

# PRIVATE CONSTRUCTION PROJECTS

## Preconstruction Lien and Construction Lien [Utah Code Annotated §38-1a-301]

- **What is it and how does it benefit subcontractors and supplies?**

**Purpose:** The “lien” creates a security interest in favor of the “claimant” and against the Owner’s property for the purpose of protecting contractors, subcontractors, laborers and suppliers (“materialmen”) who have added directly to the value of the property and to prevent the owner of land from taking the benefit of improvements placed on the property without paying for the labor and/or materials provided.

**Those entitled to lien -- What may be attached.**

Except as provided in Section **38-11-107**, [residential protection under the Residential Lien Recovery Fund Act] a person who provides preconstruction service or construction work on or for a project property has a lien on the project property for the reasonable value of the preconstruction service or construction work. . . .

A person may claim a preconstruction lien and a separate construction lien on the same project property.

(a) A construction lien may include an amount claimed for a preconstruction service.

(b) A preconstruction lien may not include an amount claimed for construction work.

A preconstruction or construction lien attaches only to the interest that the owner has in the project property that is the subject of the lien.

- **No Waiver of Right to Lien [§38-1a-105]**

(1)(a) A right or privilege under this chapter may not be waived or limited by contract.

(b) A provision of a contract purporting to waive or limit a right or privilege under this chapter is void.

(2) Notwithstanding Subsection (1), a claimant may waive or limit, in whole or in part, a lien right under this chapter in consideration of payment as provided in Section 38-1a-802. [Lien Waiver]

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1. **The Statute creates two types of liens (both types entitled to lien)**

- **"Preconstruction Service Lien"** arises from performance of preconstruction services.

**"Preconstruction service"** 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 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.

**"Anticipated improvement"** means the improvement for which preconstruction service is performed; and that is anticipated to follow the performing of preconstruction service.

- **Construction Lien** arises from Performance of Construction Work.

**"Construction work"** means labor, service, material, or equipment provided for the purpose and during the process of constructing, altering, or repairing an improvement; and includes scheduling, estimating, staking, supervising, managing, materials testing, inspection, observation, and quality control or assurance involved in constructing, altering, or repairing an improvement.

**"Improvement"** means a building, infrastructure, utility, or other human-made structure or object constructed on or for and affixed to real property; or a repair, modification, or alteration of a building, infrastructure, utility, or object referred to in Subsection (19)(a).

**"Substantial work"** does not include repair work or warranty work.

Does not include "maintenance services"

Applies to Commercial, Industrial and Residential projects. There are additional restrictions under the Residential requirements under Lien Recovery Fund.

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**2. Notice Requirements for Obtaining and Maintaining a Lien.**

**• PRECONSTRUCTION SERVICE LIEN**

**38-1a-401 Notice of preconstruction service.**

(a) A person that desires to claim a preconstruction lien on real property shall file a notice of preconstruction service with the SCR no later than 20 days after the person commences providing preconstruction service for the anticipated improvement on the real property.

A person that fails to file a timely notice of preconstruction service as required in this section may not claim a valid preconstruction lien.

A timely filed notice of preconstruction service is effective as to each preconstruction service that the person filing the notice provides for the anticipated improvement under a single original contract, including preconstruction service that the person provides to more than one supervising subcontractor under that original contract.

A notice of preconstruction service filed for preconstruction service provided or to be provided under an original contract for an anticipated improvement on real property is not valid for preconstruction service provided or to be provided under a separate original contract for an anticipated improvement on the same real property.

A notice of preconstruction service that is timely filed with the database with respect to an anticipated improvement is considered to have been filed at the same time as the earliest timely filed notice of preconstruction service for that anticipated improvement.

**A notice of preconstruction service shall include:**

- (i) the name, address, telephone number, and email address of the person providing the preconstruction service;
- (ii) the name, address, telephone number, and email address of the person that employed the person providing the preconstruction service;
- (iii) a general description of the preconstruction service the person provided or will provide;
- (iv) the name of the record or reputed owner;
- (v) the name of the county in which the property on which the anticipated improvement will occur is located;
- (vi) (A) the tax parcel identification number of each parcel included in that property; or

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(B) the entry number of a previously filed notice of preconstruction service that includes the tax parcel identification number of each parcel included in that property; and

(vii) a statement that the person filing the notice intends to claim a preconstruction lien if the person is not paid for the preconstruction service the person provides.

(g) (i) A claimant who is an original contractor or a supervisory subcontractor may include in a notice of preconstruction service the name, address, and telephone number of each subcontractor who is under contract with the claimant to provide preconstruction service that the claimant is under contract to provide.

(ii) The inclusion of a subcontractor in a notice of preconstruction service filed by another claimant is not a substitute for the subcontractor's own submission of a notice of preconstruction service.

(2) The burden is on the person filing the notice of preconstruction service to prove that the person has substantially complied with the requirements of this section.

(3) (a) Subject to Subsection (3)(b), a person required by this section to file a notice of preconstruction service is required to give only one notice for each anticipated improvement.

