

Construction Contracts – Recovery of Attorney's Fees and Expert Fees

By Christopher M. Cobb

Construction litigation is expensive. In many cases, attorneys' fees comprise a large portion of the cost; however, they are not the only significant cost. Increasingly, expert witnesses are needed to address very technical design and construction means and methods issues. Many cases will require multiple experts. Expert witness fees increase dramatically depending on the volume of material to review, the number of depositions taken and the multitude of experts needed to prove the construction claim. These costs can reach into six figures in larger cases. The importance of being able to recover these costs if successful at trial cannot be overstated and starts at the beginning of the project when the parties are negotiating their construction contract.

All too often, recovery of attorney's fees and expert witness fees is overlooked when the parties negotiate their contracts as the thought of litigation is not considered. At the deal negotiation phase, the parties are more concerned with the scope of the work, time of performance and cost of the work, and do not concern themselves with the thought of litigation. In this light, many do not realize that the form construction contracts published by the American Institute of Architects do not provide for recovery of attorney's fees. Thus, if you are working under an unmodified AIA A101 or A201, you have no ability to recover attorney's fees in the event of litigation (or arbitration) under the contract.

The AIA documents need to be modified to include the right to recover attorney fees. A well-drafted attorney's fees clause will provide for recovery of attorney's fees by the prevailing party in any arbitration or lawsuit arising out of the contract, and should include expert witness fees as recoverable expenses in addition to attorney's fees. The Statewide Uniform Guidelines For Taxation of Costs in Civil Actions (2012) do permit the limited recovery of expert witness fees, but only for, "A reasonable fee for depositions and/or trial testimony, and the cost of preparation of any *court ordered* report". Therefore, if your expert has produced a report which was not ordered by the Court, the only way to recover those expert fees would be with an express contractual provision allowing the recovery.

Additionally, Section 713.29, Florida Statutes, provides for recovery of "a reasonable fee for the services of her or his attorney for trial and appeal or for arbitration" in any action to enforce a construction lien or a claim against a payment bond. This is only applicable to a party with a valid lien or bond claim. Under the statute, they may recover attorney's fees even in the absence of an attorney's fees clause in the underlying contract. The bad news is this right is lost if the lien or bond claim is waived, released or lost for some technical reason.

Finally, a mechanism known as a "proposal for settlement" which becomes available after a lawsuit is filed may result in the recovery of attorney's fees. This requires making a settlement offer to the opposing party which is not accepted within 30 days. This mechanism provides the offering party the ability to recover attorney's fees, but only if he or she prevails at trial by an amount that is 25% more or less than (depending on which party made the offer) the offer made. Attorney's fees are recoverable only starting from the date on which the offer was made so a

party without a basis for recovery of attorneys' fees should make the offer as early as possible in the litigation.

The right to recover attorneys' fees and expert fees should be considered at the contracting stage and not after the project has already commenced. Carefully review your construction contracts and make sure you include an attorneys' fee and expert witness fee recovery clause. It may be the most important change you make!