

DON'T WAIVE GOODBYE TO YOUR CONSTRUCTION LIEN RIGHTS

Wisconsin's construction lien law provides contractors, subcontractors, suppliers, service providers, and design professionals with a valuable remedy to help them collect payment for their work. On privately owned projects, the law allows these parties to place a lien against the project property as security for payment. The economic fallout from the COVID-19 crisis has made construction lien rights more precious than ever to construction industry businesses. Yet, everyday contractors mishandle lien waivers and unwittingly forfeit their lien rights with the stroke of a pen.

Lien waivers are an integral and unavoidable part of the construction payment process in Wisconsin and throughout the country. Subcontractors and suppliers are typically required to provide a signed lien waiver along with each application for a progress payment. The prime contractor then delivers these lien waivers, together with its own lien waiver, to the owner along with the prime contractor's progress payment application. A savvy owner will refuse to release payment unless it has received all the necessary lien waivers.

Lien waivers are governed by Wis. Stat. Sec. 779.05, which imposes strict rules that can become a trap for the unwary. The statute mandates a default rule that a lien waiver is deemed to waive "all lien rights" unless the lien waiver "specifically and expressly limits the waiver to a particular portion" of the work. The statute further provides that any ambiguity in the lien waiver shall be construed against the person signing it. Therefore, a contractor must ensure that the express language of each lien waiver specifically limits the scope of the waiver only to the specific work or dollar value for which payment is sought. Otherwise, the default rule will apply, and the lien waiver will be deemed a full waiver, even if only a partial waiver had been intended. Unfortunately, this happens with alarming frequency.

The industry practice is for lien waivers to be provided in advance of payment. Section 779.05 provides that a lien waiver is "valid and binding" regardless of whether or not any consideration was paid for it. That means that the lien waiver is valid and enforceable even if the lien claimant does not subsequently receive the anticipated payment for which the waiver was given. While there is always risk in providing the lien waiver in advance of payment, under normal circumstances the risk is tolerable, especially if the lien claimant is careful to use a properly worded partial lien waiver. But these are not normal circumstances. The economic impact of the coronavirus pandemic requires construction businesses to be

extra careful. If a payment problem is anticipated, special measures should be taken to manage the risk of loss of lien rights through the lien waiver process. This can include the use of an escrow agreement, or a simultaneous exchange of the waiver for the payment.

In these extraordinary times, a construction lien may become a contractor's only hope of collecting payment on a problem project. Therefore, contractors must know how to manage the risks associated with lien waivers.

If you have any questions or need assistance, contact [Steve Slawinski](#) at 414-276-5000 or steve.slawinski@wilaw.com.