A person that provides preconstruction service under more than one original contract for the same anticipated improvement and desires to claim a preconstruction lien for preconstruction service provided under each original contract shall file a separate notice of preconstruction service for preconstruction service provided under each original contract.

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**38-1a-402 Notice of preconstruction lien -- Requirements.**

(1) Within 90 days after completing a preconstruction service for which a claimant is not paid in full, a claimant who desires to claim a preconstruction lien shall submit for recording with each applicable county recorder a notice of preconstruction lien.

(2) A claimant who fails to submit a notice of preconstruction lien as provided in Subsection (1) may not claim a preconstruction lien.

**(3) (a) A notice of preconstruction service lien shall include:**

- (i) the claimant's name, mailing address, and telephone number;
  - (ii) a statement that the claimant claims a preconstruction lien;
  - (iii) the date the claimant's notice of preconstruction service was filed;
  - (iv) the name of the person that employed the claimant;
  - (v) a general description of the preconstruction service provided by the claimant;
  - (vi) the date that the claimant last provided preconstruction service;
  - (vii) the name, if known, of the reputed owner or, if not known, the name of the record owner;
  - (viii) a description of the project property sufficient for identification;
  - (ix) the principal amount, excluding interest, costs, and attorney fees, claimed by the claimant;
  - (x) the claimant's signature or the signature of the claimant's authorized agent;
  - (xi) an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents; and
  - (xii) if the lien is against an owner-occupied residence, as defined in Section 38-11-102, a statement meeting the requirements that the division has established by rule, describing the steps the owner of the owner-occupied residence may take to require a claimant to remove the lien as provided in Section 38-11-107.
- (b) (i) A claimant who is an original contractor or a supervising subcontractor may include in a notice of preconstruction lien the name, address, and telephone number of each subcontractor who is under contract with the claimant to provide preconstruction service that the claimant is under contract to provide.
- (ii) The inclusion of a subcontractor in a notice of preconstruction lien filed by another claimant is not a substitute for the subcontractor's own submission of a notice of preconstruction lien.

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(5) (a) Within 30 days after a claimant's notice of preconstruction lien is recorded, the claimant shall send by certified mail a copy of the notice to the reputed or record owner.

(b) If the record owner's address is not readily available to the claimant, the claimant may mail a copy of the notice to the owner's last-known address as it appears on the last completed assessment roll of the county in which the property is located.

(c) A claimant's failure to mail a copy of the notice as required in this Subsection (5) precludes the claimant from being awarded costs and attorney fees against the reputed or record owner in an action to enforce the lien.

(6) Nothing in this section may be construed to prohibit a claimant from recording a notice of preconstruction lien before completing the preconstruction service the claimant contracted to provide.

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**38-1a-403 Effective time and priority of preconstruction lien -- Subordination to bona fide loan.**

(1) Except as otherwise provided in this chapter, a preconstruction lien:

(a) relates back to and takes effect as of the time of filing of the earliest timely filed notice of preconstruction service under Section 38-1a-401 for the anticipated improvement for which the preconstruction lien is claimed; and

(b) has priority over:

(i) any lien, mortgage, or other encumbrance that attaches after the earliest timely filed notice of preconstruction service is filed; and

(ii) any lien, mortgage, or other encumbrance of which the claimant had no notice and that was unrecorded at the time the earliest timely filed notice of preconstruction service is filed.

(2) A preconstruction lien is subordinate to an interest securing a bona fide loan if and to the extent that the lien covers preconstruction service provided after the interest securing a bona fide loan is recorded.

**38-1a-404 When preconstruction service considered complete.**

Preconstruction service is considered complete for any project, project phase, or bid package as of the date that construction work for that project, project phase, or bid package, respectively, commences.

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**CONSTRUCTION SERVICE LIEN**

**38-1a-501 Notice of Construction Service—Preliminary Notice [UCA §38-1a-501].**

(1)(a) A person who desires to claim a construction lien on real property shall file a **preliminary notice** with the registry no later than 20 days after the day on which the person commences providing construction work on the real property.

(b) Subject to Subsection (1)(c), a preliminary notice is effective as to all construction work that the person filing the notice provides to the construction project under a single original contract, including construction work that the person provides to more than one supervisory subcontractor under that original contract.

(c)(i) A person who desires to claim a construction lien on real property but fails to file a timely preliminary notice within the period specified in Subsection (1)(a) may, subject to Subsection (1)(d), file a preliminary notice with the registry after the period specified in Subsection (1)(a). .

(ii) A person who files a preliminary notice under Subsection (1)(c)(i) may not claim a construction lien for construction work the person provides to the construction project before the date that is five days after the preliminary notice is filed.

(d) Notwithstanding Subsections (1) (a) and (c), a preliminary notice has no effect if it is filed more than 10 days after the filing of a notice of completion under Section 38-1a-507 for the construction project for which the preliminary notice is filed.

**(e) A person who fails to file a preliminary notice as required in this section may not claim a construction lien.**

(f) A preliminary notice that is filed with the registry as provided in this section is considered to be filed at the time of the first preliminary notice filing.

