

Incorporation by Reference of Terms and Conditions: Notice, Objection, Emphasis, Enforceability, Clear Reference Test

WEDNESDAY, MARCH 29, 2023

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Incorporation By Reference

March 29, 2023 – 1:00 pm – 2:30 pm ET



Speakers



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- What we will cover:
 - U.S. contract law principles related to contracts
 - U.S. contract law principles related to incorporation by reference

- What we won't cover
 - International contract law
 - Specific laws, regulations and rules related to specific types of contracts or in regulated industries, including U.N. Convention on Contracts for the International Sale of Goods (CISG), Incoterms, UCC, etc.

- A contract is a bargained-for exchange of promises that the law will enforce.
- Consideration is what one party bargains for in exchange for a promise, such as a return promise or performance.
 - Offer
 - Acceptance – manifestation of assent
 - Definiteness – what is required to perform and basis for determining breach and appropriate remedy

Incorporation by reference is “the method of making one document of any kind become part of another separate document by referring to the former in the latter and declaring that the former shall be taken and considered as part of the latter the same as if set forth therein” *Black’s Law Dictionary (Sixth Edition)*

- Actual incorporation is when one document is copied into another

Examples:

- Written agreement incorporating terms posted online
- Electronic agreement incorporating terms posted online
- Ordering document or invoice incorporating terms posted online

Why or why not to incorporate by reference

Advantages

- Speed
- Convenience
- Uniformity

Disadvantages

- Intent
- Scope
- Potential for conflicting terms

1. Demonstrate intent – “incorporated in this Agreement”
2. Clearly identify incorporated terms
3. Ensure access to the incorporated terms – are they available when or before the contract is formed? before or at performance?
 - “*attached and* incorporated in this Agreement”
4. Are the terms fair and reasonable?
 - adhesive contracts – modifying the incorporated terms without notice
 - deceit

5. Context – business vs. consumer

- Business – courts lean toward upholding the agreement
- Restatement of Consumer Contracts (ALI approved in May)

When agreements are delivered in electronic form, a separate document may be incorporated through a prominent hyperlink, accompanied by a statement drawing the consumer's attention to the fact that clicking the button constitutes acceptance of the hyperlinked terms. But when the agreement is delivered in a printed paper form, the printed appearance of the hyperlink does not afford consumers sufficient notice and opportunity to review. In such case, it is necessary to provide a clear statement as to where the additional terms may be found, and place them in a location that is easy for the consumer to access. Similarly, merely referring to "additional terms of sale" does not sufficiently alert the consumer.

Website Terms of Use incorporate Website Privacy Policy

“...Terms and Conditions incorporate by reference a separate list of Privacy Policy terms. The following statement appears in clear type in the first paragraph of the Terms and Conditions: “Additional binding terms related to our Privacy Policy are available here,” linking to another webpage with the Privacy Policy terms. The consumer’s manifestation of assent to the transaction (by clicking “I Agree”) encompasses the additional Privacy Policy terms, and those terms are adopted as part of the contract ...”

- Advantages?
- Disadvantages?

Questions?

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Construction Law: **Incorporation by** **Reference**

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Incorporation by Reference


Absolutely critical for our clients to have copies and understand the contents of all documents incorporated into their contract.

Examples of these types of documents include:

- Prime Contract or Upper Tier Contracts (all that are binding)
- Plans and Specifications
- Schedule
- Insurance
- Safety Manuals
- Any other documents related to the project

Incorporation by Reference

- Why is it critical for our clients to have all the contract documents? They are likely bound to all documents incorporated by reference. Here is a sample clause:

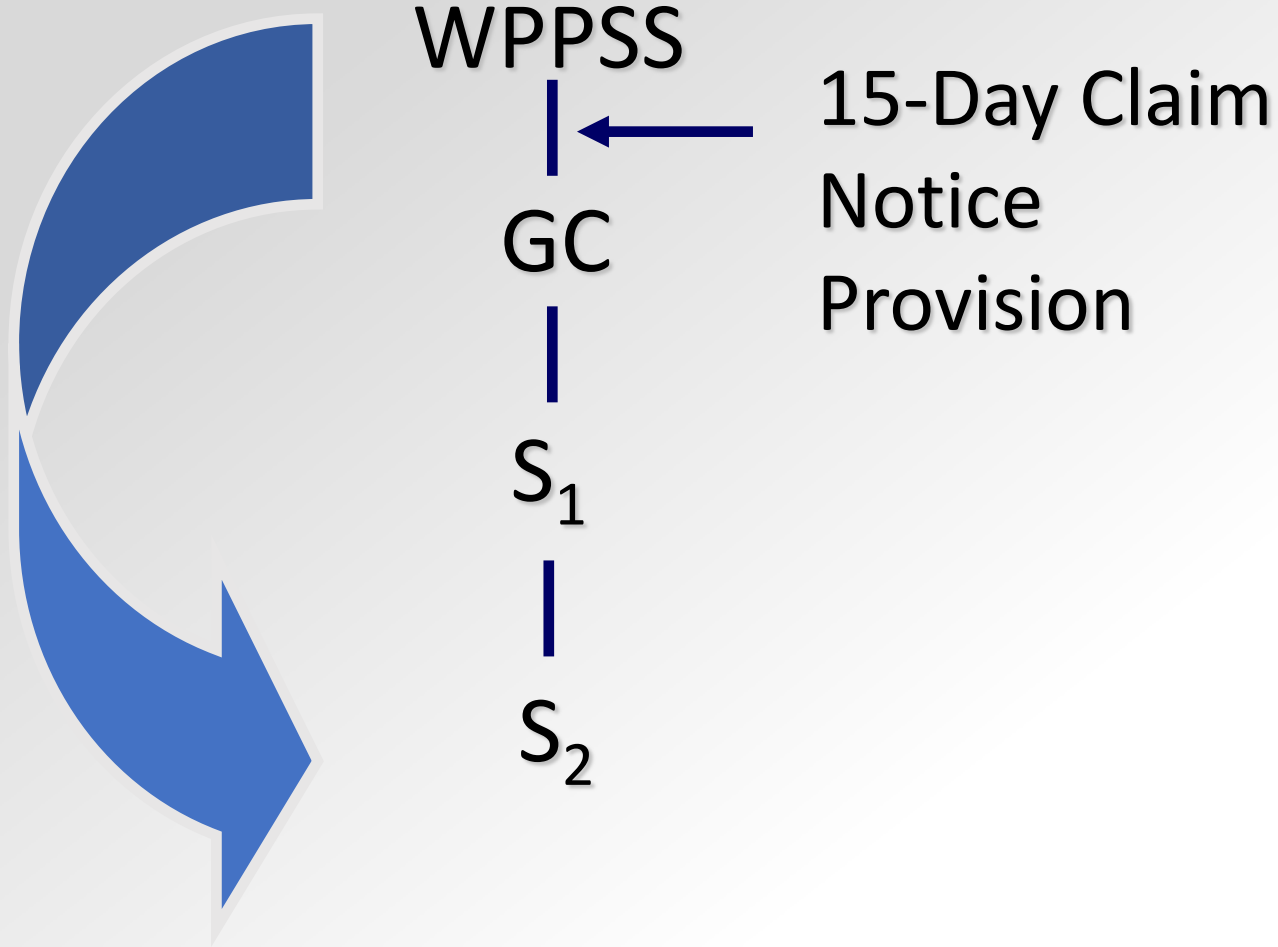
2.3 SUBCONTRACT DOCUMENTS The Subcontract Documents include this Agreement, the Owner-Contractor agreement, special conditions, general conditions, specifications, drawings, addenda, Subcontract Change Orders, amendments and any pending and exercised alternates. The Contractor shall make available to the Subcontractor, prior to the execution of the Subcontract Agreement, copies of the Subcontract Documents to which the Subcontractor will be bound. The Subcontractor similarly shall make copies of applicable portions of the Subcontract Documents available to its proposed subcontractors and suppliers. Nothing shall prohibit the Subcontractor from obtaining copies of the Subcontract Documents from the Contractor at any time ~~after~~  before the Subcontract Agreement is executed. The Subcontract Documents existing at the time of the execution of this Agreement are set forth in Article 13.

