

Page Settings

Connections

History

Edit

Publish

Publication

CONSTRUCTION

There's Always "Hope" When a Public Construction Contract Contains Ambiguous Terms

1/09/2014

The Georgia Court of Appeals' Nov. 19, 2013, decision in *Hope Electric Enterprises, Inc. v. Schindler Elevator Corp.*, A13A1586 (Ga. Ct. App. 2013) illustrates the costly effects of using construction contracts that prime contractors "have always used."

Schindler won a prime contract from the Metropolitan Atlanta Rapid Transit Authority (MARTA) in October 2007 to rehabilitate escalators in MARTA stations throughout the Atlanta area. Schindler then subcontracted to Hope in 2008 to perform certain electrical portions of the scope of work. The subcontract agreement between Schindler and Hope incorporated by reference provisions from Schindler's contract with MARTA relating to performance of the work, safety precautions, incidents of default, opportunities to cure, and termination. Among the provisions incorporated into the Hope subcontract was language commonly found in construction subcontracts:

The Subcontractor shall take reasonable safety precautions with respect to performance of the Subcontract, shall comply with safety measures initiated by the Contractor and with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities for the safety of persons and property in accordance with the requirements of the Prime Contract.

If the Subcontractor repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise perform in accordance with this Subcontract and fails within a ten-day period after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by written notice to the Subcontractor and without prejudice to any other remedy the Contractor may have, terminate the Subcontract and finish the Subcontractor's Work by whatever method the Contractor may deem expedient. . . .

From June 2008 to March 2010, Hope apparently functioned as a model subcontractor. But starting in April 2010, Hope started experiencing some performance challenges. In that one month, a MARTA official issued Hope one safety violation citation for leaving an electrical closet door open and another citation for removing a breaker from a live breaker panel without any MARTA personnel present. Then in August 2010, the owner and principal of Hope along with another Hope employee were cited for crossing live train tracks during regular operating hours. As a result of these safety violations MARTA revoked Hope's access to the project sites and Schindler ordered Hope to stop all work on the project. MARTA conducted an investigation into these safety incidents and directed Schindler to remove Hope from the project. In turn, Schindler terminated Hope.

Hope sued Schindler for breach of the subcontract alleging wrongful termination. Schindler prevailed on its partial summary judgment motion in the trial court, but lost on appeal. Here's why:

1. *Ambiguous Terms in the Contract* – The Georgia Court of Appeals found that the word "repeatedly" was rendered ambiguous due to the subcontract's failure to provide any reference point to determine what constituted "repeated" violations or failures to perform. For example, there was no indication of how many occurrences there had to be before Schindler was authorized to terminate the subcontract. The subcontract also did not let Hope know if there were any considerations beyond mere number of occurrences that would be taken into consideration, such as severity, interval between occurrences, or duration of presence on the project.

Without those reference points, the court said it was impossible to tell if Hope's four violations had to be measured against the five-month window in which they occurred or the entire two years that Hope spent on the project. Therefore, it was a question for the jury.

2. *Opportunity to Cure Trumps Owner's Right to Control Project Access* – The court noted that the subcontract required Schindler to give Hope an opportunity to cure any failures or deficiencies before terminating the subcontract. This language in the subcontract, the court admitted, put Schindler in a tight spot. MARTA had not only banned Hope from the project site, but it also ordered Schindler to remove Hope from the project. Unable to allow Hope back onto the project, Schindler risked breaching its contract with MARTA if it honored its obligation to allow Hope an opportunity to cure. The court also noted that the subcontract did not explicitly give Schindler the right to terminate a subcontractor if MARTA so directed. Without being afforded its contractual right of an opportunity to cure its alleged defects, Hope had established a basis to overturn the summary judgment against it.

The court's decision implicitly indicts Schindler's contract with Hope for Schindler's inability to terminate Hope effectively. While it may have been possible to more specifically define what Schindler intended by "repeated," it is difficult to anticipate every possible set of circumstances against which a court will scrutinize a contractual provision. These kinds of situations are common on construction projects, especially on public works and government construction projects where a public authority or agency has rights affecting how the prime contractor interacts with its subcontractors. Accordingly, subcontract provisions that allow the prime contractor to exercise the same kind of control over its subcontractors that its public owner has over it are essential.

Another commonly used provision to avoid this kind of result is a termination-for-convenience clause that allows the contractor to terminate the subcontractor at will rather than having to demonstrate an event of default. Typically, such "T4C" clauses require the prime contractor to pay the subcontractor for the work satisfactorily delivered until the date of termination plus demobilization costs, as well as profit on the work performed. That is often a more cost-effective option than resolving a dispute over wrongful termination for breach.

[Back](#)