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Flow-Down Clauses To Subcontractors: What Actually Flows?

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Subcontractors must pay close attention to provisions in their subcontract that refer back to terms in the prime contract. These provisions are commonly referred to as "flow-down" clauses. Most subs are, of course, familiar with these provisions. They attempt to make the terms of a prime contract "flow down" to the subcontract.

But what exactly "flows down?" Is the subcontractor actually bound to the prime contract "in the same manner that the prime contractor is bound to the owner," as intended by the flow down provision?

Because a flow-down clause attempts to impose legal obligations on a subcontractor based upon an extensive and detailed prime contract, the subcontractor must always carefully review the actual wording of a flow-down clause in its subcontract. This is far too often overlooked. Whether a subcontractor is actually contractually bound by the flow-down clause to a particular provision of the prime contract is often hotly contested later as issues arise.

The Legal Analysis

As indicated, many subcontracts simply state in a broad flow-down clause that the "subcontractor is bound to the prime contract to the same extent as the prime contractor is bound to the owner."

However, this type of categorical clause is not adequate under New York law. New York courts have held that such a general flow-down clause, which simply incorporates, by wholescale reference, the prime contract, without specifying any of the prime contract's specific terms will only be successful in incorporating the prime contract's terms which relate to "core" construction issues, namely, the scope, quality, character, and manner of the work to be performed by the subcontractor. Examples of such "core" information would be found in project plans, drawings, surveys, construction specifications, engineering reports, change orders, and the like.

This is because those types of provisions contain information that goes to the essence of the subcontractor's work. Such work, obviously, cannot be performed adequately by the subcontractor without such provisions being understood by the parties to be part of the subcontractors' scope of work.

However, provisions in the prime contract that are "ancillary" to the basic scope, quality, character and manner of the sub's work must specifically be incorporated into the subcontract in order to bind the subcontractor.

For example, unless specifically incorporated into the subcontract, a prime contract's "M/WBE" (minority/women business enterprise) specifications, "no damage for delay" clause, insurance/indemnity provisions, or alternative dispute resolution (mediation or arbitration) provisions will probably not be binding upon a subcontractor.

While the standard for specifically incorporating a term of a prime contract into a subcontract is essentially low, it must be met. The subcontract must specifically refer to the prime contract's particular provision for the subcontractor to be bound. It can refer to the provision by reciting it or by merely listing its section number, but it must be separately set forth.

Interestingly, in a variation of this rule, where the subcontract provided for arbitration of disputes relating to the subcontract "in the same manner" as provided for in the prime contract, but the prime contract was silent as to arbitration, the court held that subcontract disputes had to be arbitrated, because the intent to arbitrate was "clearly" in the subcontract itself.

MHH Commentary

This is yet another occasion where I implore all subs to obtain a copy of the prime contract and review it. A GC's reluctance or failure to provide same (which is common) should be interpreted, at least, to be a yellow, and perhaps a red, warning light.

Time and care invested in contract review always pays dividends. Yes, you want that job. Yes, your bid numbers were right on! But that dream job can readily turn into a nightmare. Read that contract.

I can advise from experience that a GC or sub can unfortunately be surprised to learn, due to the "flow down" requirements in New York, that a particular contract provision is or is not lawfully (*i.e.*, enforceably) included in a subcontract. The GC, of course, can be squeezed between different provisions in its upstream prime contract and its downstream subcontract. The sub, similarly, could be surprised to learn of important and expensive contract provisions being effectively "referenced into" its subcontract.

Many subs do not realize that not all attempted "flow downs" are enforceable. A knowledgeable subcontractor can more readily defend itself against the demands of a GC. Take the example of MWBE compliance. In this age of hyper-strict enforcement, can a GC enforce, or a sub escape, the MWBE requirements of a prime contract? Can a GC, without an enforceable flow down provision, successfully compel its sub to assist with essential compliance?

Clearly, during the honeymoon (post bid/pre-award) is the best time to attempt to either exclude provisions from a prime contract that you simply cannot accept without huge financial consequences or assure that the prime contract provision is, in fact, "flowed down" into the

subcontract. Knowing what is or is not an enforceable flow down can and should be a critical part of that effort.

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