

The Special World of the Subcontractor

Subcontractors are called “sub”contractors because they occupy the level in the construction project hierarchy which is just below the main or head contractor. They typically do specialised work such as electrical, painting, plumbing, gasfitting, drainlaying, scaffolding, heating and ventilation, reinforcing, roofing, precast concrete, ceilings, walls and linings. It is not uncommon for 80% of the work that is to be performed by the head contractor, to be outsourced to subcontractors, because of their specialist expertise. Notwithstanding that, subcontractors are often the most vulnerable parties in a construction project, because they sit at the bottom of the chain, at the opposite end from where the money is coming from. So what are their rights and obligations, and how do they differ from those of the other parties in a construction project?

For a start, there isn't the same variety of standard form subcontracts as there is with head contracts. Members of New Zealand Certified Builders have one, which is currently being revised. Civil Contractors New Zealand have one which is available to anyone. And one was produced in September 2009 for the Specialist Trade Contractors Federation and the Registered Master Builders Association, known as SA-2009, which I suspect is used in the majority of commercial or infrastructure projects. Then there is the occasional sophisticated subcontract that is brought in from overseas, and isn't quite suited to the local industry or regulatory environment. But the one in most common use? The humble written subcontractor's quote. In other words, no written subcontract at all.

Even when a written subcontract is used, they tend to be much smaller in size than the average head contract. But as living proof that appearances can be misleading, subcontracts typically contain more words than the average head contract. Why? Because they not only contain their own set of complex rules, but they also require the subcontractor to observe all the relevant provisions of the head contract. So the poor old subcontractor has to get his head around not just one book of legalese, but two. And if that wasn't bad enough, he often isn't shown the head contract until it's too late. And it takes a pretty astute or determined subcontractor to insist on reading the head contract from cover to cover, before he commits.

The importance of written subcontracts

In those (frequent) situations where there is no written subcontract and no express statement that the subcontractor has to observe all the relevant provisions of the head contract, it is the head contractor that runs the risk. Because if he has undertaken all sorts of obligations to his own client and hasn't passed those on to his subcontractor, he could find himself between a rock and a hard place. For that reason, head contractors are well advised to provide a full copy of the head contract (or at least the relevant parts) to all subcontractors before they are hired, and state in writing that they have to comply with its terms.

An even greater risk arises when the head contractor is doing work under a residential building contract. In that situation, the head contractor is not only bound by the express obligations imposed on him under the contract, but he is also bound by the implied terms in the Consumer Guarantees Act 1993 and the Building Act 2004. Take Part 4A of the Building Act for example. That requires residential builders working on projects costing \$30,000 or more (and in some cases, any residential project) to provide a checklist, a disclosure

statement, a written building contract and an owner's maintenance manual to the homeowner. And the head contractor is bound by a list of implied warranties and some very draconian remedies that the homeowner can use against him.

The good news for the subcontractor and the bad news for the head contractor is that none of those requirements apply to subcontractors. Subcontractors don't have to provide a checklist, a disclosure statement, a written building contract and an owner's maintenance manual, and they aren't subject to the implied warranties or the homeowner remedies. Consequently, if the head contractor hasn't expressly required the subcontractors to contribute their input into the owner's maintenance manual, and hasn't expressly imposed the same warranties and remedies on the subcontractors, once again he will be in a very weak position.

Other laws that affect subcontractors

However, subcontractors don't get a free ride when it comes to the Building Act licensing laws. That is because you have to be licensed to do most kinds of residential building work, and most of the specialised work that requires a licence - design, external plastering, bricklaying or blocklaying, foundation work or roofing work – is performed by subcontractors. That means every licensed subcontractor who carries out or supervises that kind of work, must submit a record of work on completion, and risks being disciplined by the relevant authority if they do something wrong.

If a dispute arises between a head contractor and a subcontractor, each of them tends to have a different kind of leverage over the other. The head contractor can withhold money from the subcontractor, but the subcontractor can suspend work and withhold things like producer statements. The subcontractor can serve payment claims on the head contractor under the Construction Contracts Act 2002 (**CCA**), in which case the head contractor has to be vigilant about responding with a payment schedule in time. Disputes between them can be resolved in all the traditional ways, including Disputes Tribunals, CCA adjudication, litigation, and (if agreed) mediation and arbitration.

Recent amendments to the CCA have had (or will have) a significant impact on subcontractors. As from 1 September 2016, for the first time, design, engineering and quantity surveying subcontractors were brought within the ambit of the CCA. And as from 31 March 2017, all retention money (above a certain level) withheld under commercial construction contracts must be held on trust. And guess what? A commercial construction contract means "a contract for carrying out construction work in which none of the parties is a residential occupier of the premises that are the subject of the contract". In other words, all subcontracts are commercial. That should mean that money owed to subcontractors should be a lot safer and should be paid out a lot quicker than it is at the moment. So hopefully, the special world of a subcontractor will soon be a lot rosier.

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