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(h) A preliminary notice of Construction Services shall include:

- (i) the name, address, telephone number, and email address of the person providing the construction work for which the preliminary notice is filed;
- (ii) the name and address of the person who contracted with the claimant for the construction work;
- (iii) the name of the record or reputed owner;
- (iv) the name of the original contractor for construction work under which the claimant is providing or will provide construction work;
- (v) the address of the project property or a description of the location of the project;
- (vi) the name of the county in which the project property is located; and
- (vii)(A) the tax parcel identification number of each parcel included in the project property;
  - (B) the entry number of a previously filed notice of construction loan under Section 38-1a-601 on the same project;
  - (C) the entry number of a previously filed preliminary notice on the same project that includes the tax parcel identification number of each parcel included in the project property; or
  - (D) the entry number of the building permit issued for the project.

(i) A preliminary notice may include:

- (i) the subdivision, development, or other project name applicable to the construction project for which the preliminary notice is filed; and
- (ii) the lot or parcel number of each lot or parcel that is included in the project property.

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- A person has substantially complied with the requirements of this section if the person files a preliminary notice that links, within the registry, to a preliminary notice filed by an original contractor for the same construction project, using the entry number assigned to the original contractor's preliminary notice.
- A person required by this section to give preliminary notice is required to give only one notice for each construction project.
- If the construction work is provided pursuant to contracts under more than one original contract for construction work, the notice requirements shall be met with respect to the construction work provided under each original contract.

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**38-1a-502 Notice of Construction lien -- Contents -- Recording -- Service on owner.**

(1) (a) A person who desires to claim a construction lien shall submit for recording in the office of each applicable county recorder a notice of construction lien no later than, except as provided in Subsection (1)(b):

(i) 180 days after the date on which **final completion** of the original contract occurs, if no notice of completion is filed under Section 38-1a-507; or

- 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;

(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.

(ii) 90 days after the date on which a notice of completion is filed under Section 38-1a-507, but not later than 180 days after the date on which final completion of the original contract occurs.

(b) A subcontractor who provides substantial work after a certificate of occupancy is issued or a required final inspection is completed and desires to claim a construction lien shall submit for recording in the office of each applicable county recorder a notice of construction lien no later than 180 days after final completion of that subcontractor's work.

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(2) A notice of construction lien shall contain:

- (a) the name of the reputed owner if known or, if not known, the name of the record owner;
- (b) the name of the person by whom the claimant was employed or to whom the claimant provided construction work;
- (c) the time when the claimant first and last provided construction work;
- (d) a description of the project property, sufficient for identification;
- (e) the name, current address, and current phone number of the claimant;
- (f) the amount claimed under the construction lien;
- (g) the signature of the claimant or the claimant's authorized agent;
- (h) an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents; and
- (i) if the construction lien is on an owner-occupied residence, as defined in Section 38-11-102, a statement describing what steps an owner, as defined in Section 38-11-102, may take to require a lien claimant to remove the lien in accordance with Section 38-11-107.

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(4) (a) Within 30 days after filing a notice of construction lien, the claimant shall deliver or mail by certified mail a copy of the notice to the reputed owner or the record owner.

(b) If the record owner's current address is not readily available to the claimant, the claimant may mail a copy of the notice to the last known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the project property is located.

**(c) Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the claimant from an award of costs and attorney fees against the reputed owner or record owner in an action to enforce the construction lien.**

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- Property Subject to Lien

**38-1a-302 Land covered by lien -- Multiple lots occupied by improvement -- What a lien attaches to.**

- (1) A preconstruction or construction lien extends to and covers as much of the land on which the improvement is made as necessary for the convenient use and occupation of the land.
- (2) If an improvement occupies two or more lots or other subdivisions of land, the lots or subdivisions are considered as one for the purposes of this chapter.
- (3) A preconstruction or construction lien attaches to all franchises, privileges, appurtenances, machinery, and fixtures pertaining to or used in connection with the improvement.

**38-1a-304 Liens on multiple properties in one claim.**

- (1) A claimant may claim a preconstruction or construction lien against two or more improvements owned by the same person.
- (2) If a claimant claims a preconstruction or construction lien against two or more improvements owned by the same person, the claimant shall designate the amount claimed to be due on each of the improvements.

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**3. Priority of Liens**

**• Preconstruction Services Lien**

**38-1a-403 Effective time and priority of preconstruction lien -- Subordination to bona fide loan.**

(1) Except as otherwise provided in this chapter, a preconstruction lien:

(a) relates back to and takes effect as of the time of filing of the earliest timely filed notice of preconstruction service under Section 38-1a-401 for the anticipated improvement for which the preconstruction lien is claimed; and

(b) has priority over:

(i) any lien, mortgage, or other encumbrance that attaches after the earliest timely filed notice of preconstruction service is filed; and

(ii) any lien, mortgage, or other encumbrance of which the claimant had no notice and that was unrecorded at the time the earliest timely filed notice of preconstruction service is filed.

