

LIEN WAIVERS

Subcontractors and material suppliers are sometimes asked to provide lien waivers prior to receiving payment.

A clause in a construction contract which requires a party to waive its lien rights before being paid is void and unenforceable pursuant to §779.135(1), Wisconsin Statutes. Therefore, a subcontractor cannot be forced to provide a lien waiver prior to receiving payment, even if the contract says that the subcontractor is required to do so. Note that this statute only applies to contracts for the improvement of real estate located in Wisconsin.

Assume a subcontractor provides a signed lien waiver pursuant to a contract which requires that it do so prior to receiving payment. What if the subcontractor is never paid? Is the lien waiver still valid? The Wisconsin court of appeals answered this question in the case of Tri-State Mechanical, Inc. v. Northland College. The Tri-State case involved the construction of a new science building on the Northland College campus. The general contractor entered into a contract with a subcontractor which required the subcontractor to sign a lien waiver as a condition of receiving its final payment on the project. At the end of the project, the subcontractor provided a signed lien waiver, but the general contractor failed to pay the balance of \$96,800.00 owed to the subcontractor. The general contractor went out of business, and the subcontractor attempted to file a construction lien against the project.

The subcontractor claimed that the lien waiver was invalid, because it was issued pursuant to a contractual provision which violated §779.135, Wisconsin Statutes. The Court of Appeals disagreed. It found that the clause requiring the subcontractor to sign a lien waiver before receiving final payment was void and unenforceable. However, the court concluded that the lien waiver itself was valid. The court stated that the subcontractor could have refused to

sign the lien waiver before receiving payment. By signing the lien waiver, the subcontractor had waived its right to file a construction lien against the property.

Subcontractors are often asked to sign partial lien waivers as progress payments are made on a project. The biggest problem we see with partial lien waivers is that they are often unclear as to what rights are being waived, and what rights are retained.

Section 779.05(1), Wisconsin Statutes, provides that any document signed by a lien claimant or potential lien claimant purporting to be a waiver of construction lien rights is valid and binding as a waiver regardless of whether payment is received. The statute also provides that any waiver document will be considered to constitute a waiver of all lien rights unless the document specifically and expressly limits the waiver to apply to a particular portion of the labor, services, materials, plans or specifications. Therefore, before signing a partial lien waiver, the electrical contractor should make sure that it clearly states which rights are being waived and what rights are being retained.