

Happy Holidays & Best Wishes for the New Year!

Are the ADR Provisions in Your Contract and Subcontract Consistent?



Contracts among owners, general contractors and subcontractors will invariably contain provisions detailing the forum and procedures under which their disputes are to be resolved. Of critical importance to the general contractor, of course, will be that these provisions be consistent. Otherwise, it may find itself arbitrating against the owner in one jurisdiction while litigating its dispute with a subcontractor in court in another. This may result, of course, in significant additional expense and potentially inconsistent results.

Generally, avoidance of this risk is sought by the inclusion of a provision that incorporates the ADR provisions from the principal contract into the subcontract. When preparing such incorporation provisions, however, special care must be taken to assure that they are consistent, or, as reflected in a recent

California Court of Appeal case, they may not be enforceable in the way the Contractor intended.

In *Remedial Construction Services* (subcontractor) v. *AECOM* (contractor), 65 Cal. App 5th 658, 279 Cal. Rptr. 3rd 909 (2021), the contractor had entered into a prime contract with Shell Oil Products US (owner). The contractor subsequently entered into a subcontract with the subcontractor. The subcontractor eventually filed suit against the contractor, claiming a failure to pay certain costs. The contractor responded by filing a motion to compel arbitration, asserting that the mandatory arbitration in the prime contract had been incorporated into the subcontract. The prime contract provision stated that “Any dispute or claim arising out of or in connection with the contract or its subject matter or formation, whether in tort, contract, under statute, or otherwise ... will be finally and exclusively resolved by arbitration” under the international dispute resolution procedures of the International Centre for Dispute Resolution.

The subcontract provided:

“The contract between the contractor and the owner ... is hereby incorporated into and made a part of this agreement by reference. The subcontractor assumes toward the contractor all of the obligations and responsibilities contained in the prime agreement or client flow down provisions ... that the contractor assumes toward its client as they relate to the subcontractor’s performance of the work. In the event of a conflict between any provision of this agreement and the prime contract the more restrictive provision shall govern.”

The trial court denied the contractor’s motion to order arbitration as the subcontractor “did not agree to arbitrate its disputes with the contractor in the subcontract or to be bound by the obligation to arbitrate in the prime agreement ... There is no general obligation in the subcontract and the subcontract does not directly incorporate an arbitration agreement from the

prime agreement.” Rather, the court found that the arbitration provision in the subcontract only applied to the contractor’s claims or the subcontractor’s claims against the owner, but not to claims between the contractor and subcontractor.

In agreeing with the trial court, the court of appeals noted the need for a clear agreement to submit disputes to arbitration, in the absence of which a waiver of the right to jury trial will not be inferred.

With respect to the incorporation of agreements to arbitrate, the court stated:
“While parties may incorporate by reference into their contract the terms of some other agreement ... each case must turn on its facts. For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party, and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.” **READ MORE..**

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