Incorporation by Reference

- It is agreed that Subcontractor will assume toward Contractor all obligations and responsibilities which Contractor has assumed toward Owner under the Main Contract. . . [specifically incorporate Main Contract].

Incorporation by Reference

Sime Construction v. WPPSS



Incorporation by Reference

Waldner Consulting v. Miller Contracting, Court of Appeals, (2009)

Held: Incorporation clause in subcontract that incorporated the Main Contract, “in respect of the [subcontracted] Work” did not incorporate Main Contract procedural requirements (180 day suit limitation clause).

Lesson: A general and unlimited incorporation of the Main Contract would include all procedural requirements. Alternatively, incorporate specific clauses.

Oregon Cases

Eugene Water and Electric Board v. MWH Americas, Inc., 293 Or.App. 41, 426 P.3d 142 (2018)

- Owner and general contractor formed prime contract with arbitration clause
- General contractor formed subcontracts without arbitration clause, but incorporated by reference prime contract
- Subcontractors sued owner; sought to compel arbitration

Eugene Water and Electric Board v. MWH Americas, Inc., 293 Or.App. 41, 426 P.3d 142 (2018)

Arbitration clause was not incorporated by reference in subcontract because prime contract demonstrated Owner's lack of intention to be bound to arbitration with subcontractors.

- no specific language about "rights" or "remedies" in prime contract
- prime contract arbitration provision only contemplated owner and contractor.

***Coats v. State ex rel. Dept. of Transp. ex
rel. Bureau of Labor and Industries, 188 Or.
App. 147, 71 P.3d 172 (2003)***

- Oregon Supreme Court held that contract between state agency and general contractor incorporated an Oregon L&I rule by reference.
- Remanded to Court of Appeals to determine how unclear language in the L&I rule should be interpreted, given that the L&I rule was a term of the contract.

Coats v. State ex rel. Dept. of Transp. ex rel. Bureau of Labor and Industries, 188 Or. App. 147, 71 P.3d 172 (2003)

- Parties agreed that administrative rules were incorporated by reference into contract
- Courts defer to agency interpretation of administrative regulations that are incorporated by reference provided agency interpretation is "plausible."
- Court held L&I's interpretation (and application) was plausible

A-C Const., Inc. v. Bakke Corp., 153 Or.App. 41, 956 P.2d 219 (1998)

- Purchase order between subcontractor and general contractor contained phrase “all work to be done according to plans and specifications of [owner].”
- General contractor argued the purchase order incorporated all general and specific terms and conditions in prime contract.

A-C Const., Inc. v. Bakke Corp., 153 Or.App. 41, 956 P.2d 219 (1998)

Purchase order language requiring subcontractor's "work" to comply with owner's plans and specifications did not incorporate by reference any other portion of the prime contract into the subcontract because the purchase order referred only to the "work."

Washington Cases

***Washington State Major League
Baseball Stadium Public Facilities Dist. v.
Huber, Hunt & Nichols-Kiewit Const.
Co., 176 Wn.2d 502, 296 P.3d 821 (2013)***

- Owner of Safeco Field sued General Contractor for breach of contract associated with repair costs stemming from intumescent fire protection paint
- General contractor sought to pursue third party claims against subcontractors who performed the intumescent fire paint work.
- Subcontract flow down provision incorporated prime contract documents “so far as they apply” to subcontractors work.

