

UNDERSTANDING MECHANICS' LIEN WAIVERS: DON'T SIGN AWAY YOUR RIGHTS

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Mechanics' liens are powerful tools for contractors to help collect payment. However, standard industry practice requires contractors to regularly sign lien waivers and partial releases throughout a project in exchange for payment. But do you understand what you (or your project managers) are signing? If you are not careful, you may be signing all of your rights and claims away.

MECHANICS' LIENS

A mechanics' lien is an encumbrance on real property or a leasehold that acts as security for unpaid labor, material or construction services. Liens are usually available to contractors on private jobs if they meet certain statutory requirements.

Mechanics' liens provide an extraordinary remedy and create leverage. To balance this powerful tool, contractors must strictly adhere to a number of specific requirements that vary widely from one state to the next. Unlike many other areas of the law, mistakes relating to mechanics' liens often lead to losing one's lien rights without any possibility of forgiveness. The loss of lien rights does not, however, equate to the loss of all rights and claims if you know how to preserve them.

LIEN WAIVERS

Most contractors on modern construction projects are required to execute lien waivers or partial releases on a monthly basis in order to

be paid for their work. These waivers typically contain language "waiving" or "releasing all claim rights" beyond just lien rights. The language of these lien waivers or partial releases can widely vary from one form to the next. Some will explicitly release all claims through the waiver's signature date. A waiver also may waive all rights to file a mechanic's lien, whether for work that has been done to date or work that has not been performed yet. We have even seen forms that explicitly release all future claims that the contractor is not even aware of yet. Unfortunately, it is not atypical for a contractor to be confronted with a significant claim that appears waived because the contractor signed the lien waiver.

The enforceability of such waivers varies from one state to the next. Maryland and Virginia, for instance, will not allow contractors to waive or release any rights prior to providing any of the labor, services or materials — such provisions are against public policy and are not enforceable. However, once work has commenced, a contractor can sign away its lien rights with its monthly payment application. Washington, DC does allow a contractor to waive its lien rights before even commencing work, but does not permit a general contractor to waive its subcontractor's rights to file a lien in the general contractor's contract with the owner.

Many contractors continue to sign such lien waivers under the mistaken belief that they only release lien rights associated with work performed to date. While some waivers are

drafted that way, it is common to see much broader waivers.

One general contractor learned the hard way in a case from Virginia, *United Masonry Incorporated of Virginia v. Riggs*. There, the contractor routinely signed a lien waiver form in conjunction with the submission of its monthly payment applications so as to receive payment for work performed. The waiver form itself only recited the amount that was due at that time. After a payment dispute, the contractor sued. During the litigation, the owner sought dismissal of the contractor's claims based on the lien waivers, pointing to the broad language in the waiver. The contractor argued that because the waiver only recited the amount due at the time, it was only a partial lien waiver and merely waived rights associated with the amount due. The court disagreed, noting that "the waivers contain no language limiting their enforceability to the extent of the amounts actually paid," and held that the waivers were more broadly enforceable.

HOW TO PRESERVE YOUR CLAIM

While the widespread willingness of courts to enforce lien waivers can be daunting, knowing your rights will help you avoid landing in an untenable financial position. The following strategies can help contractors preserve their lien rights.

1. Review project documents carefully. Every project will be different. Waiver

language will typically appear in the main contract provided by the owner or upstream contractor in addition to the monthly lien waivers. You also should carefully evaluate change orders for such language. It is important to understand this language before you routinely start signing such documentation. If necessary, hire legal counsel to provide an assessment.

2. Reserve your rights. Many lien waivers will explicitly provide a placeholder where you can list exceptions to the waiver. If you are aware of claims you may have due to additional scope, delay or inefficiency, list those in the area provided. You can also use more general language to reserve your rights. Even if the form does not include a place to reserve rights, it is critical that you specifically reserve them.
3. Train your personnel. Depending on the size of your company, it may not

be feasible for an owner or senior manager to evaluate every form. Proper training of your personnel of the dos and don'ts of signing project documents is essential to controlling your risk.

4. Negotiate. Not all contract language is take it or leave it. Some provisions can be negotiated or struck. This is particularly important when trying to negotiate an area to reserve your rights. If a lien waiver form says that you waive future claims you do not know about yet, take a firm position that you cannot be expected to sign such a document.
5. Play the Game. Unfortunately, there are times when upstream contractors or the owner will not allow downstream contractors to explicitly reserve their rights. When this occurs, it is crucial not to acquiesce. Instead, focus on other steps

to preserve the claim, which will depend on the circumstances of the project.

Lien waivers are widely used in construction and present a unique challenge to contractors. A prudent contractor must take every precaution to ensure that they do not sign away all of their rights by understanding the risks involved. When in doubt, have an attorney review the waiver language at the beginning of a project. This small measure of prevention can help you avoid much more serious financial consequences farther down the road. ■



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