

INTEREST ON RETAINED FUNDS FOR GENERAL CONTRACTORS

2014 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brad R. Wilson

Senate Sponsor: _____

LONG TITLE

General Description:

This bill modifies provisions regarding retention proceeds related to construction contracts.

Highlighted Provisions:

This bill:

- requires an owner or public agency to accrue and pay interest on retention proceeds related to a construction contract if the contract requires total payment of \$1,000,000 or more over the course of the contract; and

- makes technical changes.

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

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

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



28 **13-8-5. Definitions -- Limitation on retention proceeds withheld -- Deposit in**
29 **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" has the same meaning as provided in Section 38-1a-102.

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" has the same meaning as defined in Section [38-1a-102](#).

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

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

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

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

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

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

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

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

79 (iii) by a subcontractor.

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

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

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

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

90 (4) (a) [~~If any~~] For a construction contract that requires total payment of \$1,000,000 or
91 more over the course of the contract, if any payment on a contract with a private contractor,
92 firm, or corporation to do work for an owner or public agency is retained or withheld by the
93 owner or the public agency[;] as retention proceeds, [it] the payment amount shall be placed in
94 an interest-bearing account and accounted for separately from other amounts paid under the
95 contract.

96 (b) The interest accrued under Subsection (4)(a) shall be:
97 (i) for the benefit of the contractor and subcontractors; and
98 (ii) paid after the project is completed and accepted by the owner or the public agency.

99 (c) The contractor shall ensure that any interest accrued on the retainage pursuant to
100 this Subsection (4) is distributed by the contractor to subcontractors on a pro rata basis.

101 (d) Retention proceeds [~~and accrued interest retained by an owner or public agency~~]
102 retained by an owner or public agency pursuant to this section, and any interest accrued
103 pursuant to this Subsection (4):

104 (i) are considered to be in a constructive trust for the benefit of the contractor and
105 subcontractors who have earned the proceeds; and
106 (ii) are not subject to assignment, encumbrance, attachment, garnishment, or execution
107 levy for the debt of any person holding the retention proceeds and accrued interest.

108 (5) Any retention proceeds retained or withheld pursuant to this section, and any
109 [~~accrued~~] interest accrued pursuant to Subsection (4), shall be released pursuant to a billing
110 statement from the contractor within 45 days from the later of:

111 (a) the date the owner or public agency receives the billing statement from the
112 contractor;

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

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

116 (ii) the owner or architect; or

117 (iii) the public agency;

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

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

122 (6) If only partial occupancy of a building is permitted, any retention proceeds withheld
123 and retained pursuant to this section, and any [~~accrued~~] interest accrued pursuant to Section (4),
124 shall be partially released within 45 days under the same conditions as provided in Subsection
125 (5) in direct proportion to the value of the part of the building occupied.

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

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

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

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

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

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

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

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

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

148 (ii) by the subcontractor from:

149 (A) the original contractor; or

150 (B) a subcontractor.

151 (b) Notwithstanding Subsection (9)(a), if a retention payment received by the original

152 contractor is specifically designated for a particular subcontractor, payment of the retention
153 shall be made to the designated subcontractor.

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

156 (i) attorney fees; and

157 (ii) other allowable costs.

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

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

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

Legislative Review Note
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Office of Legislative Research and General Counsel