FLOW DOWN PROVISIONS: THE HIDDEN DANGERS IN YOUR SUBCONSULTANT AGREEMENT

Lessons and Best Practices in Retaining Subconsultants

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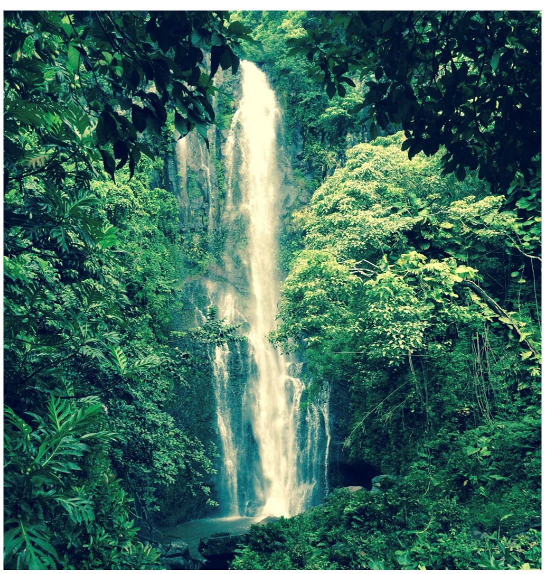
Let's be honest - you probably have not reviewed your subconsultant agreement in a while. Don't be embarrassed. It is easy to overlook these agreements when everything is running smoothly. However, failing to address critical clauses like flow down provisions can create serious risks down the road. In construction projects, design contracts are intricate and high-stakes, and the last thing any prime professional wants is to be caught off guard by unaligned contractual terms that could expose them to liability beyond their control. This article explains why flow down provisions are critical, how they are interpreted differently across jurisdictions and offers practical advice for ensuring your agreements safeguard you from delegable risks.

Design contracts for a construction project should be carefully choreographed to apportion risk and specify the obligations and responsibilities of the parties. The prime professional, who contracts directly with the project owner, exists at the center of this universe and, if not careful, will subsume substantial risk from the owner above and the professional subconsultants below. To mitigate the risks from subconsultants, it is imperative that the prime professional act proactively to push downward onto its subconsultants the requirements of the prime contract so that the subconsultants will be responsible for the risks they can best control. The flow down provision was created as a simple and direct method for accomplishing this goal. However, the manner in which these provisions are interpreted and applied in different jurisdictions can expose the prime professional to unexpected and substantial liability. The following seeks to identify these risks and provide best contractual practices for their mitigation.



a. What is a Flow Down Provision?

Flow down provisions are clauses in a subconsulting agreement that incorporate the prime contract by reference and bind the subconsultant to the prime professional in the same manner that the prime professional is bound to the owner. The AIA C401-2017, Standard Form of Agreement Between Architect and Consultant, contains a typical flow down provision:

> To the extent that the provisions of the Prime Agreement apply to this Portion of the Project, the Architect shall assume toward the Consultant all obligations and responsibilities that the Owner

> assumes toward the Architect, and the Consultant shall assume toward the Architect all obligations and responsibilities that the Architect assumes toward the Owner. Insofar as applicable to this Agreement, the Architect shall have the benefit of all rights, remedies and redress against the Consultant that the Owner, under the Prime Agreement, has against the Architect, and the Consultant shall have the benefit of all rights, remedies and redress against the architect that the Architect, under the Prime Agreement, has against the Owner.

AIA C401 at § 1.3. The intent of the flow down provision is to capture the obligations and responsibilities agreed to in the prime contract and flow them downstream. This is critical because any failure to align contractual provisions creates a coverage gap that will leave the prime professional exposed to liability or other consequences.

One example that has popped up multiple times recently is the failure of the prime professional to synchronize the dispute resolution provisions in the prime contract with those of the subconsulting agreement. For instance, where the prime contract requires arbitration but the subconsulting agreements do not, the prime professional cannot join the subconsultants to the arbitration and is left alone to arbitrate claims that may be exclusively related to services provided by the subconsultants. In this situation, not only will the prime professional have to defend against such claims by itself, but it also will ultimately be liable for any damages caused by the subconsultants. Usually, the only recourse for the litigation weary prime professional is to initiate another separate lawsuit seeking repayment against the subconsultants. No one wants to jump from one expensive litigation to the next.

