

Claim Waivers: A Must Read for All Contractors Involved With Payment Applications or Change Orders

By Scott D. Cessar | Tuesday, April 10, 2018

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Editor's Note: *Attorney Scott Cessar addresses contractors on the growing use of claim waivers in interim payment applications and in change orders and their potential effect, if not modified, on contractors' rights down the road to claim additional compensation. He recommends that project managers, project engineers, office administrators, payment clerks and anyone else in the office responsible for processing payment applications and change orders read this article and the following:*

Demand for Claim Waivers in Exchange for Final Payment (<https://www.eckertseamans.com/app/uploads/Cessar-ACBAJournal090613.pdf>)

Negotiate Purchase Orders to Avoid Legal Disputes (<http://constructionexec.com/article/negotiate-purchase-orders-to-avoid-legal-disputes>)

Too often, contractors are presented with payment applications and change orders which contain troubling claim waiver language. An ounce of prevention now will be well worth the cost of a pound of cure later in the form of foregone, but meritorious, claims for additional compensation or for attorney fees spent litigating the enforceability of claim waivers.

There are two different forms routinely used in the construction field: the interim payment application and the change order. Language that was once rarely contained in these two forms has now become commonplace.

With interim payment applications, owners and general contractors are routinely including language by which the contractor or subcontractor certifies not only that it is waiving liens to the extent of the amount of payments to date, but that it also waives any claims it may have to date. This waiver of claims means exactly what it says: all potential claims as of the date of execution are released. This would potentially exclude claims for costs for project delays or impacts antecedent to the date of the pay application and even pending change orders.

In change orders, the language will provide that, by agreeing to the within change and accepting compensation, the contractor or subcontractor agrees that it has been paid in full for all changes to date and has no other claims and/or has been paid in full to date for any such claims.

The import of signing partial payment applications and change orders containing this type of language can be significant. While there are legal theories to challenge whether such waivers are enforceable and much will turn on the precise language of the waiver, the background circumstances and the particular state law, by agreeing to such language, at a minimum, contractors or subcontractors are handing to the owner or contractor substantial leverage to argue that claims were waived and should not even be considered. They may well then be left with the Hobbesian choice to have to litigate the enforceability of the release prior to even getting to the merits of the claims.

So what to do when confronted with language in an interim payment application or change order releasing all claims to date? There are three options:

- strike the language and send the form back signed;
- modify the form and list all known claims and make reservation for unknown claims; or
- modify the language to make clear that the company does not have any known claims but reserve rights to raise any subsequent claims which arise and which predate the date of execution of the form.

Contractors or subcontractors may be concerned that if they modify the form, the payment application or change order will not be processed and they will not be paid. However, requiring the contractor or subcontractor to forego claims without additional compensation would, in most states, not be lawful as it would be a breach of the duty of good faith and fair dealing and a violation of contractor payment statutes. The fact is that the law disfavors one party extorting something from another party for nothing.



Written by Scott D. Cessar

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