

KAUFFMAN AND FORMAN, P.A.

SUBCONTRACTORS BEWARE OF THE "INCORPORATE BY REFERENCE" CLAUSE IN SUBCONTRACTS

Assume that a standard provision in a subcontract with a general contractor is:

"the Subcontractor is bound to the General Contractor by the terms and conditions of the Prime Contract and shall assume toward the General Contractor all of the obligations and responsibilities that the General Contractor assumes towards the Owner."

A common provision in a subcontract agreement is an "incorporation by reference" provision, which incorporates the prime contract as well as all of the provisions referenced in the prime contract into the subcontract. The "incorporation by reference" provision also includes documents that are referred to in the prime contract, but may not be included in the itemized list of contract documents attached to the contract. Accordingly, the "incorporation by reference" provision exposes a subcontractor to significant risks and obligations not contemplated, including but not limited to expanded scope of work and legal risk and obligations. Moreover, this provision may supersede provisions in the subcontract that conflict with terms in the prime contract, thus further waiving a subcontractor's rights.

A subcontractor should **not** agree to an "incorporation by reference" clause in a subcontract. Moreover, it is strongly recommended that a subcontractor provide that the general contractor must furnish it with all of the contract documents (and not only be obligated to provide the contract documents for subcontractor's review at its office) and that the subcontractor shall only be subject to the contract documents furnished with the additional provision "only to the extent that Subcontractor performed its work in accordance with the plans and specifications."

In these difficult economic times, it is even more incumbent upon a subcontractor to fully understand its obligations under its subcontract and not be subject to unreasonable terms, conditions, risks and obligations.

It is now "Rocky Time" and a subcontractor wants to be the one looking down at the canvas, and not the one on the canvas.

Be smart and stay tough.

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