Likewise, the prime professional will be left holding the bag for any failure to align and properly flow down such key provisions as insurance, indemnity and payment from the prime agreement through to the subconsulting agreements.

b. How are Flow Down Provisions Interpreted?

Flow downs, flow down - seems simple enough, right? Not really. While the intent is obvious from its name, the application and extent of what is captured by a flow down provision is a matter of state law with identical provisions being interpreted differently across state lines.

By way of an example, what happens if your subconsulting agreement contains a flow down provision that broadly binds the subconsultant to the terms of the prime contract and assumes toward the prime professional all the obligations and responsibilities that the prime professional assumed toward the owner? Generally speaking[i], the viability of that flow down provision is dictated by how courts in that jurisdiction analyze the provision.

Strict interpretation states, like New York and Rhode Island, interpret flow down provisions such that the subconsultant would only be bound to the prime contract provisions relating to the "scope, quality, character and manner of the work" to be performed by the subconsultant.[ii] Thus, critical contractual provisions such as insurance[iii], indemnification[iv], payment[v], forum selection[vi] and dispute resolution[vii] would not "flow down" absent sufficiently specific language exhibiting this intent. Thus, relying on a broadly worded flow down provision in a strict interpretation state could have catastrophic consequences.

Other states, like Alaska[viii], Arizona[ix], California[x], Colorado[xi], Georgia[xii], Illinois[xiii], Kansas[xiv], Massachusetts[xv], North Carolina[xvi], Ohio[xvii], Pennsylvania[xviii] and Washington[xix] are more permissive and interpret the flow down provision more generously thereby incorporating non-specified provisions to varying degrees amongst the states. Having a broadly worded flow down provision in a permissive state will be effective for some, but not necessarily all of the key provisions. Results vary by state.

Still, other states, including, Indiana[xx] , Maryland[xxi], Tennessee[xxii] and Texas[xxiii], take a more expansive view by evaluating the totality of the contract documents to discern the intent of the provision utilizing typical contractual interpretation principles. Thus, the flow down provision will be viewed and interpreted by the court in conjunction with the other contract documents.

Finally, there are many “wild card” states that have not yet definitively decided whether the courts in those states will apply a strict, permissive or expansive interpretation of broad flow down provisions. Florida[xxiv] stands out as key state that has not yet provided such a determination.

c. Best Practices for Avoiding the Pitfalls of a Flow Down Provision that Doesn’t.

The disparity in the application of flow down provisions across state lines represents a concealed but pernicious threat to the prime professional. Technology keeps making the world smaller, allowing prime professionals to easily practice across multiple jurisdictions with subconsultants from all over the world. Ensuring that you are adequately protected requires careful drafting. Do not leave this issue to the courts to decide. Retain a construction attorney to tailor your subconsulting agreements to the applicable jurisdiction and to draft a flow down provision to ensure its maximum application. If a specific provision in the prime contract is important to the owner and the prime professional, then it should be clearly expressed within the subconsultant agreement and not left to the subjective and inconsistent interpretation of the court system.

