

Legal Fees Are Not Recoverable Damages

Many standard form construction contracts and performance bonds contain language that provides that attorneys' fees are a recoverable element of damages for contractor defaults. Does this language cover attorneys' fees incurred in a civil action brought by an obligee against the principal and/or surety to recover for the contractor default? One court has recently said no. See [*Town of Georgetown v. David A. Bramble, Inc.*](#) 2017 WL 3337575 (D. Del. 2017).

In *Bramble*, the owner chose to include two standard form contracts in its bid package, which contained such provisions. The underlying construction contract included the EJCDC C-700 Standard General Conditions, which provided that if "any work is found to be defective," the contractor "shall pay all claims, costs, losses and damages (including but not limited to all fees and charges of ... attorneys ...)" relating to the correction, removal or replacement of the defective work. Similarly, the applicable EJCDC C-610 performance bond provided for the recovery of completion costs, including "additional legal ... costs resulting from contractor's default and resulting from the actions of or failures to act of surety ..."

This language is less than perfectly clear. Do these provisions cover only attorneys' fees generated in *completion* efforts (for example, an attorney seeking an EPA permit or a zoning variance to allow completion efforts to proceed)? Or do they cover *any* attorneys' fees whatsoever that occur after the default termination?

There is little authority on this seemingly important issue. In *U.S. Fidelity and Guaranty Co. v. Braspetro Oil Services Co.*, 369 F.3d 34 (2d Cir. 2004) and *Turner Construction Co. v. First Indemnity of America Insurance Co.*, 829 F. Supp. 752 (E.D. Pa. 1993), the courts concluded that similar language covered only fees incurred to complete the work, not to prosecute subsequent litigation over the performance bond. On the other hand, in *Hicks & Warren, LLC v. Liberty Mutual Insurance Co.*, 2011 WL 2436703 (S.D.N.Y. 2011), the court found that legal costs included litigation-related attorneys' fees in connection with the legal dispute over the bond and underlying construction contract. Critically, however, the construction contract in *Hicks* also had a prevailing party provision, which factored into the court's reasoning.

In *Bramble*, the general contractor and its surety moved in *limine* to preclude at trial any evidence of attorneys' fees generated in the civil action brought by the obligee. The obligee opposed on the grounds that the language was broad enough to cover attorneys' fees generated in the civil action prosecuting the contractor default itself.

The *Bramble* court seemed to acknowledge that both sides of this controversy had a legitimate argument. However, the court chose not to delve into the merits of those arguments. Instead, sidestepping the issue, the court concluded that,

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because the obligee had chosen the language of both the construction contract and the performance bond in its bid package, the contract terms and any ambiguities therein should be construed against it. Therefore, the court concluded that the obligee was unable to demonstrate that the attorneys’ fees it sought in the current action were “legal ... costs resulting from the contractor’s default.”

Although the court’s decision was based on a “tiebreaker” rule, the case should nevertheless be useful to general contractors and sureties, since most construction contracts and surety bonds are drafted or selected entirely by the owner.



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