

# RTGC: Read the General Contract

Although it has been some time since I graduated from law school, I still remember some sound advice that I received from my legal studies professor at the start of my first year of classes: “Always remember to read the problem.” Periodically throughout the semester, the professor would remind her students, “RTP, RTP, RTP.” This was her way of stressing to us the importance of reading the problem. She wanted us to take the time to read the question thoroughly before frantically scribbling an incoherent (and likely nonresponsive) answer.

Looking back, I now understand the importance of that advice when reading any document—whether it be an exam problem or a contract—before taking action. Since exam-taking advice may not be useful to the majority of plumbing engineers, let’s focus on contracts and the importance of actually reading them.

## DON'T BE A BONEHEAD

All too often I hear stories about business executives who sign legal documents such as contracts, leases, notes, mortgages, releases, or assignments without actually taking the time to read them. Otherwise sophisticated, educated, and intelligent people turn into boneheads (a legal term) when it comes to reading important paperwork prior to signing it. It is my sincere hope that after reading this column, you will remember to RTP and avoid becoming a bonehead when entering into subcontracts.

Plumbing engineers are most likely to enter into subcontracts that incorporate by reference the terms and conditions of the general contract. This term often is clearly spelled out in the subcontract. The genesis of this provision is the owner, who wants to ensure that any subcontracts entered into by the prime contractor are consistent with the provisions of the owner’s prime contract.

This is a perfectly reasonable and common requirement; however, it often leads to the bonehead problem. Most subcontractors (including plumbing engineers) agree to incorporate a prime contract by reference into their subcontract without ever reviewing the terms and conditions of that prime contract. While this failure to RTP may seem innocuous on its face, it could lead to unintended (and undesired) consequences.

## FOR EXAMPLE

The recent case of *Livers Bronze, Inc. v. Turner Construction Company* in the Missouri Court of Appeals is a perfect illustration of the problem. Turner was the general contractor on a commercial construction project located in Pennsylvania. It entered into a subcontract with Livers, a Missouri company, pursuant to which Livers was to perform certain glass wall and rail systems work on the project.

The parties’ subcontract provided that Livers was to comply with the architectural plans, the general contract, and a rider attached to the subcontract. Neither the plans nor the general contract was attached to the subcontract, but both were available for review at Turner’s office. The subcontract defined the

general contract as “the General Contract...between Turner and California State Teachers Retirement System and Thomas Properties Group LLP Brandywine Cira L.P. ... dated 2/9/05.” The subcontract also contained a dispute resolution clause providing that the parties were to participate in good faith in voluntary, nonbinding alternate dispute resolution. Any unresolved disputes were to be resolved “under the terms of the General Contract or according to law.”

A dispute regarding payment under the subcontract arose, and Livers brought suit against Turner in the Jackson County, Missouri, Circuit Court to collect the monies allegedly due and owing.

In response, Turner demanded mediation in Pennsylvania in accordance with the Dechert Tenant Improvement Agreement, which purportedly provided that all disputes must be submitted to nonbinding mediation in Pennsylvania. (This is known as a forum selection clause.) Turner also filed a motion to dismiss the Jackson County lawsuit brought by Livers, arguing that the Dechert Tenant Improvement Agreement was incorporated by reference into the subcontract. Turner acknowledged that the subcontract did not specifically refer to the Dechert Tenant Improvement Agreement, but claimed that this was due to a clerical error. The subcontract actually referred to the agreement between Turner and California State Teachers Retirement System and Thomas Properties Group LLP Brandywine Cira L.P. as the general contract.

Livers contested the motion to dismiss the Jackson County lawsuit, arguing that the Dechert Tenant Improvement Agreement was not incorporated by reference into the subcontract. Livers further argued that it never intended to have its disputes resolved in Pennsylvania. It always intended for them to be resolved in Missouri, its home state.

The Missouri Circuit Court granted Turner’s motion and dismissed the case. On appeal, Livers argued that the Circuit Court erroneously found that the Dechert Tenant Improvement Agreement (and the provision requiring that the parties’ disputes be resolved in Pennsylvania) was incorporated by reference into the subcontract.

After analyzing Missouri law regarding incorporation by reference into contracts, the Missouri Court of Appeals reversed the judgment of the Circuit Court and found in favor of Livers. Specifically, the Court of Appeals found that among the several construction contracts for this project, it was not at all clear which one was the general contract referred to in the subcontract. It also was not clear that the parties intended to incorporate the Dechert Tenant Improvement Agreement into their subcontract. As a result, the Court of Appeals found that the Circuit Court should not have dismissed the case.

## LESSONS LEARNED

The *Livers* case offers a number of valuable lessons to the plumbing engineer subcontractor. First and foremost, RTGC, or read the general contract. Although I do not have all of the facts, it is unlikely that Livers read the general contract (including the forum selection clause) before it entered into

The application and impact of laws can vary widely based on the specific facts involved. Nothing in this column should be considered legal advice, recommendations, or an offer to perform services. The reader should not act upon any information provided in this column, including choosing an attorney, without independent investigation or legal representation. As such, this column should not be used as a substitute for consultation with an attorney.

the subcontract. This was a critical omission. If Livers had read the general contract ahead of time, it might have caught the clerical error and avoided an unnecessary dispute (and the legal fees and expenses that came along with it). Also, Livers would have known whether it was subject to a forum selection clause. This is an important consideration for subcontractors, as subcontractors often have no choice in the matter and are subject to legal action in the county where the project is located (but this is not always the case). Private parties (as opposed to municipalities) are free to enter into whatever forum selection clause they deem fit. As the subcontractor, you typically are not consulted on the legal forum that is selected by the owner and general contractor.

Ultimately, the plaintiff in *Livers* received a favorable outcome because it would rather litigate its dispute with Turner in Livers' home court—i.e., the Circuit Court in Missouri—but this result came at significant financial expense incurred by Livers at both the trial and appellate courts. You readily could avoid this problem by being proactive when you enter into subcontracts. Obtain and *read* a complete copy of the general contract for your project (if possible before you execute the subcontract). Be sure to obtain copies of all contract documents, including the general conditions as well as any other documents that are incorporated as part of the overall contract.

Do not be dissuaded by the voluminous size of contract documents. You will be bound by them, so it is very important that you know exactly what they contain. By remembering to RTGC (read the general contract), you will minimize your financial exposure and better understand your legal rights and obligations in connection with the project. **PSD**

#### RECOMMENDED READING

*Livers Bronze, Inc. v. Turner Construction Co.*, S.W.3d, No. WD 68692, 2008 WL 2491948 (Mo. Ct. App. June 24, 2008)



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