(2) A preconstruction lien is subordinate to an interest securing a bona fide loan if and to the extent that the lien covers preconstruction service provided after the interest securing a bona fide loan is recorded.

**38-1a-404 When preconstruction service considered complete.**

Preconstruction service is considered complete for any project, project phase, or bid package as of the date that construction work for that project, project phase, or bid package, respectively, commences.

**38-1a-405 Preconstruction liens on equal footing.**

(1) Each preconstruction lien on a project property is on equal footing with every other preconstruction lien on the project property, regardless of:

(a) when the claimant submitted the claimant's notice of preconstruction service for recording;

(b) when the claimant submitted the claimant's notice of preconstruction lien for recording;  
or

(c) when the preconstruction service related to the lien occurs.

(2) Subsection (1) does not affect the priority of a construction lender's mortgage or trust deed, as established under this chapter.

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- **Construction Lien**

**38-1a-503 Relation back and priority of liens.**

(1) A construction lien relates back to, and takes effect as of, the time of the first preliminary notice filing.

(2)(a) Subject to Subsection (2)(b), a construction lien has priority over:

(i) any lien, mortgage, or other encumbrance that attaches after the first preliminary notice filing; and

(ii) any lien, mortgage, or other encumbrance, of which the claimant had no notice and which was unrecorded at the time of the first preliminary notice filing.

(b) A recorded mortgage or trust deed that secures a construction loan attaches immediately before the first preliminary notice filing for the construction project if each claimant that has a preliminary notice on file on the construction project before the mortgage or trust deed was recorded receives full payment for all construction work the claimant performed before the mortgage or trust deed was recorded, regardless of whether the claimant receives full payment before or after the day on which the mortgage or trust deed is recorded.

**38-1a-504 Construction liens on equal footing.**

(1) Construction liens on a project property are on an equal footing with one another, regardless of when the notices of construction lien relating to the construction liens are submitted for recording and regardless of when construction work for which the liens are claimed is provided.

(2) Subsection (1) relates to the relationship between claimants' construction liens and does not affect the priority of a construction lender's mortgage or trust deed, as established under this chapter.

4. **Enforcement of Liens**

**38-1a-701 Action to enforce lien -- Time for filing action -- Notice of pendency of action -- Action involving a residence.**

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(2) In order to enforce a preconstruction lien or construction lien, a claimant shall file an action to enforce the lien:

(a) except as provided in Subsection (2)(b), within 180 days after the day on which the claimant files:

(i) a notice of preconstruction lien under Section 38-1a-402, for a preconstruction lien; or

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(ii) a notice of construction lien under Section 38-1a-502, for a construction lien; or

(b) if an owner files for protection under the bankruptcy laws of the United States before the expiration of the 180-day period under Subsection (2)(a), within 90 days after the automatic stay under the bankruptcy proceeding is lifted or expires.

(3) (a) (i) Within the time period provided in Subsection (2) for filing an action, a claimant shall file for record with each applicable county recorder a notice of the pendency of the action, in the manner provided for actions affecting the title or right to possession of real property.

(ii) If a claimant fails to file for record a notice of the pendency of the action, as required in Subsection (3)(a)(i), the preconstruction lien or construction lien, as applicable, is void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.

(b) The burden of proof is upon the claimant and those claiming under the claimant to show actual knowledge under Subsection (3)(a)(ii).

(4) (a) A preconstruction lien or construction lien is automatically and immediately void if an action to enforce the lien is not filed within the time required by this section.

(b) Notwithstanding Section 78B-2-111, a court has no subject matter jurisdiction to adjudicate a preconstruction or construction lien that becomes void under Subsection (4)(a).

(5) This section may not be interpreted to impair or affect the right of any person to whom a debt may be due for any preconstruction service or construction work to maintain a personal action to recover the debt.

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- **Residential Lien—[Residential Lien Recovery Fund]**

(6) (a) If a claimant files an action to enforce a preconstruction or construction lien involving a residence, the claimant shall include with the service of the complaint on the owner of the residence:

(i) instructions to the owner of the residence relating to the owner's rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act; and

(ii) a form to enable the owner of the residence to specify the grounds upon which the owner may exercise available rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act.

(b) The instructions and form required by Subsection (6)(a) shall meet the requirements established by the division by rule.

(c) If a claimant fails to provide to the owner of the residence the instructions and form required by Subsection (6)(a), the claimant is barred from maintaining or enforcing the preconstruction or construction lien upon the residence.

(d) A court shall stay an action to determine the rights and liabilities of an owner of a residence under this chapter, Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act, and Title 14, Chapter 2, Private Contracts, until after the owner is given a reasonable period of time to:

(i) establish compliance with Subsections 38-11-204(4)(a) and (4)(b) through an informal proceeding, as set forth in Title 63G, Chapter 4, Administrative Procedures Act, commenced at the division within 30 days after the owner is served with summons in the foreclosure action; and

(ii) obtain a certificate of compliance or denial of certificate of compliance, as defined in Section 38-11-102.

(e) An owner applying for a certificate of compliance under Subsection (6)(d) shall send by certified mail to all claimants:

(i) a copy of the application for a certificate of compliance; and

(ii) all materials filed in connection with the application.

