

1 **STATE CONSTRUCTION REGISTRY AMENDMENTS**

2 2019 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Marc K. Roberts**

5 Senate Sponsor: _____

6

7 **LONG TITLE**

8 **General Description:**

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

11 **Highlighted Provisions:**

12 This bill:

- 13 ▶ amends definitions;
- 14 ▶ expands the applicability of a notice of intent to complete to include additional
15 construction projects;
- 16 ▶ creates a new filing with the registry for a notice of intent to finance;
- 17 ▶ creates new registry filings of a progress waiver and a final lien waiver for a
18 subcontractor to respond to a notice of intent to finance; and
- 19 ▶ makes technical changes.

20 **Money Appropriated in this Bill:**

21 None

22 **Other Special Clauses:**

23 This bill provides a special effective date.

24 **Utah Code Sections Affected:**

25 AMENDS:

26 **38-1a-102**, as last amended by Laws of Utah 2015, Chapter 258

27 **38-1a-506**, as renumbered and amended by Laws of Utah 2012, Chapter 278



28 ENACTS:

29 **38-1a-603**, Utah Code Annotated 1953

30 **38-1a-604**, Utah Code Annotated 1953

31

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

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

34 **38-1a-102. Definitions.**

35 As used in this chapter:

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

38 (2) "Anticipated improvement" means the improvement:

39 (a) for which preconstruction service is performed; and

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

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

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

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

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

50 (a) time and expense, lump sum, stipulated sum, percentage of cost, cost plus fixed or
51 percentage fee, or commission; or

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

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

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

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

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

59 (11) "Construction work":

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

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

65 (12) "Contestable notice" means a notice of preconstruction service under Section
66 38-1a-401, a preliminary notice under Section 38-1a-501, or a notice of completion under
67 Section 38-1a-506.

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

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

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

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

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

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

78 (17) "Final completion" means:

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

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

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

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

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

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

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

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

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

102 (20) "Improvement" means:

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

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

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

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

110 (23) "Original contract":

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

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

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

116 (25) "Owner" means the person that owns the project property.

117 (26) "Owner-builder" means an owner, including an owner who is also an original
118 contractor, who:

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

- 121 (b) obtains a building permit for the improvement.
- 122 (27) "Preconstruction lien" means a lien under this chapter for a preconstruction
123 service.
- 124 (28) "Preconstruction service":
- 125 (a) means to plan or design, or to assist in the planning or design of, an improvement or
126 a proposed improvement:
- 127 (i) before construction of the improvement commences; and
- 128 (ii) for compensation separate from any compensation paid or to be paid for
129 construction work for the improvement; and
- 130 (b) includes consulting, conducting a site investigation or assessment, programming,
131 preconstruction cost or quantity estimating, preconstruction scheduling, performing a
132 preconstruction construction feasibility review, procuring construction services, and preparing
133 a study, report, rendering, model, boundary or topographic survey, plat, map, design, plan,
134 drawing, specification, or contract document.
- 135 (29) "Private project" means a construction project that is not a government project.
- 136 (30) "Project property" means the real property on or for which preconstruction service
137 or construction work is or will be provided.
- 138 (31) "Registry" means the State Construction Registry under Part 2, State Construction
139 Registry.
- 140 (32) "Required notice" means:
- 141 (a) a notice of preconstruction service under Section [38-1a-401](#);
- 142 (b) a preliminary notice under Section [38-1a-501](#) or Section [38-1b-202](#);
- 143 (c) a notice of commencement;
- 144 (d) a notice of construction loan under Section [38-1a-601](#);
- 145 (e) a notice under Section [38-1a-602](#) concerning a construction loan default;
- 146 (f) a notice of intent to obtain final completion under Section [38-1a-506](#); [or]
- 147 (g) a notice of completion under Section [38-1a-507](#)~~[.];~~ or
- 148 (h) if a notice of intent to finance under Section [38-1a-603](#) is filed:
- 149 (i) a progress waiver under Section [38-1a-604](#); or
- 150 (ii) a final lien waiver under Section [38-1a-604](#).
- 151 (33) "Subcontractor" means a person that contracts to provide preconstruction service

152 or construction work to:

153 (a) a person other than the owner; or

154 (b) the owner, if the owner is an owner-builder.

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

156 (35) "Supervisory subcontractor" means a person that:

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

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

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

163 **38-1a-506. Notice of intent to obtain final completion.**

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

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

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

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

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

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

180 (a) that includes:

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

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

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

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

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

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

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

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

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

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

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

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

212 (ii) the parties disagree, in good faith, as to whether there are adequate funds, or access
213 to financing or other sufficient available funds, to pay for the completion of the demanding

214 person's approved work on the construction project.

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

- 220 (i) cash;
- 221 (ii) a bond;
- 222 (iii) an irrevocable letter of credit;
- 223 (iv) property;
- 224 (v) financing; or
- 225 (vi) another form of security approved by the court.

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

- 229 (i) charge an owner, contractor, or subcontractor more than the actual amount due; or
- 230 (ii) procure any other unfair advantage or benefit on the person's behalf.

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

- 232 (i) twice the amount by which the balance statement filed under Subsection (3) exceeds
233 the amount actually remaining due under the contract for completion of construction; and
- 234 (ii) the actual damages incurred by the owner, contractor, or subcontractor.

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

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

239 (9) A person who has not filed a preliminary notice as required under Section
240 38-1a-501 is not entitled to a right or a remedy provided in this section.

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

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

244 **38-1a-603. Notice of intent to finance.**

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

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

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

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

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

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

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

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

258 (4) If the financing does not occur within 30 days after the anticipated date specified in
259 the notice of intent to finance, the notice of intent to finance shall be removed.

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

261 **38-1a-604. Notice of progress waiver or final lien waiver.**

262 (1) Within seven business days after a notice of intent to finance is filed under Section
263 38-1a-603 on a project property, each subcontractor that has filed a preliminary notice
264 pertaining to the project property shall file with the registry:

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

267 (b) a final lien waiver, if the subcontractor has performed all anticipated services under
268 the contract, and has been paid for all services performed under the contract.

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

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

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

274 (3) The final lien waiver under Subsection (1) shall:

275 (a) include a statement that all anticipated services under the contract have been

276 completed;

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

278 (c) whether any retainage amount is outstanding.

279 (4) If a subcontractor fails to file a progress waiver or final lien waiver as required in

280 this section, the subcontractor is precluded from claiming or recording a lien against the subject
281 property.

282 Section 5. **Effective date.**

283 This bill takes effect on January 1, 2020.