



# Be Careful What You Sign

## Take advantage of a BTA contract review

by: Robert C. Goldberg, BTA General Counsel

In 1977, when my tenure as general counsel began, the most important aspect of the position was negotiating fair, equitable and ethical dealer agreements with suppliers. As the copier industry developed, products had defects and suppliers offered contracts that insulated them from claims. The National Office Machine Dealers Association (NOMDA; now the Business Technology Association [BTA]) had four essential requirements for a NOMDA-approved agreement: (1) Mutually agreed-upon quota; (2) Open-ended term; (3) Mediation of disputes; and (4) Interpretation in a fair, equitable and ethical manner. Several suppliers accepted these requirements while others rejected them.

For more than 40 years, NOMDA/BTA has provided members with contract analysis to provide guidance on the concerns and suggestions regarding proposed agreements. In discussions with dealers, it was often determined that it was more prudent not to negotiate any revisions and merely accept the agreement as presented. A dealer would return the document with a cover letter stating that while he (or she) objected to certain provisions, it was understood that the agreement was non-negotiable and must be returned as presented. This approach acknowledged an “adhesion” or “one-sided” agreement. The question is: If certain provisions are so one-sided, will a court enforce them?

A recent decision from Ohio’s 10th District Court of Appeals illustrates the risks of that kind of thinking. While BTA continues to review supplier contracts for members, this decision suggests it may be better to negotiate troublesome provisions rather than counting on a judge or arbitrator to do it for you in the future.

In *Cleveland Construction Inc. v. Ruscilli Construction Co. Inc.*, the court confronted a long-running construction dispute between a general contractor, Ruscilli Construction Company (Ruscilli), and its subcontractor, Cleveland Construction Inc. (Cleveland). The subcontract at issue contained an indemnification provision that stated, in relevant part, that Cleveland would “indemnify and hold harmless [Ruscilli] from and against claims, damages, losses and expenses, including but not limited to its actual attorneys’ fees incurred, arising out of or resulting from performance of” the subcontract. The provision further stated: “This indemnity shall include, but not be limited to, the following: ... The prosecution of any claim by [Ruscilli] against [Cleveland] or any of its subcontractors or suppliers for breach of contract, negligence or defective work



[or] ... The defense of any claim asserted by [Cleveland] against [Ruscilli] whether for additional compensation, breach of contract, negligence or any other cause.” Simply stated: Cleveland agreed that if it ever brought a claim against Ruscilli, or Ruscilli brought a claim against Cleveland, Cleveland would pay all of Ruscilli’s attorneys’ fees.

Various disputes arose between the parties and the case was ultimately heard by a three-member arbitration panel. Ruscilli asserted claims against Cleveland for more than \$900,000 in damages resulting from Cleveland’s alleged breach of contract, while Cleveland asserted various counterclaims totaling just under \$1.4 million. Of particular note, both sides requested an award of attorneys’ fees.

The arbitration panel ultimately determined that Cleveland was entitled to an award of just over \$100,000 on its claims, but was not entitled to an award of attorneys’ fees. However, the panel determined that Ruscilli was entitled to such an award. Relying on the indemnification language, the panel reasoned that “[t]he Parties are two sophisticated commercial entities that entered into a negotiated, lengthy Subcontract agreement that included several specific provisions that shifted the risk of [Ruscilli’s] attorneys’ fees and costs onto [Cleveland] in any dispute between the parties.”

Although 99% of all BTA supplier agreements are signed, filed and never considered again, it is important to understand what you sign. Take advantage of a BTA contract review to fully understand contract provisions. Do not rely on a court to protect you. ■

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