(f) The division shall notify all claimants listed in an owner's application for a certificate of compliance under Subsection (6)(d) of the issuance or denial of a certificate of compliance.

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- Final Completion

**38-1a-706 Apportionment of costs -- Costs and attorney fees to subcontractor.**

(1) Except as provided in Section 38-11-107, the court shall apportion costs between the owner and original contractor according to the right of the case.

(2) The court shall award a subcontractor with a valid preconstruction or construction lien:

(a) all of the subcontractor's costs, including the costs of preparing and recording the notice of preconstruction or construction lien; and

(b) the subcontractor's reasonable attorney fees incurred in preparing and recording the notice of preconstruction or construction lien.

**38-1a-707 Attorney fees -- Offer of judgment.**

(1) Except as provided in Section 38-11-107 and in Subsection (2), in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover reasonable attorney fees, to be fixed by the court, which shall be taxed as costs in the action.

(2) A person who files a wrongful lien as provided in Section 38-1a-308 may not recover attorney fees under Subsection (1).

(3) (a) A person against whom an action is brought to enforce a preconstruction or construction lien may make an offer of judgment pursuant to Rule 68 of the Utah Rules of Civil Procedure.

(b) If the offer is not accepted and the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall pay the costs and attorney fees incurred by the offeror after the offer was made.

**38-1a-309 Interest rate on lien.**

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

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**38-1a-804 Notice of release of lien and substitution of alternate security.**

(1) The owner of any interest in a project property that is subject to a recorded preconstruction or construction lien, or any original contractor or subcontractor affected by the lien, who disputes the correctness or validity of the lien may submit for recording a notice of release of lien and substitution of alternate security:

- (a) that meets the requirements of Subsection (2);
- (b) in the office of each applicable county recorder where the lien was recorded; and
- (c) at any time before the date that is 90 days after the first summons is served in an action to foreclose the preconstruction or construction lien for which the notice under this section is submitted for recording.

(2) A notice of release of lien and substitution of alternate security recorded under Subsection (1) shall:

(a) meet the requirements for the recording of documents in Title 57, Chapter 3, Recording of Documents;

(b) reference the preconstruction or construction lien sought to be released, including the applicable entry number, book number, and page number; and

(c) have as an attachment a surety bond or evidence of a cash deposit that:

(i) (A) if a surety bond, is executed by a surety company that is treasury listed, A-rated by AM Best Company, and authorized to issue surety bonds in this state; or

(B) if evidence of a cash deposit, meets the requirements established by rule by the Department of Commerce in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act;

(ii) is in an amount equal to:

(A) 150% of the amount claimed by the claimant under the preconstruction or construction lien or as determined under Subsection (7), if the lien claim is for \$25,000 or more;

(B) 175% of the amount claimed by the claimant under the preconstruction or construction lien or as determined under Subsection (7), if the lien claim is for at least \$15,000 but less than \$25,000; or

(C) 200% of the amount claimed by the claimant under the preconstruction or construction lien or as determined under Subsection (7), if the lien claim is for less than \$15,000;

(iii) is made payable to the claimant;

(iv) is conditioned for the payment of:

(A) the judgment that would have been rendered, or has been rendered against the project property in the action to enforce the lien; and

(B) any costs and attorney fees awarded by the court; and

(v) has as principal:

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- (A) the owner of the interest in the project property; or
- (B) the original contractor or subcontractor affected by the lien.

(3) (a) Upon the recording of the notice of release of lien and substitution of alternate security under Subsection (1), the real property described in the notice shall be released from the preconstruction lien or construction lien to which the notice applies.

(b) A recorded notice of release of lien and substitution of alternate security is effective as to any amendment to the preconstruction or construction lien being released if the bond amount remains enough to satisfy the requirements of Subsection (2)(c)(ii).

(4) (a) Upon the recording of a notice of release of lien and substitution of alternate security under Subsection (1), the person recording the notice shall serve a copy of the notice, together with any attachments, within 30 days upon the claimant.

(b) If a suit is pending to foreclose the preconstruction or construction lien at the time the notice is served upon the claimant under Subsection (4)(a), the claimant shall, within 90 days after the receipt of the notice, institute proceedings to add the alternate security as a party to the lien foreclosure suit.

(5) The alternate security attached to a notice of release of lien shall be discharged and released upon:

(a) the failure of the claimant to commence a suit against the alternate security within the same time as an action to enforce the lien under Section 38-1a-701;

(b) the failure of the lien claimant to institute proceedings to add the alternate security as a party to a lien foreclosure suit within the time required by Subsection (4)(b);

(c) the dismissal with prejudice of the lien foreclosure suit or suit against the alternate security as to the claimant; or

(d) the entry of judgment against the claimant in:

(i) a lien foreclosure suit; or

(ii) suit against the alternate security.

(6) If a copy of the notice of release of lien and substitution of alternate security is not served upon the claimant as provided in Subsection (4)(a), the claimant has six months after the discovery of the notice to commence an action against the alternate security, except that no action may be commenced against the alternate security after two years from the date the notice was recorded.

