

CONSTRUCTION AND THE LAW IN TEXAS

Recovering Your Attorney's Fees in Construction Disputes

As a construction lawyer, I am consciously aware of the costs associated with legal disputes in the construction industry and the economic considerations that my clients must consider when a dispute arises. It is not uncommon for disputes to consume tens of thousands of dollars in legal fees before litigation and hundreds of thousands of dollars if litigation follows.

Because legal bills can become large, the effect of attorney's fees on a party's decision to pursue a dispute should be considered at various phases of any dispute. The value of and return on the investment for legal fees should be evaluated. The size of the "wrong" and the likelihood of a positive recovery should always be considered along with the ability to add the fees to a recoverable claim. Just as one would be ill advised to throw good money after bad, one would be similarly ill advised to incur attorney's fees equal to the value of a claim if those fees were not recoverable.

Under Texas law, multiple avenues exist for recovery of attorney's fees. However, the law concerning recoverability is changing. In a case called *Barton v. Fleming*, a Houston Court of Appeals decided that certain types of business organizations may not be subject to attorney's fees under a commonly used statute allowing a prevailing party in a contract dispute to recover those fees. That statute appears as section 38.001 of the Texas Civil Practice and Remedies code. It states that "A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and

costs, if the claim is for an oral or written contract."

Section 38.001 has long been the go-to statute for lawyers and litigants to use in seeking to collect attorney's fees for contract litigation. Because almost all construction work is performed under a contract, mostly written but sometimes oral, section 38.001 is often used in construction disputes to seek reimbursement of attorney's fees. Texas law follows the general rule that attorney's fees are only recoverable if specifically provided for in a statute or contract.

In the *Barton v. Fleming* case, the court determined that a partnership, specifically a limited liability partnership, is not subject to an attorney's fee award because a partnership is not an "individual" or a "corporation". The court made that ruling because the statute specifically says individual or corporation. It does not say, for example, a business entity. The effect of this ruling could be huge for parties to construction disputes as many entities are organized as partnerships, limited partnerships or limited liability companies. Unless an adverse party is a corporation, attorney's fees may not be recoverable.

The easiest way to eliminate this possible risk is to have written contracts that address recoverability of attorney's fees. Many contracts contain provisions that the prevailing party in a dispute is entitled to attorney's fees. Contracts often fail to define what is required to be a prevailing party, but the inclusion of that language will remove the impact *Barton v. Fleming* might have on a dispute with

a partnership, joint venture, or limited liability company that is not organized as a corporation.

Keep in mind that not all attorney's fee provisions must be written to allow recovery of fees. Contracts will, at times, contain language that states each party shall bear full responsibility for all attorney's fees and expert costs associated with a dispute. When contracting, consider whether the other party to the contract has limited resources or a historically demonstrative desire to avoid contentious disputes. Often, a provision allowing the recovery of fees acts as an enabler for a fight. A provision to the contrary can quell a dispute if the party claiming damages loses the economic incentive to fight.

In addition to section 38.001, there are other statutes that parties will look to for the right to recover attorney's fees. The prompt pay statute and the statutes waiving immunity for government actors also have attorney's fee provisions. For claims against cities and counties, sovereign immunity is waived by two statutes in the local government code. For state agencies, a different chapter waives immunity for small claims under \$250,000. That statute does not have an attorney's fee provision, but a bill that is making its way through the current legislature that has a shot at passage would authorize that recovery.

However, a recent case, *County of Galveston v. Triple B Services*, has ruled that the attorney's fee provisions of the waiver of immunity statutes do not confer on a litigant suing the government the right to recover attorney's fees. Rather, the language enables the waiver of immunity to extend to claims for attorney's fees if the underlying contract or another statute has specifically provided for the recovery of those fees. As we have seen, 38.001 only applies to individuals and corporations. It does not apply to governmental entities. So, for these immunity-waiving statutes to allow for the recovery of fees, generally speaking, the contract itself must have a provision allowing the award of fees.

Finally, the prompt payment acts for both public works and private contracts also contain attorney's fee award language. In the private projects statute, the award of attorney's fees is based solely on the court's discretion. In the public act, the language removes the discretion and orders the award of fees to the prevailing party. But, in *City of San Antonio v. KGME*, the court called into question whether the prompt pay act confers the ability to



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A Balanced Approach to Construction Law.

recover attorney's fees independent of separate authorization. This court's decision was similar to the Galveston case.

In summary, consider whether attorney's fees are available in any disputes that might arise on a project. Do not assume that they are automatically allowed and evaluate whether allowing them is ultimately in your best interest. While the court cases mentioned here may be further revised by other courts, recoverability absent specific contract language is unclear and is worthy of serious consideration before moving forward into a dispute.

