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Don't Underestimate the Importance of "Waiver of Liens" Forms

A seemingly routine part of the construction payment process is the signing of a release/waiver form in order to obtain payment. These important documents are often referred to generally as *waiver of liens* forms. Many contractors and subcontractors mistakenly believe these documents are just boilerplate standard "forms" that do not carry significant legal consequences. This mistaken assumption can be catastrophic. Contractors and subcontractors need to understand that signing these releases can inadvertently waive or release claims and payment requests of any type that are submitted before the effective date of the release/waiver. Even unresolved or pending change order proposals can be waived or released by the submission of these documents. Many contractors and subcontractors erroneously believe that pending change order and other similar requests are not affected by these waiver of liens forms. This assumption can be perilous. Contractors and subcontractors alike should follow these recommendations when dealing with release/waiver forms to avoid problems.

First, when you receive a contract or subcontract, carefully review it to determine if it requires a release/waiver form be submitted in order to obtain payment. Many contracts are silent on releases/waivers – in other words, there is no apparent requirement for a release/waiver form as a condition of payment. However, when the time comes to obtain that first payment, the customer sends a release/waiver form and requires you to sign it in order for payment to be made. It is important to understand that if the contract does not require a release/waiver form as a condition of getting paid, you are not required to sign it. The customer is actually breaching the contract in attempting to impose a new requirement for payment which is not contained in the contract. You have every right to refuse to sign it and the customer has no right to refuse payment.

Contractors and subcontractors who want to make sure that their lower-tiers provide release/waivers with each payment request must make sure that the contract with the lower-tier entity clearly requires them to submit a release/waiver as a condition of payment. A clause similar to the following will be sufficient:

It shall be a condition precedent to Contractor's duty to make progress and final payment that with each payment request, Subcontractor provide to Contractor a fully-executed conditional waiver of liens, in the form attached hereto as Exhibit "A."

Second, do not agree to sign whatever release/waiver form the customer requires. Contracts and subcontracts often contain language indicating that "*the Subcontractor will provide a waiver/release of liens in such manner as Contractor shall require.*" If you agree to this language, you have no choice but to sign the form the customer later requires you to sign regardless of how onerous the release/waiver form turns out to be. Instead, ask to see a copy of the actual release/waiver form that will be required and make sure the contract references the form. A good practice is to attach the waiver form to the contract as an exhibit. That way, there will be no dispute about exactly what you are required to sign. (Along those lines, all contractors and subcontractors should

carefully review all contract provisions concerning payment so there are no surprises or misunderstandings about what is required).

Third, review the language of the release/waiver form and make sure it gives you the right to except or reserve claims that you do not intend to waive. Some release/waiver forms expressly permit you to identify claims that you do not intend to waive. The release may provide a space for you to identify claims that are excepted from the release, or the release may state that you waive all claims except those identified on the back or in the space provided. If the language of the release does not provide you with that space or an opportunity to reserve claims, you still must attempt to identify the claims that you do not want to waive. This is called excepting or reserving claims. Previously submitted but unresolved change order claims must be identified to avoid a later argument that the claims were waived. Any other claims – including claims for delays – must be reserved or excepted in the same way in order to avoid a later argument that the claim was waived by the submission of the waiver form.

Fourth, if the release/waiver form does not expressly permit you to reserve or except claims, ask that the form be revised to include it. If the customer will not agree to this, you should still attempt to reserve or except claims. To do so, simply identify the claims that you do not intend to waive somewhere on the face of the release. Even a handwritten description of the claim either in the margin or at the bottom of the page with an indication that the claim(s) is not intended to be released, will likely be sufficient.

Some customers will refuse to process payment in response to your attempt to reserve or except claims. They may insist that you remove the reservation language and refuse payment unless you do. Courts have condemned this practice. They have punished those who refuse to make payment on this basis ruling that it is a harsh negotiating tactic that cannot be permitted. Courts have ordered the guilty parties to pay attorneys' fees to the other side for improperly withholding payment on this basis. Courts have ruled that the undisputed amount must be paid and that you have a right to carve out claims that you do not intend to release.

If the customer refuses to allow you to reserve or except claims on the release, my recommendation is that you comply with the demand, but write a contemporaneous letter making it *very clear* that you are removing the reservation language purely because the customer refuses to make payment otherwise. This will help defeat a later argument by the customer that you knowingly waived the claim. Along those lines, signing releases without attempting to reserve claims will most likely result in a finding that the claim was waived/released provided the contract or subcontract required you to sign a release. There is no guarantee that a court or arbitrator will determine that you did not waive the claim even if you submit a contemporaneous letter. Therefore, the best approach is to address the form of the release at the contract negotiation stage and to ensure that the form gives you the right to reserve or except claims. In summary, release and waiver forms are critically important and cannot be dismissed as a meaningless form document.