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I Agreed to What?

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Federal Court in New York City highlights the importance of reading all documents referenced in a contract before signing it.

Many construction contracts contain “boilerplate” language that does not seem to have anything to do with the actual work that a contractor has to perform. However, these “boilerplate” sections can have a tremendous impact on the contract’s scope of work. Therefore, to protect themselves against unpleasant surprises on the jobsite (or in court trying to collect on a claim) contractors are well-served to read the “boilerplate” so that they fully understand the scope of work that they are binding themselves to perform by signing a contract.

However, careful contractors cannot stop there. In many instances, in one simple sentence, a contract can “incorporate” obligations and responsibilities that are not even mentioned in the contract itself. As a recent case in federal court in New York City, *Industrial Window Corp. v. Federal Insurance Company*, shows, contractors who sign contracts that refer to other documents must also be aware of what those other documents require to be sure that they fully understand their own scope of work. As the *Industrial Window* case shows, the law in New York is not friendly to contractors who do not read all of the materials referenced in their contract and then sue in court when they realize that they underbid a job as a result.

In the *Industrial Window* case, Industrial Window was a subcontractor on a New York City Department of Design and Construction (“DDC”) project. It sued the general contractor on the project, Beys General Construction

Corp. and Bey’s payment bond surety, Federal Insurance Company, for payment of claims for extras it had submitted on the project. One of these claims, for more than \$110,000, was for alleged extra work due to what it claimed was an “unforeseen” condition at the project.

Under its subcontract, Industrial Window had to deliver and install a curtain wall. Without inspecting the worksite beforehand, Industrial Window prepared its bid, which included the curtain wall work, and signed a subcontract based on that bid. However, when Industrial Window submitted its construction plan before starting work, the MTA rejected it because of structural issues involving the 135th Street IRT subway station, which was near the project site. As a result, Industrial Window incurred additional costs to complete the curtain wall work using a more expensive method that the MTA had approved.

After finishing the curtain wall work, Industrial Window submitted a claim for the additional costs it incurred. Although its subcontract said that Industrial Window was responsible for all construction means and methods for its scope of work at the project, Industrial Window claimed that it had did not know that the subway station was so close to the project, or that it needed MTA approval for any of its work. DDC denied the claim, even though the construction manager, Hill International, had approved and signed-off on it. Industrial Window then sued Beys and its payment bond surety for the additional costs it incurred completing the curtain wall work.

The court agreed with DDC and dismissed Industrial Window’s claim. The court relied on a clause in Industrial Window’s subcontract that stated that the DDC’s contract with Hill International was a



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part of Industrial Window’s subcontract. Even though Industrial Windows claimed that it did not know about the subway station or the obligation to get MTA approval, both the location of the station and the MTA approval requirement were referenced in the Hill/DDC contract. The Court held that, because the Hill/DDC contract was a part of the Industrial Window subcontract, Industrial Window would be held to the terms of the Hill/DDC contract. The court reached this conclusion even though Industrial Window had not read the Hill/DDC contract and even through Industrial Window claimed that it had asked to see the Hill/DDC contract, but Beys apparently failed to give the Hill/DDC contract to Industrial Window.

There are numerous “boilerplate” contract provisions like the one in *Industrial Window* that can expand the scope of work of a subcontract. These can include “incorporation” provisions and contractual definition provisions. Subcontractors must be sure that they have read their contract, as well as all other documents referenced or “incorporated” into their subcontract, to fully understand their scope of work. If they do not, they bear the risk of incurring additional costs during construction that they cannot claim from the owner or their contractor. <<