

Short notes on:

SUBCONTRACTORS – THERE ARE VARIOUS WAYS TO CONTRACT? WHY DOES IT MATTER?

Introduction

A construction contract is an agreement between an employer (the property owner or its authorised agent) and a contractor to construct, repair, modify, renovate or even demolish something in an agreed time frame, for an agreed price and to agreed / acceptable standards.

The main agreement is normally signed by both the employer and the contractor. But, where does the subcontractor feature, in a legally binding agreement between these two parties? That is often a very important question to ask and as early on as possible.

The Parties

As a brief outline of the role-players in executing a project:

A contractor is an organisation (or sometimes a person – aka a builder or a principal-agent such as an engineer or architect) hired by the employer to carry out the work required for the completion of a project. Nevertheless, contractors do not always have the expertise or capacity to complete all construction work by themselves. For that reason, subcontractors are a common appointment to complete specified parts of a building project.

The appointment of subcontractors is often a contentious issues due to the far reaching legal implications this has.

General Contract Options and Compliance

The construction industry uses various standard contracts in their transactions published by/as inter alia “FIDIC”, “GCC”, “JBCC” and “NEC3”.

On another point, one of the key role-players in the industry in South Africa is the Construction Industry Development Board (CIDB). The CIDB is a Schedule 3A public entity established by Construction Development Board Act to promote a regulatory and developmental framework.

Importantly the mandate of the CIDB excludes home building, which is regulated by the National Home Builders Regulatory Council (NHBRC).

These standard documents /contracts and bodies set standards and frameworks to regulate the industry and are important to take note of, although not the focus of this article.

Sub- Contractor(s)

Generally speaking there are three forms of subcontractor appointments, commonly found in the ways in which parties contract in the industry:

- "Domestic" is usually a subcontractor appointed by the main contractor at his/her discretion;
- "Nominated" is usually a subcontractor nominated by the employer and that the contractor is obliged to appoint;
- "Selected" is usually a subcontractor selected by the contractor in consultation with the employer in terms of the contract requirements.

The legal relationship / contract follows the appointment and that is why it is important to ensure an understanding.

Where does the relationship lie?

Accordingly, the manner in which the subcontractor is engaged is therefore quite important. Simply put, this doctrine of privity of contract is that "parties who are not privy to a contract cannot sue or be sued on it." ¹

Therefore the implication can be that an employer is not a party to the subcontract and cannot claim poor quality or delay from a subcontractor. There is privity of contract between the employer and the main contractor, which is where the employer's recourse lies. Thus, the employer compels the performance of the subcontract through its remedies against the main contractor (main agreement). The main contractor, in turn, claims from the subcontractor in terms of the subcontract.

Conclusion

¹ <https://www.lexology.com/library/detail.aspx?g=9d6dc4e7-6429-4980-94ee-7c9ddd9cf567>; accessed on 19 May 2021

The legal relationship between the employer, main contractor and subcontractor(s) may not be as simple as it seems. It could also have far reaching implications for dispute resolution. When a dispute arises, it is crucial to seek legal advice in resolving or clarifying any legal disputes. Contact an Attorney at SchoemanLaw for assistance in your construction matters.