(7) (a) The owner of any interest in a project property that is subject to a recorded preconstruction or construction lien, or an original contractor or subcontractor affected by the lien, who disputes the amount claimed under a preconstruction or construction lien may petition the district court in the county in which the notice of lien is recorded for a summary determination of the correct amount owing under the lien for the sole purpose of providing alternate security.

(b) A petition under this Subsection (7) shall:

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(i) state with specificity the factual and legal bases for disputing the amount claimed under the preconstruction or construction lien; and

(ii) be supported by a sworn affidavit and any other evidence supporting the petition.

(c) A petitioner under Subsection (7)(a) shall, as provided in Utah Rules of Civil Procedure, Rule 4, serve on the claimant:

(i) a copy of the petition; and

(ii) a notice of hearing if a hearing is scheduled.

(d) If a court finds a petition under Subsection (7)(a) insufficient, the court may dismiss the petition without a hearing.

(e) If a court finds a petition under Subsection (7)(a) sufficient, the court shall schedule a hearing within 10 days to determine the correct amount claimed under the preconstruction or construction lien for the sole purpose of providing alternate security.

(f) A claimant may:

(i) attend a hearing held under this Subsection (7); and

(ii) contest the petition.

(g) A determination under this section is limited to a determination of the amount claimed under a preconstruction or construction lien for the sole purpose of providing alternate security and does not conclusively establish:

(i) the amount to which the claimant is entitled;

(ii) the validity of the claim; or

(iii) any person's right to any other legal remedy.

(h) If a court, in a proceeding under this Subsection (7), determines that the amount claimed under a preconstruction or construction lien is excessive, the court shall set the amount for the sole purpose of providing alternate security.

(i) In an order under Subsection (7)(h), the court shall include a legal description of the project property.

(j) A petitioner under this Subsection (7) may record a certified copy of any order issued under this Subsection (7) in the county in which the lien is recorded.

(k) A court may not award attorney fees for a proceeding under this Subsection (7), but shall consider those attorney fees in any award of attorney fees under any other provision of this chapter.

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5. Wrongful liens

**38-1a-209 Abuse of registry (SCR)-- Penalty.**

- (1) As used in this section, "third party" means an owner, an original contractor, a subcontractor, or any interested party.
- (2) A person abuses the registry if that person files a notice in the registry:
  - (a) without a good faith basis for doing so;
  - (b) with the intent to exact more than is due from the owner or any other interested party;or
  - (c) to procure an unjustified advantage or benefit.
- (3) A person who abuses the registry as described in Subsection (2) is liable to a third party who is affected by the notice for twice the amount of the actual damages incurred by the third party or \$2,000, whichever is greater.

**38-1a-308 Intentional submission of excessive lien notice -- Criminal and civil liability.**

- (1) A person is guilty of a class B misdemeanor if:
  - (a) the person intentionally submits for recording a notice of preconstruction lien or notice of construction lien against any property containing a greater demand than the sum due; and
  - (b) by submitting the notice, the person intends:
    - (i) to cloud the title;
    - (ii) to exact from the owner or person liable by means of the excessive notice of preconstruction or construction lien more than is due; or
    - (iii) to procure any unjustified advantage or benefit.
- (2) (a) As used in this Subsection (2), "third party" means an owner, original contractor, or subcontractor.
  - (b) In addition to any criminal penalty under Subsection (1), a person who submits a notice of preconstruction lien or notice of construction lien as described in Subsection (1) is liable to a third party who is affected by the lien for twice the amount by which the excessive lien notice exceeds the amount actually due or the actual damages incurred by the owner, original contractor, or subcontractor, whichever is greater.

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**§38-1a-805 (2015)**

- Provides that the parties involved in a dispute/claim for an excessive notice of Preconstruction lien or an excessive notice of Construction lien on a residential construction project, involving a claim for lien for \$50,000 or less, may submit that claim to binding arbitration;
- The amendment establishes procedures to be followed to commence the arbitration of the claim and procedures for an appeal to the District Court of an arbitration decision regarding a claim for an excessive notice of Preconstruction lien or an excessive notice of Construction lien;

**§38-1a-308 (2015)**

- Establishes an expedited procedure to nullify a preconstruction lien or a construction lien on any construction project, regardless of the amount of the lien claim that is invalid because the lien claimant did not properly file a preliminary notice of Preconstruction lien or a Construction lien.

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# **BOND CLAIMS**

- **Private Construction Projects**

**14-2-1 Definitions -- Payment bond required -- Right of action -- Attorney fees.**

(1) For purposes of this chapter:

(a) "Commercial contract" means a contract for the construction, alteration, or repair of the following if it is not residential construction:

(i) a building;

(ii) a structure; or

(iii) an improvement upon land that is not associated with a single family detached housing.

(b) "Contractor" means any person who is or may be awarded an original commercial contract for the construction, alteration, or repair of any building, structure, or improvement upon land.

