Short Notes on:

NOMINATED AND SELECTED SUBCONTRACTORS – WHAT IS THE DIFFERENCE AND WHY IT MATTERS?

Introduction

In any construction job, there will inevitably be the use of Subcontractors. The Subcontractor is usually appointed by the Contractor to perform a part of the construction works. However, there are times where one finds that their agreement makes reference to a nominated Subcontractor and a Selected Subcontractor. It is important to understand the difference between the two as they may have implications for the Employer.

Nominated Subcontractor vs Selected Subcontractor

In *Minister of Public Works and Land Affairs v Group Five Building Ltd*¹, the Court laid out the essential elements of a Nominated Subcontractor:

- Its first essential quality is that the Employer reserves the right to nominate as Subcontractors particular persons to perform specified parts of the overall works.
- A second essential feature is that the Contractor is obliged to accept the nomination, subject to a limited, but nonetheless important, right of challenge.
- A third is that the Contractor must enter into a subcontract with the person nominated, usually one containing the same terms, particularly as to performance, as those contained in the main contract.
- A fourth is that there is no privity of contract between the Employer and the Subcontractor.
- From this flows a fifth, that the Employer compels performance of the subcontract not directly, but through his remedies against the Contractor under the main contract.
- A sixth is that in the bills of quantities contract a figure is inserted in the bills for the Nominated Subcontract works which is called a provisional sum, provisional because when a payment

¹ [1999] 3 All SA 467 (A)
certificate is prepared this sum is struck out and replaced by the contract price derived by multiplying the actual measured quantities by the appropriate unit rates in the bills.

A common further feature is that the terms of the subcontract are settled only after the main contract has been concluded. This description is a broad one, and, of course, its accuracy in a particular case depends upon the terms of the particular contract. This is designed to avoid privity between the Employer and the nominated subcontractor, whilst retaining substantial control over the subcontract works in the Employer’s hands.

The Contractor has no control over the appointment of nominated subcontractors. Accordingly, if there is any delay in the appointment of such a subcontractor for whatever reasons, the Employer is liable for any expenses and costs that the main Contractor may incur as a result of such delay. The Contractor is liable for any default of a selected subcontractor save that where the default of the nominated subcontractor delays the Contractor in the completion of his contract he is entitled to an extension of time, and where the agreement with the subcontractor is cancelled due to the default or insolvency of the subcontractor or the default of the Employer or his agents, any additional cost incurred in the completion of the subcontract works shall be to the account of the Employer.

Conclusion

A Selected Subcontractor is one that is employed at the discretion of the Contractor. A Nominated Subcontractor on the other hand is nominated by the Employer, usually to complete a specialised part of the works. The is no contract between the Employer and the Nominated Subcontractor. This distinction is important to determine who is responsible for any delays in the works and in determining where liability lies if things go wrong. Contact us at SchoemanLaw today for assistance with your construction agreements and disputes.

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2 Inform Practice Note #7 May 2007 (Version 1 - May 2007)