

Changes to Georgia's Lien Waiver Statute

By J. Jackson Harris March 3, 2021

Dramatic changes to the lien waiver statute, O.C.G.A. § 44-14-366, took effect on January 1, 2021. Lien waivers are ubiquitous in the construction industry, and a failure to comply with the lien statute's requirements can have severe consequences. Thus, contractors, subcontractors, and their sureties should take note of these statutory changes.

The Georgia lien waiver statute provides a framework for obtaining releases of lien and payment bond claims from contractors, subcontractors, and material suppliers on projects located in the state. This includes statutory language which must be included on interim and final lien waivers, respectively, and the process a claimant must follow to preserve its claims should payment not be received after signing a lien waiver.

The General Assembly made two changes to the statute that will favor claimants. *First*, the General Assembly took direct aim at a 2019 Georgia Court of Appeals decision, in which the court held that a party who signs a lien waiver shall be deemed to have waived not only its lien and payment bond rights but other rights as well, including its contractual right to payment. *See ALA Construction Services, LLC v. Controlled Access, Inc.*, 351 Ga. App. 841, 833 S.E.2d 570 (2019). Under the existing law, an unpaid subcontractor who executed a lien waiver, but failed to file an affidavit of non-payment, was deemed to have lost both the right to assert a lien or payment bond claim and the contractual right to payment from the contractor. Under the revised statute, this is no longer the case: a lien waiver *solely* affects lien and payment bond rights – not other rights, such as a breach of contract claim for non-payment.

Second, the General Assembly extended the time within which a claimant who executes a lien waiver may file an affidavit of non-payment. Under the prior statute, a lien waiver became effective after 60 days. According to the revised statute, the lien waiver does not become effective for 90 days. Thus, under the revised statute, lien waivers will not become effective as quickly as they once did, and claimants will have 30 more days within which to file affidavits of non-payment.

Though these two changes favor claimants, a third change might catch unsuspecting lien claimants off guard. The statute formerly permitted lien claimants to render the lien waiver ineffective either by filing an affidavit of non-payment or by filing a claim of lien. A claimant no longer has the option of not filing an affidavit of non-payment. To render the lien waiver ineffective under the new statute, the claimant must file an affidavit of non-payment.

While the remaining changes may not seem substantive, they could be equally important. Georgia has long followed the rule that the lien statutes “must be strictly construed in favor of the property owner and against the materialman.” *Few v. Capitol Materials, Inc.*, 274 Ga. 784, 785, 559 S.E.2d 429, 430 (2002). Thus, the lien statutes, including the lien waiver process, require strict compliance with the statutory

provisions. In particular, the revised statute contains a revised lien waiver form and a revised affidavit of non-payment form. Like the prior statute, the revised statute requires that a lien waiver and an affidavit of non-payment must “substantially” follow the forms set forth in the statute. But the statutory form has slightly changed, including provisions to account for the changes discussed above. Those changes must be applied to lien waiver forms in use or a lien waiver which may have been effective under the old statute may no longer be effective.

All contractors, subcontractors, and sureties with projects in Georgia should immediately update their forms to incorporate the statute’s new form language. These changes took effect on January 1st and apply to all lien waivers after that date.

If you have questions about the statutory changes or need assistance in updating your statutory forms, we would be happy to assist you.