

A Contract Provision Waiving a Subcontractor's Rights to Make Bond Claims is Void

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In *Costa v. Brait Builders Corporation*, the highest Court in Massachusetts addressed the question of whether a contract term is void because it precluded a Subcontractor from bringing a payment bond claim on a public project. The Court declared the contract term void and, thus, allowed the Subcontractor to pursue its bond claim. The Court also addressed another contract term concerning the award of attorneys' fees to the prevailing party that provides guidance to all parties negotiating such terms.

Brait Builders Corporation ("Brait") included a term in its subcontract that sought to waive the Subcontractor's right to make a payment bond claim against Brait if the Subcontractor did not provide its own payment and performance bonds (ostensibly for Brait to make claims should the Subcontractor default). The Subcontractor did not provide those bonds, but nevertheless brought a payment bond claim against Brait. Brait moved to dismiss the bond claim reasoning the contract term precluded such claims. The Subcontractor, on the other hand, argued the contract term was void because it violated public policy.

The Court declared the contract term void because it violated public policy. The Court reasoned that bonds are required by statute on public projects because public properties are immune from mechanic's liens. If Subcontractors did not have the benefit of bonds, they would have to increase their bid amounts to hedge against non-payment. Additionally, bonds serve the public good by encouraging Subcontractors to bid on projects and to complete projects when payment issues arise. In short, the Court valued the public's interests in securing lower bids and completed projects over the parties' rights to determine their own contract terms.

The Court also addressed a contract term relating to the prevailing party's award of attorneys' fees. Brait included a contract term that provided the following:

In the event that the Subcontractor recovers less than amounts claimed, Subcontractor shall be responsible for attorneys' fees.

Although Brait lost on virtually all counts, it sought to preclude the Subcontractor from recovering its significant attorneys' fees (\$300,693.75) because the Subcontractor claimed more than it was awarded. Ultimately, the Court held the Subcontractor could recover its attorneys' fees, but the Court ruled for the Subcontractor on the basis of a technicality (i.e., Brait failed to include in the term a provision noting it applied to lawsuits as well as arbitration actions).

While it is not uncommon for parties to negotiate provisions relating to the award of attorneys' fees, Brait's provision is somewhat unusual. Often, these provisions will simply specify the prevailing party is entitled to attorneys' fees. Brait's provision, however, imposes an additional criterion to obtaining attorneys' fees; namely, the prevailing party must win AND must win at least as much as it claimed as damages. Inherently, there is nothing wrong with the provision used. However, it is imperative for all parties reviewing such provision to ensure they fully understand the provisions including how and under what circumstances attorneys' fees are recoverable.