



## Contractual Considerations Regarding Legal Fees

Most modern construction contracts contain a provision allowing for recovery of attorneys' fees to the prevailing party in a dispute. In addition, certain Texas laws affecting construction can likewise allow for the recovery of legal fees.

An example of a common prevailing party provision is the following: "If either party to this Agreement institutes litigation or arbitration with the other party arising out of this Agreement, the prevailing party shall be entitled to recover from the other party its reasonable attorneys' fees and expenses incurred. The prevailing party is that party which, in light of the claims, counterclaims, and defenses asserted, is afforded greater relief by the court judgment or arbitration award."

As one might imagine, there have been considerable disagreements over which party is the prevailing party. For instance, imagine that a subcontractor sues a contractor over its failure to pay the \$200,000 subcontract balance. The contractor claims that offsets and back charges eliminate any further payment obligation to the subcontractor. If the court ultimately determines that the subcontractor is owed \$20,000 (10% of its claims), then which party prevailed?

Each party would certainly have a viable argument that it could recover legal fees. The contractor defended against 90% of the subcontractor's overinflated claim. Similarly, the subcontractor actually recovered monies owed to it and it was forced to file suit to recover those damages.

For these and other reasons (such as the sense that a potential recovery of attorneys' fees can encourage parties to file suit), we are seeing some players in the industry shift away from prevailing party provisions and instead contractually requiring that each party bear the burden of their own fees and costs. Essentially, they are removing the proverbial pot of gold at the end of the rainbow.

Contracts are the lifeblood of the construction industry. Parties should consider what they want (or don't want) in those contracts—even if they are viewed as standard or common terms and conditions.

**For more information, please contact [Andy Harris](#).**