Construction Contract Clauses in Motion

Jeff Jury, Burns Anderson Jury & Brenner, L.L.P. (jjury@bajb.com)
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First Things First – Phased Dispute Resolution Clauses

One of the cornerstones of a successful construction projects, like many successful undertakings in life, is the execution of a sensible schedule. Our construction clients understand the importance of critical path management. If our clients appreciate the importance of executing tasks in an orderly phase, why not apply this framework to dispute resolution clauses?

It is easy create a simple sequence of negotiate, mediate, litigate/arbitrate, as shown in the exemplar paragraph. Some bullet point issues and suggestions beyond those listed on the dissected exemplar:

- Does the phasing language inadvertently create a condition precedent to any contractual duties?
- Is everyone who should be included in the process, made part of the process?
- Is the process sufficiently flexible in choice of process or time?
- What about allowing longer time for giving notice of claims or submitting supporting material?
- Should you designate the representatives who must confer or negotiate?
- What about allocating fees and costs of the process in proportion to the Parties' claims?

- What limits on the ADR process should be listed – joinder of non-parties, and discovery, for example?

Everything Flows Downhill, Doesn't It? -- Flow-down Clauses

Flow-down clauses are common in construction contracts. Simply defined, a flow-down clause incorporates provisions of one contract (typically the general) into other contracts (typically the subs). They are handy tools, but perhaps not perfect tools, to bind a subcontractor to the terms of the general's contract with the owner. Flow-down clauses are widely used in government construction contracts as a means of ensuring compliance with government standards and policies throughout the performance of a contract.

One of the principal objectives of a flow-down clause is identity of obligation between the owner/general and the general/sub. How easy to identify the interests of these parties that can move at cross-purposes. For example, a subcontractor's desire for revenue may overcome the risks of assuming the owner's obligation on the day the contract is signed, but become an intolerable burden when things slide into the ditch. The attached exemplar and case reference point out some problems with the volume of duties that flow down, suggesting that, contrary to the old adage, everything may not flow downhill.

A Garden-variety Phased Dispute Resolution Clause

Should any dispute arise regarding, the terms, conditions, interpretations, rights, duties, obligations, or performance of this Agreement, the Parties agree first to attempt resolution through good faith negotiation.

In the event the Parties are unable to negotiate a resolution, the Parties agree to mediate this dispute using a mutually agreeable mediator in the Austin, Travis County Texas area. The Parties shall share the mediator's fee equally.

In the event the Parties are unable to reach a settlement at mediation, the Parties agree to waive their rights to a bench or jury trial, and submit this dispute to binding arbitration under the Rules of ABC Arbitration Services Provider, with the costs of said arbitration to be equally born by both parties.

A Garden-variety Phased Dispute Resolution Clause, Dissected

Should any dispute arise regarding, the terms, conditions, interpretations, rights, duties, obligations, or performance of this Agreement, the Parties agree first to attempt resolution through good faith negotiation.

What is "good faith negotiation?" is it fertile ground for more dispute?

In the event the Parties are unable to negotiate a resolution, the Parties agree to mediate this dispute using a mutually agreeable mediator in the Austin, Travis County Texas area. The Parties shall share the mediator's fee equally.

If parties are in a dispute, what is the chance they will agree on a mediator?

In the event the Parties are unable to reach a settlement at mediation, the Parties agree to waive their rights to a bench or jury trial, and submit this dispute to binding arbitration under the Rules of ABC Arbitration Services Provider, with the costs of said arbitration to be equally born by both parties.

Is this a sufficient mandatory arbitration clause?

What is the best way to choose a provider?

What discretion would the arbitrator have to award forum fees or attorneys' fees?

At what point does/should the design professional participate?

Is there a risk of multiple/inconsistent results? What about lien rights?

Will construction continue during the dispute resolution process?

A Bare Bones Flow-Down Clause (?)

> The Contractor agrees to be bound to Subcontractor by all the obligations that Owner assumes to Contactor under the Contract Documents and by all provisions thereof affording remedies and redress to Contractor from Owner insofar as applicable to this Subcontract.
>
> --or--
>
> Subcontractor binds himself to Contractor for the performance of Subcontractor's Work in the same manner as Contractor is bound to Owner for such performance under Contractor's contract with Owner. Contractor's contract with Owner, excluding financial data, and all other Contract Documents listed above have been made available to and read by Subcontractor. In case of conflict between this Subcontract and the other Contract Documents, Subcontractor shall be bound by this Subcontract Agreement.

Question: Under Texas law, exactly what obligations flow down to the Sub?

A) All obligations of any type because it is sufficiently broad.

B) No obligations of any type because it is overly broad.

C) Only the obligations to execute the work described in the subcontract.

Tribble & Stephens Co. v. RGM Constructors, L.P. (Tex. App. – Houston [14th Dist.] 2004, pet. den.) provides the answer. In *Tribble & Stephens,* the general argued that the sub was precluded from suing on its claims for additional compensation against the general because the sub failed to present its claims to the general, which in turn would submit the claim to the owner. The general argued that this sequence of claim submittal is standard in the construction industry, and a condition precedent to litigation. The general cited paragraph 4.3.2 of the AIA General Conditions as controlling:

> Claims … shall be referred initially to the Architect for action… A decision by the Architect…shall be a condition precedent to arbitration or litigation of a Claim between the Contractor and owner …

The general further argued that the reference to the project manual ("SPECIFICATIONS/PROJECT MANUAL"), which incorporated the General Conditions, therefore also incorporated the General Conditions into the subcontract.

The Court of Appeals disagreed. Although recognizing that flow-down provisions are consistent with the accepted notion that a contract may incorporate separate agreements by reference, the court did not believe that reference to the "contract documents" was sufficient to bind the sub to the condition precedent language contained in the General Conditions. The Court concluded that the general had the burden to either obtain the sub's written agreement to assume the same responsibilities to the general as the general had to the owner; or specifically recite that the sub would be bound to the general by the General Conditions. The Court also was unmoved by the argument that the reference to the "SPECIFICATIONS/PROJECT MANUAL" was not sufficient to incorporate those documents in their entirety.