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Prevention is Cheaper than Cure

Eighth Edition - August 2013

GCC: Liability for Subcontractors under the GCC 2010

Introduction

Subcontractors:

The Construction Industry Development Board (CIDB) in its Practice Note on Subcontracting Arrangements[1] recognizes that three types of subcontractors are provided for in the standard forms of contract for construction works, namely:

> The drafters of the GCC 2010, in formulating Clause 4.4, took great pains to ensure that the contractor would assume all of the liability surrounding the acts, defaults and negligence of its subcontractors.

1. Domestic subcontractors which are appointed by the main contractor at its discretion;
2. Selected subcontractors which are appointed by the main contractor in consultation with the employer; and
3. Nominated subcontractors which the main contractor is obliged to appoint on the nomination of the employer

Regardless of the type of subcontractor however, or the type of contract (barring an express clause to the contrary in a contract between the main contractor and the employer) it is trite law that "the main contractor remains fully liable to the employer for the works and cannot excuse himself by proving that bad work was done or delay caused by a subcontractor."[2]

The reason for this is simple: **Privity of contract**!

Privity of Contract:

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."

An employer is not a party to the subcontract and cannot claim for poor workmanship or delay from a subcontractor. There is no privity of contract between them.

There is privity of contract between the employer and the main contractor and this is where the employer's recourse lies. The employer compels performance of the subcontract through its remedies against the main contractor in terms of the main contract.[3]

The main contractor in turn claims from the subcontractor in terms of the subcontract.

GCC 2010:

Clause 4.4.2 of the GCC 2010 affirms this doctrine by stating that:

"The Contractor shall be liable for the acts, defaults and negligence of any subcontractor, his agents or employees as fully as if they were the acts, defaults or negligence of the Contractor."

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1 Construction Industry Development Board, Inform Practice Note No. 7, Subcontracting Arrangements, Version 1, May 2007

2 Abrahamson, Engineering Law and the ICE Contracts (2nd ed), 1969, pg 138-139 in Loots, Construction Law and Related Issues, Juta & Co, Ltd, 1995, pg 609

3 Minister of Public Works and Land Affairs v Group Five Building Ltd 1999 (4) SA 12 (SCA)

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Clause 4.4.3 then states as follows:

"The contractual relationship between the Contractor and any subcontractors selected by the Contractor in consultation with the Employer in accordance with the requirements of and a procedure set out in the Scope of Work, shall be the same as if the Contractor had appointed the subcontractor in terms of Clause 4.4.2."

The words "*selected by the Contractor in consultation with the Employer"* make it clear that the appointment of a selected subcontractor is envisaged.

In order to fall within Clause 4.4.3 however, and influence the appointment of a subcontractor, the procedure and requirements for doing so must be set out in the Scope of Work.

This means that the Scope of Work must contain the requirements and procedure in terms of which, the Employer and the Contractor may consult on the appointment of a subcontractor.

Clause 4.4.3 uses the word *"and"* between *"requirements"* and *"procedure"*. The use of the word *"and"* means that **both** the requirements and procedure must be contained in the Scope of Work.

Employers are therefore advised to ensure that these procedures and requirements do in fact appear in the Scope of Work, and not elsewhere in the contract.

Clause 4.4.4 then carries on to state that:

"Any appointment of a subcontractor in accordance with Clause 4.4.3 shall not amount to a contract between the Employer and the subcontractor, or a responsibility or liability on the part of the Employer to the subcontractor and shall not relieve the Contractor from any liability or obligation under the Contract."

This clause once again affirms the doctrine of privity of contract!

It is likely then that a provision in a subcontract to the contrary passing some obligation or other liability past the contractor to the employer would be a breach of the terms of the GCC 2010 and unenforceable as against the employer by the contractor.

Employer's Remaining Liability:

Despite the above, it is still open to a main contractor to claim any delay, expense or loss, which they may suffer or incur as a result of the employer's delay in the procurement or consultation process with respect to a selected subcontractor.[4]

Should the employer delay the appointment of a selected subcontractor, this would amount to a delay in complying with the provisions of the main contract in relation thereto, and the main contractor's recourse would lie against the employer.

It must be noted, further, that while there is no contractual relationship between the employer and a subcontractor, there may still be an element of delictual liability.

Given the contractual matrix that usually accompanies a construction project, however, such a delictual claim would probably require an unusually invasive and disruptive employer!

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[4] Ibid, note 1.

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Conclusion:

Clauses 4.4.2 to 4.4.4 of the GCC 2010, affirming as they do the doctrine of privity of contract, make it clear that a contractor's liability to the employer for his subcontractors is all encompassing and main contractor's will find real difficulty shifting liability back to the employer for any problems created by the main contractor's subcontractors.

It is also clear however, that the employer cannot use these clauses to escape liability for its own actions, default or negligence in delaying the appointment of a subcontractor or causing the subcontractor to suffer delictual damages.

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