

A Convenient Ending

Kluwer Construction Blog

December 1, 2009

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Please refer to this post as: Joel Heard, 'A Convenient Ending', Kluwer Construction Blog, December 1 2009, <http://kluwerconstructionblog.com/2009/12/01/a-convenient-ending/>

Recent examples illustrate clearly that cancelling a project can be very expensive. The City of Ottawa recently paid over C\$36 million to settle claims from contractors arising from the cancellation of a light rail transit project. In Montréal, the [termination of a contract to build an incinerator](#) has resulted in years of costly litigation and a large court award against the municipal defendants (which they have appealed). Particularly in the face of current economic conditions, project owners are well-advised to include appropriate provisions in their project contracts giving them the right to terminate without cause. Although "termination for convenience" clauses are not uncommon in construction contracts, they are, somewhat surprisingly, absent from some standard forms, such as the CCDC 2 - 2008 (the flagship standard form fixed price contract in the Canadian construction industry). Even in robust economic times, termination for convenience rights can provide owners with a measure of flexibility (for similar reasons, the inclusion of an express right to suspend the work for the owner's convenience should also be considered).

Without a termination for convenience clause, a party who terminates without having appropriate grounds to do so may be exposed to liability for breach of contract. That liability could include not only the terminated party's out-of-pocket damages, but also its lost expected profits on the unperformed work.

Accordingly, while termination for convenience provisions should address operational and commercial issues unique to the circumstances of the project (including, for example, the timetable and procedures for winding down the work and demobilizing), the key component of a termination for convenience clause is almost always the method for calculating the amount to be paid as compensation to the terminated contractor. Will the contractor be entitled only to payment for the work performed to the time of termination? To what extent should it be reimbursed for its cancellation and demobilization costs? What amounts, if any, should the contractor be paid as compensation for its bid costs, unabsorbed overheads and lost profits? These are some of the questions to which the terms of the contract should ideally provide answers if termination for convenience is contemplated.

To avoid disputes and unpleasant surprises, owners should give thought to including the right to terminate for convenience, and both parties have an interest in ensuring that the compensation to which the party terminated for convenience will be entitled is clearly articulated in the contract.