

LIEN WAIVERS: THE HIDDEN RISKS YOU CAN'T IGNORE

ABC Free Webinar Series

September 16, 2015



The Wake-Up Call



v.



Zachry Construction v. Port of Houston: Case Timeline

- Work begins June 2004
 - 2-year schedule
- Key modification nine months in
 - Birth of the dispute
- Zachry's primary claims:
 - Interference with means & methods
 - \$30 million in delay damages
 - Release of \$2.36 million in liquidated damages

Zachry Construction v. Port of Houston: Trial Result

- Jury finds Port Authority breached
 - Arbitrary and capricious conduct
 - Active interference
 - Bad faith and/or fraud
- \$18.6M in delay damages awarded
- \$2.2M in LDs released



Zachry Construction v. Port of Houston: Appeal Round 1

- Texas Court of Appeals reverses
- No-damages-for-delay clause in contract barred \$18.6MM in delay damages
- \$2.2MM in LD's reinstated



Zachry Construction v. Port of Houston: Appeal Round 1

■ Lien waiver language:

“Contractor hereby acknowledges and certifies that Owner has made partial payment to Contractor on all sums owing on Payment Estimate Number ____ and that it has no further claims against Owner for the portion of the Work completed and listed on the Schedule of Costs in Payment Estimate Number ____.”

Zachry Construction v. Port of Houston: Appeal Round 2

- Texas Supreme Court reinstates jury's verdict
- No-damages-for-delay clause trumped by Owner's active interference
- \$2.2MM in LD's released



Presentation Road Map

- Defining “Lien Waivers”
- Three Key Hidden Risks
- Lien Waiver Best Practices

Defining “Lien Waivers”: The Narrow View

- A document that waives, in whole or in part, the right of the signing party to file a mechanics’ lien, provided by the signing in exchange for final or partial payment
- May be a separate document, or contained within the payment application itself

Defining “Lien Waivers”: The Reality

- Waiver of all rights & claims of any kind and nature whatsoever -- not just of mechanics' lien claims
- Certification that downstream subs & suppliers have been paid
- Promise to indemnify upstream entities in the event of claims from downstream subs & suppliers
- Certification that the work was performed in accordance with plans & specs
- Acknowledgment that upstream entities are entitled to rely on the representations made by the signing party in the waiver

The Hidden Risks

- **Waiver Before Payment**
- **Inadvertent Release of Claims for Additional Time, Compensation**
- **Fraud Liability**

Hidden Risk #1: Waiver Before Payment

- What comes first – payment or waiver?
- The difference between “conditional” and “unconditional” lien waivers

Example: Conditional Lien Waiver

SUBCONTRACTOR CONDITIONAL LIEN WAIVER AND RELEASE OF CLAIMS (FINAL PAYMENT)

Project: _____

Job No.: _____

On receipt by the undersigned of a check from _____, in the sum of \$_____ payable to _____, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, the undersigned does by these presents waive, relinquish, and absolutely release forever, all right to claim a mechanic's lien against the above described project which might accrue under the laws of the State of Colorado by virtue of labor, services, equipment or materials furnished for improvement to the above described project.

This release covers a final payment for all labor, services, equipment or materials furnished to the job site or to _____ [name of owner or general contractor] and does not cover any retentions retained after the release date, pending modifications, changes or items furnished after the

On receipt by the undersigned of a check from _____, in the sum of \$_____ payable to _____, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, the undersigned does by these presents waive, relinquish, and absolutely release forever, all right to claim a mechanic's lien

In execution of this instrument, the undersigned states that he/she is under no constraint and that the same has been signed by the undersigned of his/her own free will and accord.

DATED this _____ day of _____, _____

(Company Name)

By: _____
(Signature)

(Title)

This instrument was prepared by:

Name



Example: Unconditional Lien Waiver

UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT (ALABAMA)

The undersigned has been paid and has received a progress payment in the sum of _____ DOLLARS (\$_____) for labor, services, equipment and/or materials furnished to _____ (the "Owner") on the job of the Owner located at _____ (address) and does hereby release any mechanic's lien, stop notice, or bond right that the undersigned has on the above referenced job to the following extent. This release covers a progress payment for labor, services, equipment, and/or materials furnished to the Owner through the ____ day of _____, ____ only and does not cover any retentions retained before or after the release date, except as furnished before.

The undersigned has been paid and has received a progress payment in the sum of _____ DOLLARS (\$_____) for labor, services, equipment and/or materials furnished to _____ (the "Owner") on the job of the Owner located at _____ (address) and does hereby release any mechanic's lien, stop notice, or bond right that the undersigned has on the above referenced job to the following extent. This release covers a progress payment for labor, services,

YOU HAVE SIGNED IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, YOU SHOULD USE A CONDITIONAL RELEASE FORM.

This instrument was prepared by:

Name

Address



Hidden Risk #1: Waiver Before Payment

- What comes first – payment or waiver?
- The difference between “conditional” and “unconditional” lien waivers
- Is that “conditional” lien waiver actually conditional?
- Check the effective date
 - End of pay period?
 - The date payment is made?
 - Recited effective date of release?
- Watch out for “the receipt and sufficiency of which is acknowledged” language

Hidden Risk #2: Inadvertent Waiver of Claims

- Types of claims that might be waived:
 - Claims for release of retainage
 - Payment bond claims
 - Extra work claims
 - Time extension claims
 - Delay, disruption, inefficiency claims

- Watch out for broad language:
 - “...waive all rights, demands, suits and/or claims of any kind or nature whatsoever...”
 - “...this instrument shall constitute a complete release of any and all claims...”

Hidden Risk #3: Fraud Liability

- State statutes imposing criminal liability for lien waiver misrepresentations
- Fraud/unfair & deceptive trade practices exposure
- Bankruptcy/surety implications
- Individual liability

Lien Waiver Best Practices

■ Contract stage

Not Acceptable

EXHIBIT H

SUBCONTRACTOR'S/SUPPLIERS' AFFIDAVIT OF PARTIAL PAYMENT AND RELEASE
OF LIEN

In form and substance as approved by Owner and its lender.

Lien Waiver Best Practices

- **Contract stage**
- **Performance stage**
 - Excepting & reserving claims
 - Tighter internal controls & coordination
 - Talk to your lawyers in real-time
- **Demand legislative action**

QUESTIONS?