Odyssey-Geronimo JV v. Dep't of Transportation, No.77743-2I, 2018 WL 3544993 (Wn. App. July 23, (Not Reported) (2018)

- Washington State Department of Transportation hired Odyssey-Geronimo to paint a bridge
- WSDOT and Odyssey disputed the amount of surface area to be painted, whether the 'standard specifications' in contract incorporated by reference the Estimating Guide produced by the Painting and Decorating Contractors of America

**Odyssey-Geronimo JV
v. Dep't of Transportation, No.77743-2I, 2018
WL 3544993 (Wn. App. July 23, (Not Reported)
(2018)**

Though the Estimating Guide was referenced in the contract, the contract did not incorporate it by reference because the Estimating Guide clearly stated that it was “not suitable for referencing in a specification or procurement document.”

***Washington State Major League
Baseball Stadium Public Facilities Dist. v.
Huber, Hunt & Nichols-Kiewit Const.
Co., 176 Wn.2d 502, 296 P.3d 821 (2013)***

- Flow down provision not limited to “performance” of the subcontractor’s work.
- Court held that “so far as they apply” encompassed all prime contract provisions pertaining to subcontractor’s portion of the work—including limitations and accrual provisions.
- “If parties clearly and unequivocally incorporate by reference some other document, that document becomes part of the contract.”

W. Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn.App. 488, 7 P.3d 861, (2000)

- Surety for the Seventh-Day Adventist Church (Church) brought action against contractor and subcontractor for fire damage to unfinished building under a right of subrogation.
- Subcontract expressly included “Project Contract Documents” and “Contract Project Documents” in the signed Trade Contract with the contractor, this included by reference to “mechanical specifications” which are expressly incorporated in AIA Document A201 which included a subrogation waiver.
- owner/architect agreement, incorporated by reference the waiver of subrogation in AIA Document 201

W. Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn.App. 488, 7 P.3d 861, (2000)

- “Incorporation by reference must be clear and unequivocal.” But “where [an] incorporated matter is referred to for a specific purpose only, it becomes a part of the contract for such purpose only and should be treated as irrelevant for all other purposes.”
- Trade contract specifically incorporated by reference Contract Documents including mechanical specifications was unequivocally part of the contract. But waiver of subrogation not specifically referenced in prime contract was not incorporated by reference.

Graoch Associates N0.5 Ltd. Partnership v. Titan Const. Corp., 126 Wn.App 856, 109 P.3d 830 (2005)

- Subcontract incorporated by reference terms of prime contract
- Subcontract contained warranty.
- GC sued subcontractor for defective work, subcontractor claimed that subcontract warranty was exclusive remedy.
- But under prime contract, work had to be of “good quality, free from faults and defects.”

***Graoch Associates N0.5 Ltd. Partnership
v. Titan Const. Corp., 126 Wn.App 856, 109
P.3d 830 (2005)***

A warranty in subcontract does not control or provide exclusive remedy if prime contract is incorporated by reference a separate duty to provide high quality work. I.e., work that is “good quality, free from faults and defects.”

3A Indus., Inc. v. Turner Const. Co., 71 Wn. App. 407, 869 P.2d 65 (1993)

- Subcontract provision gave general contractor the same “rights and remedies” as owner had against general contractor in prime contract
- Prime contract contained arbitration clause
- General contractor demanded subcontractor submit to arbitration

3A Indus., Inc. v. Turner Const. Co., 71 Wn. App. 407, 869 P.2d 65 (1993)

In contrast to vague references to “rights, responsibilities, and obligations” found in other cases, subcontract’s use of the term “remedies” was sufficiently specific and explicit to bind subcontractor to prime contract’s arbitration provision.

Edifice Constr. Co., Inc. v. Arrow Insulation, Inc., 12 Wn. App. 2d 1019 (2020) (unpublished)

- Subcontract contained provision governing pass through claims, which stated that “subcontractor is bound to contractor to the same extent contractor is bound to owner by the terms of the main contract”
- Owner initiated arbitration with general contractor
- General contractor filed a lawsuit against subcontractors to compel arbitration

Edifice Constr. Co., Inc. v. Arrow Insulation, Inc., 12 Wn. App. 2d 1019 (2020) (unpublished)

- Departure from past cases—court held that the general contractor must demonstrate “that parties had knowledge of and assented to incorporated terms.”
- Here, general contractor did not establish that subcontractors had knowledge of the incorporated terms
- Assent can be implied if subcontractors know that terms incorporated by reference come from an industry standard prime contract.

