

## Insights



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## Construction Lien Waiver Provisions Contractors Should Be Using

By [Jason S. Lambert](#)  
*Construction Executive*

It is common in construction for a subcontractor or material supplier of any tier to be required to provide a lien waiver when receiving payment. But not all lien waivers are created equal. While at a minimum, a lien waiver, by definition, needs to include a release of liens, it can also include many other terms that can tie up loose ends or resolve potential problems before they begin.

### Additional Releases

A typical lien release is going to release any liens and right to claim liens on the subject property. But a lien waiver can also include releases of any claims against surety bonds, other statutory rights or claims, and at its broadest, claims against the paying party. One example of a provision that could help accomplish this is a release of “any right arising from a payment bond that complies with a state or federal statute, any common law payment bond right, any claim for payment, and any rights under any similar ordinance, rule, or statute related to claim or payment rights.” Broad release language can also be used to effectively preclude any claims arising prior to the date of the release.

### Payment Representations and Warranties

A typical lien release has no representations or warranties about payment to subcontractors or material suppliers of a lower tier. But contractors can include language requiring the company receiving payment to represent and warrant that all subcontractors of a lower tier have been paid or will be paid within a certain timeframe using the funds provided and that these are material representations and inducements into providing payment. On a related note, if the contract requires subcontractors to provide lien releases from lower tier subcontractors in addition to their own release when seeking payment, contractors can require the sub-subcontractor releases to include representations that they have been paid by the subcontractor to try and tie up payment loose ends all around.

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## MEET OUR AUTHOR



**Jason S. Lambert**

**Associate**

T 813.225.3057

[jason.lambert@nelsonmullins.com](mailto:jason.lambert@nelsonmullins.com)