if a notice of intent to finance under Section 38-1a-603 is filed;~~

~~(i) a progress waiver under Section 38-1a-604; or~~

~~(ii) a final lien waiver under Section 38-1a-604.~~

~~(33)};~~

~~(33)}~~ (34) "Subcontractor" means a person that contracts to provide preconstruction service or construction work to:

- (a) a person other than the owner; or
- (b) the owner, if the owner is an owner-builder.

~~(34)~~ (35) "Substantial work" does not include repair work or warranty work.

~~(35)~~ (36) "Supervisory subcontractor" means a person that:

(a) is a subcontractor under contract to provide preconstruction service or construction work; and

(b) contracts with one or more other subcontractors for the other subcontractor or subcontractors to provide preconstruction service or construction work that the person is under contract to provide.

Section 2. Section **38-1a-506** is amended to read:

38-1a-506. Notice of intent to obtain final completion.

(1) An owner~~[, as defined in Section 14-2-1, of a nonresidential]~~ of a construction project that is registered with the registry, or an original contractor of a ~~[commercial nonresidential]~~ construction project that is registered with the registry under Section 38-1a-501, shall file with the registry a notice of intent to obtain final completion as provided in this section if:

(a) the completion of performance time under the original contract for construction work is greater than 120 days; and

HB0395S01 compared with HB0395

(b) the total original construction contract price exceeds [~~\$500,000; and~~] \$1,000,000.

~~[(c) the original contractor or owner has not obtained a payment bond in accordance with Section 14-2-1.]~~

(2) The notice of intent described in Subsection (1) shall be filed at least 45 days before the day on which the owner or original contractor of a [~~commercial nonresidential~~] construction project files or could have filed a notice of completion under Section 38-1a-507.

(3) A person who provides construction work to an owner or original contractor who files a notice of intent in accordance with Subsection (1) shall file an amendment to the person's preliminary notice previously filed by the person as required in Section 38-1a-501:

(a) that includes:

(i) a good faith estimate of the total amount remaining due to complete the contract, purchase order, or agreement relating to the person's approved construction work;

(ii) the identification of each original contractor or subcontractor with whom the person has a contract or contracts for providing construction work; and

(iii) a separate statement of all known amounts or categories of work in dispute; and

(b) no later than 20 days after the day on which the owner or contractor files a notice of intent.

(4) (a) A person described in Subsection (3) may demand a statement of adequate assurance from the owner, contractor, or subcontractor with whom the person has privity of contract no later than 10 days after the day on which the person files a balance statement in accordance with Subsection (3) from an owner, contractor, or subcontractor who is in privity of contract with the person.

(b) A demand for adequate assurance as described in Subsection (4)(a) may include a request for a statement from the owner, contractor, or subcontractor that the owner, contractor, or subcontractor has sufficient funds dedicated and available to pay for all sums due to the person filing for the adequate assurances or that will become due in order to complete a construction project.

(c) A person who demands adequate assurance under Subsection (4)(a) shall deliver copies of the demand to the owner and contractor:

(i) by hand delivery with a responsible party's acknowledgment of receipt;

(ii) by certified mail with a return receipt; or

HB0395S01 compared with HB0395

(iii) as provided under Rule 4, Utah Rules of Civil Procedure.

(5) (a) A person described in Subsection (3) may bring a legal action against a party with whom the person is in privity of contract, including a request for injunctive or declaratory relief, to determine the adequacy of the funds of the owner, contractor, or subcontractor with whom the demanding person contracted if, after the person demands adequate assurance in accordance with the requirements of this section:

(i) the owner, contractor, or subcontractor fails to provide adequate assurance that the owner, contractor, or subcontractor has sufficient available funds, or access to financing or other sufficient available funds, to pay for the completion of the demanding person's approved work on the construction project; or

(ii) the parties disagree, in good faith, as to whether there are adequate funds, or access to financing or other sufficient available funds, to pay for the completion of the demanding person's approved work on the construction project.