(c) "Owner" means any person contracting with the original contractor for construction, alteration, or repair of the following if it is not residential construction:

(i) a building;

(ii) a structure; or

(iii) an improvement upon land.

- **This statute does not apply to Residential Construction**

(d) (i) "Residential construction" means the construction, alteration, or repair of:

(A) single family detached housing; or

(B) multifamily attached housing up to and including a fourplex.

(ii) "Residential construction" includes rental housing.

(2) Before any original commercial contract exceeding \$50,000 in amount for the construction, alteration, or repair of any building, structure, or

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improvement upon land is awarded to any contractor, the owner shall obtain from the contractor a payment bond:

- (a) complying with Subsection (3); and
  - (b) that becomes binding upon the award of the original commercial contract to the contractor.
- (3) The payment bond shall be:
- (a) with a surety or sureties satisfactory to the owner for the protection of all persons supplying labor, services, equipment, or material in the prosecution of the work provided for in the commercial contract; and
  - (b) in a sum equal to the original commercial contract price.

**(4) A person shall have a right of action on a payment bond under this chapter for any unpaid amount due that person if that person:**

- (a) has furnished labor, services, equipment, or material in the prosecution of the work provided for in the commercial contract for which the payment bond is furnished under this chapter; and
- (b) has not been paid in full within 90 days after the last day on which that person:
  - (i) performed the labor or service for which a claim is made; or
  - (ii) supplied the equipment or material for which the claim is made.

(5) (a) An action under this section shall be brought in a court of competent jurisdiction in the county where the commercial contract was to be performed and not elsewhere.

**(b) An action under this section is barred if not commenced within one year after the last day on which the claimant:**

- (i) performed the labor or service on which the claim is based; or
  - (ii) supplied the equipment or material on which the claim is based.
- (c) The obligee named in the payment bond need not be joined as a party to an action under this section.

**(d) In any action upon a payment bond under this section, the court may award reasonable attorney fees to the prevailing party, which attorney fees shall be taxed as costs in the action.**

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(6) The payment bond shall be exhibited to any interested person upon request.

**(7) In any suit upon a payment bond under this chapter, the court shall award reasonable attorney fees to the prevailing party.**

(8) Unless otherwise specified in a lawful contract between the owner and the person making a claim under this section, the interest rate applicable to the claim is the rate described in Subsection 15-1-1(2).

**14-2-2 Failure of owner to obtain payment bond -- Liability.**

(1) An owner who fails to obtain a payment bond required under Section 14-2-1 is liable to each person who performed labor or service or supplied equipment or materials under the commercial contract for the reasonable value of the labor or service performed or the equipment or materials furnished up to but not exceeding the commercial contract price.

**(2) An action to recover on the liability described in Subsection (1) may not be commenced later than one year after the day on which:**

- (a) the last of the labor or service was performed; or
- (b) the equipment or material was supplied by the person.

**(3) In an action for failure to obtain a bond, the court shall award reasonable attorney fees to the prevailing party. These attorney fees shall be taxed as costs in the action.**

**14-2-5. Preliminary notice requirement.**

(1) Any person furnishing labor, service, equipment, or material for which a payment bond claim may be made under this chapter shall provide preliminary notice to the designated agent as prescribed by Section 38-1a-501, except that this section does not apply to an individual performing labor for wages.

**(2) Any person who fails to provide the preliminary notice required by Subsection (1) may not make a payment bond claim under this chapter.**

(3) The preliminary notice required by Subsection (1) shall be provided prior to commencement of any action on the payment bond.

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(4) Subsection (1) does not exempt the following from complying with the requirements of this section:

- (a) a temporary labor service company or organization;
- (b) a professional employer company or organization; or
- (c) any other entity that provides labor.

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- **Public Construction Projects**

**Government Projects—Not subject to lien statute 38-1a-103**

**"Government project"** means a construction project undertaken by or for: (a) the state, including a department, division, or other agency of the state; or (b) a county, city, town, school district, local district, special service district, community development and renewal agency, or other political subdivision of the state.

- For Construction Services—Not Preconstruction Services

**Notice requirements**

**38-1b-201 Notice of commencement for a government project.**

(1) No later than 15 days after commencement of physical construction work at a government project site, the original contractor, owner, or owner-builder shall file a notice of commencement with the registry.

(2) An original contractor, owner, or owner-builder on a government project may file a notice of commencement with the designated agent before the commencement of physical construction work on the project property.

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(4) The designated agent shall assign each government project a unique project number that:

(a) identifies the project; and

(b) can be associated with all notices of commencement, preliminary notices, and notices of completion filed in connection with the project.

(5) A notice of commencement is effective only as to any construction work that is provided after the notice of commencement is filed.

(6) (a) A notice of commencement shall include:

(i) the name, address, and email address of the owner;

(ii) the name, address, and email address of the original contractor;

(iii) the name, address, and email address of the surety providing any payment bond for the project or, if none exists, a statement that a payment bond was not required for the work being performed;

(iv) (A) the address of the project property if the project property can be reasonably identified by an address; or

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(B) the name and general description of the location of the project property, if the project property cannot be reasonably identified by an address; and

(v) the government project-identifying information.

