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Protecting Lien Rights in Difficult Financial Times

An oft quoted curse, states "may you live in interesting times". Well the curse is upon us in the construction industry as financial uncertainty and perils lurk around every corner. It is a time to be more careful of the risks you take - particularly regarding payment. As payment flow slows down or even stops on many financially troubled Georgia projects, contractors, subcontractors and suppliers must be very protective of their lien and bond rights. Indeed, these rights may be the only security and leverage available to unpaid contractors, subcontractors and suppliers to accomplish payment for work performed and labor, materials and services furnished to the troubled project.

Recent experience has underscored the potential risk of inadvertent waiver of those rights when the owner is unable or unwilling to make payment, even by lien or bond claimants who have never received payment for their work, labor or materials. This results from the "trap for the unwary" of the legal presumption of payment - and resulting waiver of lien and bond rights - that arises upon passage of 30 days after execution and submission of the Georgia statutory form of interim lien waiver.

But wait a minute, you say! Isn't this statutory form captioned an "Interim Waiver and Release of Lien Upon Payment," indicating that the resulting waiver of lien (or bond) rights was to be conditional and effectual only "upon payment" - that is actual receipt by the waiving party of

corresponding payment for the payment application period? O.C.G.A. § 44-14-366 (c). Further, doesn't the text of this statutory form reaffirm this conditional nature by stating that the waiver and release is "[u]pon the receipt of the sum of \$ _____" which is the amount for which interim progress payment is requested by the potential lien or bond claimant? Id. Only then, "upon the receipt of" such payment, you think, will you have waived and released those rights for all work performed and labor and materials furnished to the project "through the date of _____ (date)," as stated in the waiver form corresponding with the payment period for which the application and waiver is submitted, excepting only rights and liens "in any retained amounts."

All that is true - But looks can be deceiving! The "conditional" character of the "Interim" waiver form is subtly but effectively countermanded by the current qualifying language buried deep in statutory language. Such "stealth" waiver and release of lien (and bond) rights results from the last subpart of the last subsection, which states, in pertinent part, that:

(2) Such amounts shall conclusively be deemed paid in full upon the earliest to occur of:

* * *

(C) Thirty days after the date of the execution of the waiver and release, unless prior to the expiration of said 30 day period the claimant files a claim of lien or files in the county in which the property is located an Affidavit of Nonpayment, using substantially the following form:

O.C.G.A. § 44-14-366 (f) (2) (Emphasis added).

This current language results in a legal presumption of payment based solely upon passage of time and such presumption of payment satisfies the "condition" of payment and thus effects a waiver and release of lien (and payment bond) rights through the payment application period on the date specified upon expiration of this 30 day period, irrespective of actual receipt of payment. Nothing on the waiver form itself affords the executing party of this potential and dire consequence. This presumption of payment concept was originally inserted at the insistence of banking interests that wanted assurance that all lien waiver forms submitted in exchange for release of payment did at some point in time become effectual, without regard the actual flow of payment which is otherwise difficult to monitor and police.

In sum, under the current Georgia lien law (note, as discussed below, this law changes in material respects on March 31, 2009), once you execute and submit as part of the payment application process an "Interim" lien waiver in the statutorily prescribed form, you have started a 30 day clock running on your lien rights relative to the amounts requested in the application. Such lien rights are effectively waived and released after the 30 days has run, even if you have not actually received such payment, unless you file of record an "Affidavit of Nonpayment" in the real estate records maintained by the Superior Court in the county in which the project is located.

The practical problems and risks posed to contractors, subcontractors and suppliers by this conclusive presumption of receipt of payment after this 30 day period derives from the typical payment cycle for interim "progress" payments typically occurring on a monthly basis on most large commercial and public works projects. In order to prepare its monthly progress payment application for submission to the owner, the prime general contractor must receive applications for the corresponding period from its subcontractors, who must similarly receive corresponding applications from the lower tier subcontractors and suppliers. With each application at each tier, the contractor and its subcontractors and suppliers are also generally required to submit waivers substantially in form of the statutory "Interim Waiver and Release of Lien Upon Payment" relative to such payment period and corresponding to the amounts requested for payment.

