

Recession Planning: Avoiding Accidental Waiver



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In the last two columns, my colleague, Jeff Chapman, discussed protecting rights to payment and understanding the Texas lien statute in light of what appears to many to be signs of an oncoming recession. Ensuring payment rights are protected is of utmost importance when the financial future of the construction industry seems less secure. This column seeks to dove-tail the previous two by reviewing waiver and providing some tips for how not to get tricked into accidental waiver.

Many contractors have been trapped by lien waivers or have unknowingly waived rights to payment by signing a lien or bond waiver in exchange for payment on a job. Taking care to avoid unintentional waiver should be a key training element for all project management professionals. After all, lien and bond rights provide a valuable protection to contractors and subcontractors to ensure payment for their goods and services. Further, the language in the waivers can appear confusing.

In 2011, the legislature attempted to clarify this confusion by providing statutory forms for waiver of lien or payment bond claims, which can be found in section 53.284 of the Texas Property Code. It is important to note that if the waiver and release form signed does not substantially comply with these forms, then it is unenforceable per the statute. Four different forms are provided:

- Conditional Waiver and Release on Progress Payment;
- Unconditional Waiver and Release on Progress Payment;
- Conditional Waiver and Release on Final Payment; and
- Unconditional Waiver and Release on Final Payment.

So, what is the difference between conditional and unconditional waiver? Unconditional waivers go into effect immediately and should only be signed if the contractor has actually received payment for the amount in stated in the waiver. To the contrary, conditional waivers are effective once payment is received, so at the time of execution of the

waiver the contractor has not actually been paid, and the waiver is not triggered until payment is received by the contractor.

Don't just go through the motions. It is imperative that contractors carefully read the language in waivers to make sure they are accurate and determine if they are conditional or unconditional waivers. Contractors shouldn't sign a lien waiver that says they have been paid if they haven't actually received the money. Remember, after all, a lien waiver is waiving the right to payment.

Also, before signing a lien waiver, contractors need to be sure they are not waiving their rights to make a claim on any disputes for the work or time period that the waiver covers. If a contractor has such a claim, it needs to preserve its claim. As mentioned in Part I of this series, one way to preserve its claims is to simply write a note on the waiver – “Excluding change order request for (description) scope of work.” By merely adding this note, it reserves the contractor's rights while allowing the waiver to be submitted and the pay application processed so that payment can be made.

Beware of waivers presented in the form of a settlement agreement. One exception to complying with the statutory forms is when there is a written agreement to waive all or part of a lien or bond claim in an accord and satisfaction of an identified dispute. “Accord and satisfaction of an identified dispute” can plainly be called a settlement agreement to a claim. Many contractors may think this applies to only a formal settlement from a litigation or arbitration; however, it may be far less than that. Even a change order may be considered settlement to a known dispute. Thus, contractors should make sure to review any waiver language added to content of the standard change orders. Contractors should also be aware that if they have filed a lien, any settlement to that dispute does not need to comply with the statutory forms. If presented with a formal or informal settlement agreement on claims, contractors may want to seek the legal advice to make sure they are not waiving rights to current or future payments.

Additionally, the waiver forms discussed above do not apply to certain circumstances. For instance, the statutory forms only apply to private construction projects. As such, public projects with governmental entities often have differing forms that should be carefully reviewed to avoid accidental waiver, which could prevent lien or bond claims in the case of non-payment.

Likewise, the statutory waiver forms are not applicable for certain residential contracts. Waiver in those cases must be in the written original contract or subcontract for land development, construction, remodel, or repair of a single-family house, townhouse, or duplex and must be made before labor or materials are provided under the contract. However, this exception does not apply to a material-only supplier.

If a contractor, or one of its project team members, mistakenly waives rights to payment by signing the wrong waiver form, the contractor should immediately notify the owner in writing that the waiver was not intentional, provide the corrected waiver form, and include a reservation of rights to its claim. While this ultimately may not recover the contractor's waived rights, it may provide some evidence to a court that the original waiver should be invalidated. Further, a court may hold the waiver unenforceable if it does not substantially comply with the statute, in which case the contractor would be able to recover its rights to seek payment. Also, depending on the language in the waiver, it is possible that the contractor only waived the right to file a lien or claim on the bond, but could still seek its right to payment.

However, all of these recourses will take additional time and money, which contractors can avoid by properly training personnel on the importance of waivers, taking time to thoroughly read waivers, and making sure to reserve rights to claims.

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