

# SETTLEMENT CLAUSES – BUYER BEWARE

By Thomas L. Rosenberg

Contractors have claims on projects all the time. Contractors seek additional compensation and time extensions on projects for many legitimate reasons. Some owners have a very fair approach to requests for additional compensation and time. Others do not. What do we need to look for in the contract documents to recognize the possibility of future problems with cost and time extensions?

In regards to claims, we have to recognize that on sophisticated projects, especially public projects, there will often be an exhaustive administrative review of a claim before it can be submitted to arbitration or litigation. The internal administrative review of a claim can take many steps and require a substantial amount of documentation and proof to be provided for a claim. Courts typically uphold this process including the fact that the decision maker is often directly, or one step, removed from the people who made the decision in the field that is being challenged. In other words, the contractor may be seeking additional compensation that has been denied by the owner. Now the administrative appeal is to that same person or his/her immediate supervisor. Often times

the contractor feels that this is a one-sided process. However, contractors have to go through it before they can get their day in court or appear before an arbitration panel.

But what are the clauses we need to look out for? The following are taken from actual contracts.

## PREVAILING PARTY PROVISIONS

The first one deals with prevailing party provisions. Prevailing party provisions are becoming more and more common in contract documents. It means that the party that prevails on a claim is entitled to its costs and attorneys' fees. In the public sector, we do not see this as much because government may be precluded from agreeing to pay a private contractor's legal fees. In the private sector, it is becoming quite common. However, one must be wary of a one-sided version of this provision. In other words, sometimes contracts are drafted and presented to a contractor for consideration that says if we engage in arbitration or litigation and the owner is the prevailing party, then the contractor owes the owner its costs and attorneys' fees. It is not reciprocal and does not provide for a similar remuneration to the contractor if it prevails. It only provides

that if the owner prevails it is entitled to its costs and/or attorneys' fees.

Taking it one step further, a provision in a contract recently presented did not have a requirement to prevail. It said that if arbitration or litigation ensues, the owner is entitled to its costs and attorneys' fees. The owner lost the claim and then argued to a court that even though it lost the claim, under the contract the prevailing contractor had to pay the owner's costs and attorneys' fees. Thankfully, the court struck down the provision and refused to enforce it. Be careful and avoid similar provisions.

## OFFERS OF SETTLEMENT

Another provision in a contract deals with offers of settlement. The owner says if it makes an offer of settlement on a claim and the contractor refuses the offer of settlement, the contractor owes all of the owner's ongoing costs and attorneys' fees incurred subsequent to the time when it rejected the offer of settlement, unless the contractor obtains a result better than the settlement offer amount. This is a difficult provision to ignore. If you have a claim that you believe is worth \$400,000 and the owner offers you \$250,000, you have to think long and hard about what to do because if

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you don't recover more than \$250,000, you are going to owe the owner all of its ongoing costs and attorneys' fees. This promotes settlement. Be wary of the provision though, however, because it is often not understood until it is too late.

### TO PREVAIL ON THE ENTIRE CLAIM

This last one is the most onerous provision I have seen. It says:

Owners shall not be liable to contractor for any expenses, damages, loss of profits (anticipated or otherwise) or charges of any nature whatsoever (including, but not limited to, legal fees and professional fees) which shall result because of any extension of the time of completion which is granted by Owner to Contractor or to any other Contractor employed by Owner to perform any other portion of the project, or which shall result because of any delay or hindrance of any nature whatsoever in the progress of the work (e.g., winter protection clause) whether such delay or hindrance shall be avoidable or unavoidable. In the event Contractor chooses to litigate and fails to prevail as to its entire claim in its litigation, Contractor shall reimburse Owner, program manager and engineer for any legal fees, professional fees, and all other costs and expenses associated with analyzing, defending or otherwise opposing any such claim or litigation.

The above is a mouthful! First, it says the owner is not liable to the contractor for anything. The owner is not liable to contractor for *any* damages or additional compensation resulting from an extension of time, failure of any other contractor employed by the owner to complete its work, and any delays or hindrances regardless of whether the delay or hindrance was avoidable or not. Having stated that the owner is not liable to the contractor for anything, it goes on and it says if the contractor chooses to litigate (this is a public contract that provided only for litigation) and fails to prevail on its entire claim, then the contractor owes not only the owner, but also the project manager and the engineer all legal fees, professional fees or any other costs associated with analyzing, defending or otherwise opposing the claim. If you do not think this provision in the contract curtails

contractors from filing claims, then you are in the wrong business. This provision is a disaster for contractors. What does it mean to prevail on the entire claim? By example, if the contractor claims it is entitled to \$400,000, and goes to trial but recovers only \$395,000, it owes the other side all of its costs and legal fees. If this type of provision is confronting

you, you must take steps to make sure that there is no fluff in your claim.

### CONCLUSION

Contract provisions can help or hurt contractors. The above are some examples of things to look out for as owners become more and more focused on how to minimize or defeat claims. ■

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