Execution and submission of such forms as a part of the routine application for payment process is not perceived by many participants to pose any risk of inadvertent waiver, because the forms, on their face, are explicitly "conditional" upon receipt of payment. Then, depending upon contract terms and practical considerations, the Owner generally has 20 to 25 days - or longer - after submission of the application to make payment under the prime contract.

And, depending upon the payment terms of the successive lower tier subcontracts and agreements, each lower tier will likely then not be entitled to payment until 7 to 15 days after actual receipt of payment by the upper tier contractor of corresponding funds. As this plays out, the prime contractor may not even be entitled to expect payment until 20 days or longer after the submission of the progress payment application, and then the best case for the subcontractors at any tier would be that they are not entitled to payment until longer than 30 days after the submission of their payment

application - and lien waiver forms - for the corresponding period. Of course, if there are any material delays by the owner in making progress payments, even the prime contractor may not receive payment, if at all, within the thirty days after submittal of the application.

Almost all parties are at risk every time they submit an application for payment, supported by an executed "Interim" waiver form, that the nominally "conditional" waiver forms will have been executed and submitted more than 30 days before actual payment flows to them. Therefore, regardless of whether payment is eventually received, the lien claimant will have been "conclusively * * * deemed paid in full" upon the expiration of the 30 day period. Of course, upon such "deemed" payment, the condition of payment has been satisfied and the waiver of lien and bond rights accomplished. If the delayed payment is then never received, the corresponding lien and bond rights will nevertheless have been waived.

The only way to avoid such inadvertent waiver of lien and bond rights upon such "deemed" payment under the current statutory scheme is to have filed of record an "Affidavit of Nonpayment" in statutory form within that 30 day period after the giving of the executed waiver form. Such Affidavit filing typically causes considerable confusion and accounting complications, as well as unnecessary dispute and paranoia (unnecessary because all parties may well be acting within their contract payment schedules and terms and likely will eventually receive payment). Further, upon receipt of payment, the claimant filing such an "Affidavit of Nonpayment" would, upon receipt of a request for filing of an acknowledgement of payment of the corresponding amounts, have to file yet another sworn statement. All of this would be required for all potential lien claimants (contractors, subcontractors and suppliers) for whom the normal contractual cycle of payment extends to 30 days or longer.

The only reason this "doomsday" scenario does not occur on virtually every construction project is that most participants are oblivious of this statutory provision deeming them conclusively paid and effectively making their waivers effectual after the passage of the 30 day period, and, as they say, ignorance is bliss. However, in these times of uncertainty, all involved must be aware of this possibility and act accordingly. A practical "work around" to avoid this mandated Affidavit filing process to protect lien rights is to defer submission of the executed "Interim" waiver

forms until closer to the date when the actual release of funds by the owner to the prime contractor is anticipated to occur. However, this approach requires an enlightened cooperation among the owner, contractor and subcontractor.

Fortunately, this portion of the Georgia lien statute is one of the areas that were substantially amended by the General Assembly during the 2008 session. The modifications, that will not actually become effectual until March 31, 2009, will mitigate but not eliminate this legal "presumption" of payment concept. Under the amended version of the statute, such presumption of payment will not occur until 60 (rather than 30) days after submission of an executed waiver form, the revised form of "Interim" waiver has been changed in form and format and must include a specific bold faced notice at the bottom of the form warning of the presumption of payment after 60 days, and the Affidavit of Nonpayment form and procedure has been changed as well. Nevertheless we still have three daunting months ahead of us controlled by the existing version of the Georgia law - be aware of the risks and proceed accordingly!

For further information regarding these requirements, and how they will be modified when the lien law revisions go into effect on March 31, 2009, please contact:

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