(b) A notice of commencement may include a general description of the project.

(7) If a notice of commencement for a government project is not filed within the time set forth in Subsection (1), then Section 38-1b-202 (Requirement for filing Preliminary Notice) and Section 38-1b-203, with respect to the filing of a notice of completion, do not apply.

(8) (a) The burden is upon any person seeking to enforce a notice of commencement to verify the accuracy of information in the notice of commencement and prove that the notice of commencement is filed timely and meets all of the requirements of this section.

(b) A substantial inaccuracy in a notice of commencement renders the notice of commencement invalid.

(c) A person filing a notice of commencement by alternate means is responsible for verifying and changing any incorrect information in the notice of commencement before the expiration of the time period during which the notice is required to be filed.

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**38-1b-202 Preliminary notice on government project.**

(1) (a) A subcontractor on a government project shall file a preliminary notice with the registry by the later of:

(i) 20 days after the subcontractor commences providing construction work to the construction project; and

(ii) 20 days after the filing of a notice of commencement, if the subcontractor's work commences before the filing of the first notice of commencement.

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(2) A preliminary notice filed within the period described in Subsection (1) is effective as to all construction work that the subcontractor provides to the construction project, including construction work that the subcontractor provides to more than one contractor or subcontractor.

(3) (a) If more than one notice of commencement is filed for a project, a person may attach a preliminary notice to any notice of commencement filed for the project.

(b) A preliminary notice attached to an untimely notice of commencement is valid if there is also a valid and timely notice of commencement for the project.

(4) A preliminary notice filed after the period prescribed by Subsection (1) becomes effective on the date that is five days after the date on which the preliminary notice is filed.

(5) Except as provided in Subsection (8), failure to file a preliminary notice within the period required by Subsection (1) precludes a person from maintaining any claim for compensation earned for construction work provided to the construction project before the the date that is five days after the preliminary notice was filed, except as against the person with whom the person contracted.

(6) A preliminary notice on a government project shall include:

(a) the government project-identifying information;

(b) the name, address, and telephone number of the person providing the construction work;

(c) the name and address of the person who contracted with the claimant for the providing of construction work;

(d) the name of the record or reputed owner;

(e) the name of the original contractor under which the claimant is performing or will perform its work; and

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(f) the address of the project property or a description of the location of the project property.

(7) Upon request, an original contractor shall provide a subcontractor with the number assigned to the project by the designated agent.

(8) A person who provides construction work before the filing of a notice of commencement need not file a preliminary notice to maintain any right the person would otherwise have, if the notice of commencement is filed more than 15 days after the day on which the person begins work on the project.

(9) The burden is upon the person filing a preliminary notice to prove that the person has substantially complied with the requirements of this section.

(10) Subsections 38-1a-501(1)(e) and (f) and (3) apply to a preliminary notice on a government project under this section to the same extent that those subsections apply under Section 38-1a-501 to a preliminary notice on a project that is not a government project.

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## **Payment Bond Claim on Public Construction Project**

### **§ 63G-6a-1103. Bonds or security necessary when contract is awarded- Waiver—Action--Attorney fees**

(1) When a construction contract is awarded under this chapter, the contractor to whom the contract is awarded shall deliver the following bonds or security to the procurement unit, which shall become binding on the parties upon the execution of the contract:

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(b) a **payment bond** satisfactory to the procurement unit that is in an amount equal to, 100% of the price specified in the contract and is executed by a surety company authorized to do business in the state or any other form satisfactory to the procurement unit, which is for the protection of each person supplying labor, service, equipment, or material for the performance of the work provided for in the contract.

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(4) A person shall have a **right of action on a payment bond** under this section for any unpaid amount due to the person if:

(a) the person has furnished labor, service, equipment, or material for the work provided for in the contract for which the payment bond is furnished under this section; and

(b) the person has not been paid in full within 90 days after the last day on which the person performed the labor or service or supplied the equipment or material for which the claim is made.

(5) An action upon a payment bond may only be brought in a court of compete jurisdiction in a county where the construction contract was to be performed. The action is barred if not commenced within one year after the last day on which the claimant performed the labor or service or supplied the equipment or material on which the claim is based. The obligee named in the bond need not be joined as a party to the action.

(6) In any suit upon a payment bond, the court shall award reasonable attorney fees to the prevailing party, which fees shall be taxed as costs in the action.

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**63G-6a-1104. Preliminary notice requirement**

(1) Any person furnishing labor, service, equipment, or material for which a payment bond claim may be made Under this chapter shall provide preliminary notice to the designated agent as prescribed by Section 38-1b-202, except that this section does not apply:

(a) to an individual performing labor for wages; or

(b) if a notice of commencement is not filed as prescribed in Section 38-1b-201 for the project or improvement for which labor, service, equipment, or material is furnished.

**(2) Any person who fails to provide the preliminary notice required by Subsection (1) may not make a payment bond claim under this chapter.**

(3) The preliminary notice required by Subsection (1) must be provided before commencement of any action on the payment bond.

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