

Construction contracts

How prevailing party clauses offer leverage to the little guy

INTERVIEWED BY ADAM BURROUGHS

A prevailing party clause is a contractual provision that requires the court or arbitrator to include the winning litigant's attorneys' fees and costs associated with the dispute as part of an award or judgment. In construction contracts, a prevailing party clause can encourage the parties embroiled in a dispute to try to settle outside of a courthouse or arbitration.

"Dispute resolution provisions are included to discourage project partners from leaning on legal proceedings to resolve disputes. Knowing you will pay the other side's fees and costs if you lose should be a great motivator to be reasonable. They can get to the end with far less expensive methods of resolution," says Buckingham, Doolittle & Burroughs, LLC Cleveland Office Partner-in-Charge, John Swansinger.

Smart Business spoke with Swansinger about this clause, and when and why it should be used.

WHY WOULD A PARTY WANT A PREVAILING PARTY CLAUSE?

Prevailing party clauses tend to provide a greater benefit to the smaller subcontractors and other project players because it eliminates some of the advantages of deep pockets that larger project partners possess. That's because with a prevailing party clause in place, the losing litigant would pay the winning party's attorneys' fees and costs.

Those financially strong entities that recognize the possibility that they have financial power over their project partner in a construction contract often reject the prevailing party clause so as not to let go of that power. They might take more aggressive and less reasonable positions

John Swansinger

Office Partner-in-Charge | Cleveland
Buckingham, Doolittle & Burroughs, LLC

216.615.7356
jswansinger@bdblaw.com



WEBSITE: Learn more about how to use prevailing party clauses by connecting with John at www.bdblaw.com/attorneys/john-swansinger.



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knowing that the lesser partner is getting beaten down by attorneys' fees it can barely afford in the short term and can't recover later

No matter where a party stands in the process, they should insist on a prevailing party clause in any construction contract they sign as it tends to dissuade frivolous litigation.

WHAT COULD THESE CLAUSES DICTATE?

Often a prevailing party clause is coupled with a thoroughly described dispute resolution procedure so that if a dispute arises, an independent party can be called on to negotiate or mediate the disagreement. That could be the architect or the engineer on the project as disputes in construction contracts are often related to the project plans and those professionals understand the plans best.

The more precise these clauses are written, the better the outcome, and the less likely that it would be misinterpreted by or misapplied by the arbitrator, judge or jury. For instance, the prevailing party clause may be written so the court, arbitrator or jury can only award fees from the point in time that they arrived in court, or from the point in time where a settlement was offered. So, there are ways to place a scale on it that ultimately limits the award to the prevailing party.

WHAT'S OFTEN MISSED WHEN IT COMES TO CONSTRUCTION CONTRACTS?

More contractors should understand that they're not required to simply sign the forms that they're given. They can add a prevailing party clause and other clauses or modify the proposed agreement to shift the risk away from them.

Ultimately, contracts are a discussion. When negotiating, it can be telling if this clause is being requested and the other side refuses. Most parties don't want the cost — in time or money — of prolonged litigation, so they will agree to include a prevailing party clause as a legal avoidance tool that hangs over the dispute and should force the parties to be reasonable. That's why the party that wants this clause should boldly stand up for it and look for ways to be creative with how they're written.

To make the most of these contracts, work with a seasoned construction law attorney. Construction law is highly specialized. The typical contract transactional attorney won't likely have experience in the interplay of the contract documents and the risk shifting that occurs on all projects before the shovels go in the ground. An attorney who is engaged in construction law will have an understanding of the deeper issues that are unique to these arrangements and can craft a clause that works best for the situation. ●