



The Soto Law Group, P.A.

# CONSTRUCTION PRACTICE GROUP

Legal Information for the Construction Industry

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## TOP TEN CONSTRUCTION CLAUSES PART 5-THE TERMINATION FOR CONVENIENCE CLAUSE

This is the fifth installment in a ten-part series analyzing critical construction clauses. This installment analyzes the termination for convenience clause. The first four articles addressed: (i) [Indemnification](#); (ii) [Mutual Waiver of Consequential Damages](#); (iii) [Liquidated Damages](#); and (iv) [Force Majeure](#).

### A. Overview and Background

Termination for convenience clauses are contractual provisions which permit one party to terminate a contract, even in the absence of fault or breach by the other party, without suffering the usual financial consequences of breach of contract. *Handi-Van, Inc. v. Broward County*, 116 So. 3d 530, 535 (Fla. 4th DCA 2013) (citations omitted). This provision can be particularly worrisome to a contractor who does not include the appropriate safeguards in the event this provision is exercised by the Owner.

The termination for convenience clause dates back to the Civil War where it was developed as a tool for the United States government to avoid costly military procurements that were rendered unnecessary by changing war-time technology or by the cessation of the conflict. *Id.* Following World War II, the use of such termination for convenience provisions expanded into both peacetime military procurement and later into all other realms of Government procurement contracts. *Id.* at 536. Today, termination for convenience clauses are presently included, either impliedly or expressly, in all United States government fixed-price or service contracts. *Id.* (citing 48 C.F.R. § 49.502 (2012)). Locally, all public construction contracts with Broward County are required to include a termination for convenience provision. *See Id.* at 539 (citing *Broward County, Florida Admin. Code*, § 21.70 (2012) (“All construction contracts for Broward County shall contain clauses allowing for the termination of the contract for convenience and prescribe methods in which the vendor may calculate the cost of work already performed, and termination settlement costs.”)).

The termination for convenience clause has also become increasingly common in private-sector contracts and is even included in the American Institute of Architects’ General Conditions of the Contract for Construction (AIA Document A201-2007). Therefore, it is crucial that a contractor fully understand the implications of the termination for convenience clause, as well as strategies to mitigate the losses caused by enforcement of such a provision, before entering into the contract.

### B. Sample Termination for Convenience Provision

The American Institute of Architects’ General Conditions of the Contract for Construction (AIA Document A201-2007), includes the following provision:

## § 14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

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

§ 14.4.2 Upon receipt of a written notice from the Owner of such termination for the Owner's convenience, the Contractor shall

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase order.

§14.4.3 In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

### C. Negotiation Strategies

First and foremost, it is highly advisable that the Contractor negotiates the termination for convenience provision out of their contracts with the Owner, if at all possible. Most Owners and Contractors enter into the contract for construction with the intent to fully complete the project, so from a practical perspective, there is usually little utility in including such a provision. In today's economic environment, with plenty of work available, many contractors enjoy a stronger bargaining position with the owner, and should be able to persuade an owner to remove the provision. However, if the Contractor is working on a federal project, or is unable to convince the Owner to remove the provision, there are a few important mechanisms that should be included to adequately protect the Contractor in the event the provision is enforced.

1. The Contractor must include a similar provision in all of its downstream contracts with subcontractors and suppliers. In essence, whatever the Contractor's upstream rights are with the Owner should be mirrored in the Contractor's downstream subcontracts.
2. To fully protect a contractor's economic expectations and discourage the Owner from exercising the provision, the termination for convenience clause should include the language of AIA A201 § 14.4.3 above that requires payment of the Contractor's reasonable overhead and profit on the Work not executed.
3. The provision, as a matter of law, must require written notice of the termination for convenience. From the Contractor's perspective, this period should be as long as possible to mitigate the adverse impact of the termination for convenience.
4. The provision should set forth the date by which the Contractor must submit its claims for any payment remaining due and the date by which the Owner must make such payment.
5. The provision should state that an Owner cannot utilize the termination for convenience provision solely to obtain a better price from another Contractor or Subcontractor.

Inclusion of the foregoing provisions will not only lessen the impact of an Owner's termination for convenience, but may discourage the act all together, ensuring that the Contractor's economic expectations are fully realized.

#### **D. Notable Florida Cases**

A couple of recent Florida appellate court opinions illustrate how a termination for convenience clause may be utilized in practice. For example, *Vila & Son Landscaping Corp. v. Posen Constr. Inc.*, 99 So. 3d 563 (Fla. 2d DCA 2012) addressed a termination for convenience provision between a contractor and a landscaping subcontractor it hired to perform certain landscaping and irrigation work on a project. The contractor subsequently terminated the landscaper after the contractor sought and obtained a better price for the same work from another subcontractor. The appellate court found that a termination for convenience provision that requires notice is valid and enforceable and the contractor's use of the provision solely to obtain a lower price did not constitute bad faith.

In *Handi-Van, Inc. v. Broward County*, 116 So. 3d 530 (Fla. 4th DCA 2013), Broward County contracted with private entities, including the contractors, for the provision of paratransit services. The parties' contract contained a termination for convenience provision, which permitted the County to terminate the contract for convenience upon notice once a less-costly paratransit system was developed. Once a new paratransit system was devised and new bids by certain providers were accepted, the county formally gave all paratransit providers notice of its plan to terminate their contracts for convenience. The contractors asserted that the County breached its contract by invoking its ability to terminate for convenience without a change in circumstances.

On appeal, the court found that the county's termination-for-convenience clause was independently supported by consideration, debunking any claim of its illusory nature. Furthermore, the county properly exercised its contractual right to terminate the contractors' contract for convenience. Moreover, the contractors were paid in full for all work performed under the contract prior to termination. Finally, the remedies conferred under the contract were effectively met making summary final judgment appropriate.

The takeaway of these cases is that when the contract contains a valid termination for convenience clause that requires written notice of termination, a contractor is at a substantial risk if the Owner subsequently determines that it can obtain the same services at a cheaper cost. Accordingly, contractors would be well-advised to avoid these provisions altogether, or negotiate as many of the protections set forth above as possible.

Consult with an attorney knowledgeable in construction so that together you can negotiate a provision suitable for your business.

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