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[i] We caution that the following is a general overview and that each case can vary based on its specific facts and contractual language.
[ii] *Bussanich v. 310 East 55th St. Tenants*, 282 A.D.2d 243, 244, 723 N.Y.S.2d 444 (1st Dept. 2001).
[iii] Id.
[iv] Id.
[v] *Empire City Iron Works, Inc. v. Ins. Co. of N. Am.*, 90 CIV. 2058 (LMM), 1991 WL 19809, at *1 (S.D.N.Y. Jan. 31, 1991)(finding "pay when paid" clause does not flow down through general flow down provision).
[vi] *CooperVision, Inc. v. Intek Integration Techs., Inc.*, 7 Misc.3d 592, 601, 794 N.Y.S.2d 812, 820 (N.Y. Sup. Ct. 2005).
[vii] *Fischbach & Moore Elec. v. Bell BCI Co.*, 2004 WL 1811392 (W.D.N.Y. Aug. 11, 2004); *United States Steel Corp. v. Turner Constr. Co.*, 560 F.Supp. 871, 874 (S.D.N.Y.1983).
[viii] *Indus. Indem. Co. v. Wick Constr. Co.*, 680 P.2d 1100, 1106 (Alaska 1984).
[ix] *Weatherguard Roofing Co., Inc. v. D.R. Ward Const. Co., Inc.*, 214 Ariz. 344, 349, 152 P.3d 1227, 1232 (Ariz. Ct. App. 2007).
[x] *Scott Co. v. U.S. Eng'g Co.*, No. 94–1963, 1994 U.S. Dist. LEXIS 13585, 1994 WL 519493 (N.D.Cal. Sept. 16, 1994); *Slaught v. Bencomo Roofing Co.*, 25 Cal.App.4th 744, 30 Cal.Rptr.2d 618, 622 (1994).
[xi] *Plum Creek Wastewater Auth. v. Aqua-Aerobic Sys., Inc.*, 597 F.Supp.2d 1228, 1234 (D. Colo. 2009).
[xii] *L & B Constr. Co. v. Ragan Enters.*, 267 Ga. 809, 482 S.E.2d 279, 282 (Ga.1997).
[xiii] *Turner Construction Co. v. Midwest Curtainwalls, Inc.*, 187 Ill.App.3d 417, 135 Ill.Dec. 14, 543 N.E.2d 249, 252 (1989).
[xiv] *Dynamic Drywall, Inc. v. Walton Constr. Co., L.L.C.*, No. 06–1280, 2007 U.S. Dist. LEXIS 5473, at *2–*4, 2007 WL 164351 (D.Kan. Jan. 18, 2007).
[xv] *Costa v. Brait Builders Corp.*, 463 Mass. 65, 78, 972 N.E.2d 449, 459 (2012).
[xvi] *Am. Nat. Elec. Corp. v. Poythress Commercial Contractors, Inc.*, 167 N.C.App. 97, 100, 604 S.E.2d 315, 317 (2004).
[xvii] *KeyBank Natl. Assn. v. Sw. Greens of Ohio, L.L.C.*, 2013-Ohio-1243, ¶ 28, 988 N.E.2d 32, 40.
[xviii] *Clark Res., Inc. v. Verizon Bus. Network Servs., Inc.*, 1:10-CV-1119, 2012 WL 1339697, at *6 (M.D. Pa. Apr. 18, 2012); *Bernotas v. Super Fresh Food Mkts., Inc.*, 581 Pa. 12, 863 A.2d 478, 481–83 (Pa. 2004).
[xix] *Sime Construction Co. v. Washington Public Power Supply System*, 28 Wash.App. 10, 621 P.2d 1299, 1303 (1980).
[xx] *Eastgate Investments II, LLC v. MW Builders, Inc.*, 2:20-CV-286-TLS-JPK, 2023 WL 2674565, at *8 (N.D. Ind. Mar. 29, 2023); *MPACT Const. Grp., LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901, 910 (Ind. 2004).
[xxi] *Peach State Roofing, Inc. v. Kirlin Builders, LLC*, 1:15CV526-CSC, 2018 WL 3097326, at *31 (M.D. Ala. June 22, 2018)(interpreting Maryland law).
[xxii] *ESI Companies, Inc. v. Ray Bell Const. Co., Inc.*, W200700220COAR3CV, 2008 WL 544563, at *5 (Tenn. Ct. App. Feb. 29, 2008).
[xxiii] *Nelson v. Vernco Constr., Inc.*, 566 S.W.3d 716, 752 (Tex. App. 2018), *judgment set aside, opinion not vacated* (June 22, 2018).
[xxiv] *Great Divide Ins. Co. v. Amerisure Ins. Co.*, 2:17-CV-14271, 2018 WL 1318340, at *4 (S.D. Fla. Mar. 14, 2018)(dicta asserting subcontracts can contain flow down clauses which would require the subcontractor to be bound by all the obligations of the prime agreement); but see *St. Augustine Pools, Inc. v. James M. Barker, Inc.*, 687 So. 2d 957, 958 (Fla. 5th DCA 1997) (finding that prime agreement was not incorporated by reference into parties' separate contract despite language stating that subcontract was "subject to" the prime agreement and that subcontractor "agrees to comply with all applicable provisions thereof.")