

THE 'ACCIDENTAL' RELEASE

Pay Close Attention to Standard Lien Waivers

As part of the payment process, most construction contracts require contractors to submit some form of lien waiver and affidavit when requesting a progress payment. However, many contractors do not give much thought to what a standard lien waiver form actually says. Instead, they presume that, as the document's title indicates, they are waiving claims for nonpayment and attesting to payment of lower-tier subcontractors in exchange for the payment being requested.

BY WALLY ZIMOLONG

A closer look at the language shows a contractor is releasing much more than simple payment claims when it executes a lien waiver—it likely is releasing its claims for delay damages as well.

Courts have consistently treated the release language in lien waivers as broad releases of claims. A recent opinion from the Federal Court for the Western District of Pennsylvania illustrates how courts treat releases contained in lien waivers. In *Sauer Incorporated v. Honeywell Building Solutions SES Corporation*, the plaintiff (a mechanical and plumbing subcontractor) sued the defendant (the general contractor) for, among other things, delays associated with the construction project. Honeywell, the general contractor, moved for summary judgment against Sauer on the basis that its claims for delay were barred by the releases it signed in connection with its progress payment application. The court agreed and dismissed most of the plaintiff's delay claims.

Like most subcontracts, the subcontract between Sauer and Honeywell required Sauer to submit with its payment application a Subcontractor Lien Waiver and Affidavit Form. The form stated that “based upon payment of such sums due as of [the date of the application], Subcontractor hereby waives, relinquishes, and releases its liens, claims, rights and charges of every nature whatsoever which have arisen at law, equity, or contract by virtue of such labor, and/or materials furnished by said Subcontractor.”

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Sauer submitted 18 payment applications to Honeywell with attached lien waivers containing the quoted language. Critically, beginning with payment application No. 19, Sauer began submitting payment application with the applicable release language stricken.

The court reviewed the release language contained in the lien waiver and found it clearly released all claims Sauer could have asserted at the time of payment, including delay claims. The court noted if Sauer did not believe that the release was clear and effective, then it would not have felt the need to cross out the offending release language starting with payment application No. 19. The court held by crossing out such language, Sauer had implicitly acknowledged that the unaltered release meant it was releasing the delay claims it was pursuing.

The court then dismissed all of Sauer's delay claims that arose prior to the date of payment application No. 18—the last unaltered application—because of the release language contained in the lien waivers submitted with those first 18 payment applications.

IDEAS FOR CONTRACTORS AND SUBCONTRACTORS

Because the release language contained in lien waivers will release delay and impact claims, a contractor must take affirmative steps to preserve these claims. First, prior to entering a contract, a contractor should review the documents it will submit with its payment applications to see if release language may act as a waiver of its delay damage claims. If possible, a contractor should negotiate for this language to be revised so delay claims are excluded from the release.

If this is not possible or if the contract has been executed already, then when a contractor first learns that its work is being delayed, like Sauer, it should consider striking the problematic release language prior to submitting its next payment application. Alternatively, a contractor in this situation may consider adding language to the release that carves out delay claims.

IDEAS FOR PAYING CONTRACTORS AND OWNERS

The release language contained in lien waivers provides contractors and owners with a powerful defense against delay claims. Typically, a party defending a delay damage claim will rely on a “no-damages-for-delay” clause, although relying on the release language of a lien waiver may be more effective.

In the *Sauer* case, the subcontract contained this clause. However, Honeywell did not base its motion for summary judgment on the no-damages-for-delay clause. Instead, it relied solely on the release language contained in the lien waiver form, and the court's opinion was based only on that language.

In the rush for payment, contractors must be mindful of what is being released with each payment application. Otherwise, they may not be able to recover cost overruns at the completion of the project.

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