(b) If a court finds that an owner, contractor, or subcontractor has failed to provide adequate assurance in accordance with Subsection (4)(a), the court may require the owner, contractor, or subcontractor to post adequate security with the court sufficient to assure timely payment of the remaining contract balance for the approved work of the person seeking adequate assurance, including:

(i) cash;

(ii) a bond;

(iii) an irrevocable letter of credit;

(iv) property;

(v) financing; or

(vi) another form of security approved by the court.

(6) (a) A person is subject to the civil penalty described in Subsection (6)(b), if the person files a balance statement described in Subsection (3) that misrepresents the amount due under the contract with the intent to:

(i) charge an owner, contractor, or subcontractor more than the actual amount due; or

(ii) procure any other unfair advantage or benefit on the person's behalf.

(b) The civil penalty described in Subsection (6)(a) is the greater of:

(i) twice the amount by which the balance statement filed under Subsection (3) exceeds

HB0395S01 compared with HB0395

the amount actually remaining due under the contract for completion of construction; and

(ii) the actual damages incurred by the owner, contractor, or subcontractor.

(7) A court shall award reasonable attorney fees to a prevailing party for an action brought under this section.

(8) Failure to comply with the requirements established in this section does not affect any other requirement or right under this chapter.

(9) A person who has not filed a preliminary notice as required under Section 38-1a-501 is not entitled to a right or a remedy provided in this section.

(10) This section does not create a cause of action against a person with whom the demanding party is not in privity of contract.

Section 3. Section **38-1a-603** is enacted to read:

38-1a-603. Notice of intent to finance.

(1) An owner, a construction lender, or other interested party may file with the registry a notice of intent to finance.

(2) A notice of intent to finance under Subsection (1) shall state:

(a) the anticipated date on which financing will occur;

(b) the anticipated lender's name, address, and telephone number;

(c) the name of the trustor on the trust deed securing the **anticipated** loan;

(d) the approximate address of the project property, or other identifying reference number to describe the property; and

(e) the name of the county in which the project property is located.

(3) If an owner, a construction lender, or other interested party chooses to file a notice of intent to finance, the owner, construction lender, or other interested party shall file the notice of intent to finance no less than 14 days before the date on which the financing is anticipated to occur.

(4) If the financing does not occur within 30 days after the anticipated date specified in the notice of intent to finance, the notice of intent to finance shall **automatically have no effect and shall** be removed **from the registry**.

Section 4. Section **38-1a-604** is enacted to read:

38-1a-604. Notice of progress waiver or final lien waiver.

(1) ~~{Within seven business days after}~~ **After** a notice of intent to finance is filed under

HB0395S01 compared with HB0395

Section 38-1a-603 on a project property, each subcontractor that has filed a preliminary notice pertaining to the project property ~~{shall}~~may file with the registry~~;~~.

~~—— (a) a progress waiver, if the subcontractor is owed money under the contract, or if the subcontractor anticipates performing additional services under the contract; or~~

~~—— (b) } a final lien waiver, if the subcontractor has performed all anticipated {services} construction work under the contract, and has been paid for all {services} construction work performed under the contract.~~

~~(2) (a) A progress waiver under Subsection (1) shall include the amount owed to the subcontractor as of the date of the filing:~~

~~—— (b) The progress waiver shall state whether the amount indicated is an estimate or the final amount owed, plus any retainage amount.~~

~~—— (c) The progress waiver may state that no amount is currently owed.~~

~~—— (3) } The final lien waiver under Subsection (1) shall~~;~~~~

~~—— (a) } include a statement:~~

~~(a) that all anticipated {services} construction work under the contract ~~{have}~~has been completed;~~

~~(b) that no amount is owed under the contract; and~~

~~(c) whether any retainage amount is outstanding.~~

~~(~~4~~3) ~~{If a subcontractor fails to file a progress waiver or} The final lien waiver ~~{as required in this section, the subcontractor is precluded from claiming or recording a lien against the subject property}~~described in Subsection (1) may be filed on the registry even if no notice of intent to finance was filed on the registry.~~~~

Section 5. **Effective date.**

This bill takes effect on January 1, 2020.