WHAT TO INCLUDE IN A LIEN WAIVER FORM REQUIRED BY YOUR SUBCONTRACTOR OR SUPPLIER

Anyone who works in commercial construction who has submitted an application for payment also has certainly experienced the obligation of submitting a lien waiver. This article will discuss what to include in a lien waiver, specifically lien waivers you obtain from your lower-tier subcontractors and suppliers.

The three drivers of what should be included in your waivers are the requirements from your contracts upstream (the contract documents for the project); statutory requirements; and practical concerns. The three main items to be mindful of when reviewing lien waivers are which claims are to be waived (all claims, lien claims, bond claim, etc.); whether the waiver is conditional; and whether there is a discrete time period to which the waiver refers.

STEP ONE: READ YOUR CONTRACT

Though reading the contract sounds basic, many roofing contractors fail to thoroughly execute this step. For purposes of this article, this step means reading and understanding the fine print regarding lien waivers. Often, a subcontract from a higher-tier party, such as the owner or general contractor, will include a sample lien waiver as an exhibit to your subcontract. But other times, subcontracts will require the use of certain lien waivers without providing copies of such samples. These subcontracts may use language such as “subcontractor shall provide, for itself and its subcontractors, any waiver of lien rights required by the Prime Contract” or “as a condition of payment, Subcontractor shall provide, in a form satisfactory to the Owner and General Contractor, a lien waiver . . .”

The bottom line is you want to read and understand the waiver you will be expected to submit
with your applications for payment. If a needed waiver is not attached to your contract as an exhibit, you should request copies of any waivers you will need to submit for payment. You should expect the waiver to release lien and bond rights for the time period you are seeking payment.

You also should determine whether you are waiving all claims. If so, the waiver is much broader than just liens and could include claims against payment bonds, breach of contract and torts, leaving the claimant entirely without recourse. Make a note of such broad waivers and only sign them when necessary, keeping in mind any outstanding claims you may have at that time.

You also should determine if the waiver is conditional. A waiver is conditional if it waives rights once a condition (usually the receipt of payment) occurs. An example of conditional language is “Upon the receipt of $____, Subcontract hereby waives and releases its lien and bond rights for labor and materials through __________ (date).” Unless the waiver states otherwise, the conditional waiver is not effective until the condition, such as payment, occurs. If the waiver is not conditional, it should not be submitted until you receive payment, which you may require to be in certified funds. The requirement of an unconditional waiver could mean the difference between swapping the waiver for a check in person and mailing the application for payment.

If you are required to obtain the same waivers from your subcontractors and suppliers in order to receive payment, you should include them in your subcontracts and purchase orders downstream so there are no surprises and to ensure the waivers are binding. This will avoid the future headache of having a lower-tier subcontractor or supplier refuse to execute a waiver, delaying payment to you.

Finally, you need to determine whether the lien waiver is limited to a discrete time period or whether it is open-ended. If the project is one in which you will be paid in progress payments, be sure your waiver only requires you to waive rights through the time period you are seeking
payment. Although some states will not allow you to waive rights for work you have not yet completed, you do not want to risk waiving such rights.

**STEP TWO: KNOW THE STATUTORY REQUIREMENTS OR SEEK COUNSEL**

Once you know what is required from your upstream parties on the project, you need to know what is required to waive lien rights by the state in which the project is located. If the waivers required from upstream parties do not comply with state statutory requirements, you should require the upstream waiver and the statutorily required waiver from your lower-tier subcontractors and suppliers. Again, these statutory waivers also should be attached to your subcontracts and purchase orders downstream to avoid any surprises and to ensure they are binding. To avoid nullifying the waiver, in the states that require lien waiver forms, only change the portions of the forms regarding the project-specific information, such as names of parties, dates, amount of money to be received, description of the project property, etc.

**STEP THREE: PRACTICAL CONCERNS**

If you believe you need to require a broader waiver than what is required by the statutory form or waivers from upstream parties, you should create a proprietary waiver that will be attached to your subcontracts or purchase orders downstream. For example, if you want a broad claim waiver or a specific release of your payment bond, your attorney should develop a separate waiver to accomplish this—making changes and combining waivers required from upstream parties or by statute may nullify the otherwise required waivers. Again, your proprietary waiver should be included as an exhibit to your subcontracts or purchase orders to downstream parties to ensure they are binding upon your lower-tier partners.

**CONSIDER LIEN WAIVERS FINE PRINT**

The issues discussed in this article will help you better evaluate lien waivers that bind you
and your subcontractors and suppliers. Waivers come in all shapes, sizes and scopes. The devil is truly in the details. Because waivers release legal rights and often are fully enforceable, consider them fine print to which you need to pay attention.