Termination of Convenience Clauses: Are They a Convenience or a Hindrance?

By Jason Robinson & Trevor Furner

In contracts, there are essentially two types of termination clauses. The most common clause is termination for cause, also known as a termination for default, which most contracts contain. The second type, and the one discussed in this article, is termination for convenience. Outside of these clauses, the only way for a party to exit a contract is to breach the contract.

Termination for convenience (TFC) clauses have been a mainstay in government construction contracts for years. However, TFC clauses are becoming more prevalent in private construction contracts.

A TFC clause is a clause within a contract allowing the parties' contractual relationship to mirror that of at-will employment. In other words, it allows a party, or parties, to terminate a contract for almost any reason.

While technically a party does not need a reason to terminate a contract for convenience, it does have some limitations in its capacity to exercise the TFC clause. The main limitation concerns the parties' good faith. In effect, all parties must enter the contract in good faith with the intention of fulfilling the contract. If a party terminates the contract to avoid making the final payment or it always intended to terminate the contract the party will likely be held liable for breaching the contract.

The most commonly used TFC clause comes from the American Institute of Architects (AIA) A201 contract. In Section 14.4.1 of the A201, it reads:

The owner may, at any time, terminate the Contract for the owner's convenience and without cause.

Keep in mind, this exact language is not required. Any contractual language allowing one party to walk away from a contract without requiring any justification of their actions can be considered a TFC clause.

Typically, after a contract has been terminated for convenience, the terminated party is entitled to: payment for work it completed; costs it incurred due to the termination of the contract; reasonable profit and overhead on work that has yet to be executed; and anything else stipulated in the contract. These entitled costs are meant to incentivize parties from terminating their contract for trivial reasons.

The terminated party is also deprived of the opportunity and contractual right to fix, or cure, any defective work; and thus, the terminating party is unable to recover any costs associated with repairing the damaged work. If a party desires to withhold payment for defective work, they can go the traditional route of terminating the contract for cause/default. However, if the parties have contractually agreed that the cost of repairing defective work can be offset, a court will uphold that contractual agreement.

In some situations, outstanding change orders are recoverable after a contract has been terminated for convenience. If the change orders were approved in accordance with the contract, then costs associated with the change orders can typically be recovered. However, if the change orders were not approved in accordance with the contractual terms, or were approved after the contract was terminated, it is likely the costs will not be recoverable.

It is important to note that the minute details of what may or may not be withheld are usually determined by the contractual terms. For instance, some contracts may have a liquidated damages clause – specific damage amounts stipulated by the contract – that take effect when a contract has been terminated for convenience. Other contracts may afford a party to be reimbursed for costs associated with winding its subcontractors. This is entrenched in the theory that parties have the right to contract freely and judges do not want to create a habit of allowing parties to alter contractual terms once a dispute has arisen.

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In conclusion, when a contract has been terminated for convenience it does not seem to be very convenient at all. However, three steps can be taken to make this process more convenient. First, know the language of your contract. Second, explicitly follow the language of your contract. Third, contact your lawyer if a contract is being terminated for convenience. If you follow these three steps, you will maximize the possibility of the process being convenient. ■

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