Federal Cases

Leeward Construction, Inc. v. United States, 160 Fed. Cl. 446 (2022)

- Army Corps of Engineers rejected Leeward's bid because language in the bid conflicted with the requirements of FAR 52.228.
- Leeward argued that savings clause incorporated FAR 52.228-1(e) by reference because it contained the phrase: "any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein."

Leeward Construction, Inc. v. United States, 160 Fed. Cl. 446 (2022)

- Court held phrase “statutory or other legal requirement” was too broad and indefinite to incorporate FAR 52.228-1(e) by reference.
- “[M]ere reference to another [document] is not an incorporation of anything therein.”
- To incorporate a regulation, the reference to the regulation must be explicit.

***United States and Architectural Coatings, Inc.,
v. Travelers Cas. & Sur. Co., Fed Supp., 2018
WL 6571234, (M.D. Fla. Dec. 13, 2018) (Not
Reported)***

- Subcontract incorporated by reference prime contract in its entirety
- Prime contract incorporated by reference two FARs and Modification 15.

***United States and Architectural Coatings, Inc.,
v. Travelers Cas. & Sur. Co., Fed Supp., 2018
WL 6571234, (M.D. Fla. Dec. 13, 2018) (Not
Reported)***

- Because the Miller Act provides specific rights for subcontractors, Courts read incorporation by general reference to include only prime contract provisions involving performance of the work
 - Provisions regarding rights and remedies must be specifically incorporated
- Therefore, the FAR Clauses and Modification 15 that pertained to payment terms were not incorporated by reference into the subcontract.

U.S. for the Use and Benefit of Ken's Carpets Unlimited, Inc., v. Interstate Landscaping Co., Inc., 37 F.3d 1500 WL 481684 (6th Cir. 1994) (Not Reported).

- Prime contract between General Contractor and the government obligated Interstate to pay laborers working on the project in accordance with the Davis–Bacon Act
- Subcontract generally incorporated by reference the prime contract but contained no specific reference to Davis-Bacon wage rate requirements.
- Subcontractor did not pay wage required by the Davis-Bacon Act.

U.S. for the Use and Benefit of Ken's Carpets Unlimited, Inc., v. Interstate Landscaping Co., Inc., 37 F.3d 1500 WL 481684 (6th Cir. 1994) (Not Reported).

- The “Miller Act establishes specific statutory rights intended to protect subcontractors, and courts are reluctant to conclude that a subcontractor abandoned those rights absent language of specific incorporation.”
- General incorporation by reference did not incorporate by reference the Davis-Bacon act because Subcontractor was not on notice about the Davis-Bacon wage requirements.

Ball, Ball & Brosamer, Inc. v. Reich, 24 F.3d 1447, 339 (D.C. Cir. 1994)

- Contract between Department of the Interior and contractor incorporated by reference “all rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 C.F.R. Parts 1, 3, and 5.”
- The Act applies to “all mechanics and laborers employed directly upon the site of the work”
- However, the Secretary defined “site of work” to include borrow pits located two miles away from the construction site.

Ball, Ball & Brosamer, Inc. v. Reich, 24 F.3d 1447, 339 (D.C. Cir. 1994)

- Court applied the test from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984): whether agency interpretation differs materially from the plain language of the statute.
- Here, the Court held that the Secretary's definition of "site of work" was materially different than a plain language reading of the Davis-Bacon Act. The workers who worked at the borrow pits two miles from the construction site were not located at the site of work.
- The Court held for the contractor.

Incorporation by Reference

- **Insert an Order-of-Precedence Clause in Contracts Document provision**
- *For example:*
- Contractor and Subcontractor agree that in the event of a conflict between the terms of this Subcontract and the terms of the incorporated Owner / Contractor Agreement, the terms of this Subcontract shall govern and control.

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