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CLIENT ALERT - CONTINGENT PAYMENT CLAUSES IN FLORIDA CONSTRUCTION CONTRACTS

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Florida continues to be at the forefront of construction activity in the country, bringing in new residents, developers, and contractors looking to take advantage of the demand offered by the sunshine state. The devastation recently brought by Hurricane Ian has substantially increased the number of contractors seeking work here.

Understanding Contingent Payment Clauses

Contingent Payments Clauses ("CPC") are utilized throughout the country in construction agreements, primarily subcontracts. However, the legality, use, and enforcement of CPC are state-specific, with some jurisdictions outright barring CPC and others providing a complex roadmap towards enforcement. Florida is the latter. For all those venturing into the state, and even construction industry players that have already taken root, it is critical to understand Florida law regarding CPC.

Essentially, CPC seek to trigger the responsibility of having to make a payment downstream only upon the receipt of payment from an upstream party, i.e., the general contractor ("GC") not having to pay a subcontractor unless an owner pays the GC, or a subcontractor not having to pay a lower tier unless the GC pays the subcontractor.

If one assumes that language such as "payment shall not be due until payment is received from X" suffices, one would be mistaken. Courts strike down such language routinely, and Florida law requires additional express terms to adequately shift the risk downstream and rely upon a CPC in a construction agreement.

However, we barely stepped foot into the legal minefield associated with CPC. Even with the appropriate contractual language, other provisions, including in an upstream agreement, such as a prime contract, can contradict a CPC or render the CPC ambiguous, again causing the CPC to be unenforceable. Just as the language for enforcement is essential, understanding those typical terms that can still preclude enforcement of an otherwise enforceable CPC is equally essential.

Know Your Rights

Contractors and subcontractors are typically aware of CPC, but often fall short, given the foregoing. Developers and owners also need to understand the legal parameters revolving around CPC because, as with most contractual provisions requiring scrutiny when entering into an agreement for construction, they can become front and center in case of a dispute.

If funding is ceased either wholly or partially, whether from an owner, GC, or subcontractor, downstream payments will inevitably be affected, especially if the parties believe they can rely upon a CPC. Change orders still lie at the heart of many payment disputes, regardless of adherence to contractual terms or the legitimacy of the change order. Suppose a GC or lower tier refuses to release funds towards a change order (or even for initial contract work) while relying upon a CPC. In that case, you can guarantee the assertion of liens or bond claims, especially given the short time frames within which a claimant must act to preserve its rights in Florida.

An understanding of Florida law on CPC not only can better protect contractors and subcontractors but can also provide developers and owners with several ways to avoid what can quickly turn into a snowballing payment dispute.

If you have any questions regarding CPC or other contractual provisions, whether negotiating a construction agreement or already facing a construction dispute, please reach out to Adam E. Richards or any other Berger Singerman construction attorney.

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