

CAPITAL

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Fall 2012

Statutory Form Now Required for Construction Mechanic's Lien Releases



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Owners and general contractors can have a difficult time obtaining the appropriate mechanic's lien releases during and after a construction project. Often a construction contract calls for both a conditional lien release for the progress payment being requested, which states that the lien is released if the subcontractor is paid the requested amount, and an unconditional lien release for the immediately preceding progress payment that has since been paid in full. This same pattern will often be followed for the final payment as well. Obtaining each and every conditional and unconditional release before making a payment to the general or subcontractor is certainly the best practice, but practically it can be very difficult. In the last legislative session the Texas legislature passed a new law that will add another layer of complexity to the lien release process.

As of August 31, 2012, construction lien waivers in Texas are likely unenforceable unless they match the new lien waiver forms set forth in the Texas Property Code. Chapter 53 of the Texas Property Code generally governs mechanic's liens, and the Texas legislature added Subchapter L to it in 2011. The new Subchapter L specifically governs waivers and releases of mechanic's lien and payment bond claims and became effective on January 1, 2012. It includes four different lien waiver forms that contractors and owners must use in order to effectively waive or release a mechanic's lien. Section 53.285, titled "Attempted Compliance" and now expired, provided that a waiver or release is enforceable if it attempts to comply with Subchapter L; this section, however, expired on August 31, 2012. Without section 53.285, Subchapter L appears to require compliance with the forms provided.

There are four different waiver and release forms to be used in different circumstances:

1. *Conditional Waiver and Release on Progress Payment* – to be used when a contractor/subcontractor is required to execute a waiver and release before receiving a progress payment, or the progress payment is made by check.
2. *Unconditional Waiver and Release of Progress Payment* – to be used when a contractor/subcontractor is required to execute a waiver and release to prove the receipt of a progress payment.
3. *Conditional Waiver and Release on Final Payment* – to be used when a contractor/subcontractor is required to execute a waiver and release before receiving a final payment, or the final payment is made by check.
4. *Unconditional Waiver and Release on Final Payment* – to be used when a contractor/subcontractor is required to execute a waiver and release to prove the receipt of a final payment.

After August 31, 2012, national, standardized forms such as the AIA G706A Contractor's Affidavit of Release of Liens may no longer be enforceable against contractors, subcontractors or suppliers.

Finally, it is unclear whether an owner could enforce a lien release that includes every part of the statutory form but also includes additional language, for example releasing the owner or general contractor from liability related to the construction project. Would the court enforce the entire document, only the lien release but not the extra language, or possibly reject the entire document? It's difficult to anticipate, and the safest course will be to include additional language on a separate document that is also required prior to payment by the contract documents.

While the new statute does create an additional hurdle when relying on or enforcing a mechanic's lien release, it also simplifies the payment process by creating a standardized form. Owners and general contractors previously may have had to handle many different forms used by various sub-contractors on the project. Now, at least, each lien release form should look the same resulting in a quicker evaluation of whether or not the release is adequate.