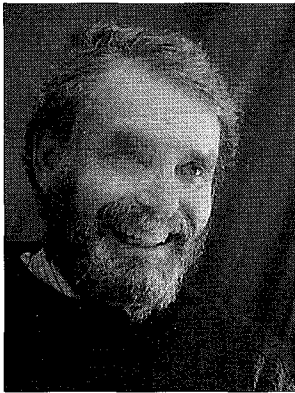


A VIEW FROM THE TOWER

Justin Sweet



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Recently I suffered the classic author nightmare. I had just packed off the manuscript of my forthcoming sixth edition of *Legal Aspects of Architecture, Engineering and the Construction Process* to my new publisher, PWS Publishing Co. To relax I decided to browse a recent issue of volume 27 of our sister *Public Contract Law Journal*. I found a fine student note, on page 117, by Michael

D. Garson. He dealt with the *Krygoski* case¹ and terminations for convenience in the federal procurement system. I had discussed that topic in my manuscript at section 34.03(B) by highlighting the famous *Torncello* case.² The *Krygoski* case, he wrote, cast doubt on the plurality opinion in *Torncello*, which had stated that it would take a change of circumstances to justify use of the power to terminate for convenience. Otherwise, said the plurality, an unlimited power to terminate might make the entire contract invalid because of the one-sidedness created by the power.

I gritted my teeth, but revision it had to be. I added to section 34.03(B) that it was unclear as to the scope of the power to terminate for convenience in federal procurement.

But my troubles weren't over yet. After I sent in the revision, my eyes lit upon the winter 1998 issue of *The Procurement Lawyer* (33 *PROCUREMENT LAW*, 2, at 3 (1998)). It contained a short piece by W. Bruce Shirk. He discussed *District of Columbia v. Organization for Environmental Growth*,³ a recent opinion by the D.C. Court of Appeals. It added to the termination for convenience confusion. Who has the burden of showing whether the termination had been proper, that is, did the government agency act in bad faith?

It is not my purpose to add to the federal procurement literature. These cases have been and will be the subject of much legal writing. But I want to link the confusion over this power in federal procurement shown by these cases with the decision of the American Institute of Architects (AIA) to insert paragraph 14.4 in A201-1997. That paragraph gives the owner the power to terminate for convenience.

Before I get to that, though, Shirk speaks a number of times of the "private sector interpretation." He distinguishes the pedestrian private practice construction lawyer from the expert federal procurement specialist. As you will see, this bears on my theme.

But first, let me compare the federal procurement formula for measuring the contractor's remedy and the one adopted by the AIA. The federal government does not like to pay

profit on unperformed work. This would place a restraint on the federal agency's power to change its mind, the purpose of convenience termination. So the federal convenience termination gives the contractor profit only on work performed. The contractor does not receive his full expectation interest. His restitution interest and reliance interest are protected, including profit on the latter. But he does not get his profit for the entire project.

But AIA Document A201-1997, paragraph 14.4.3, gives the contractor profit on work performed, as well as—I believe—profit on work performed. I do not share Dean Thomson's belief, as expressed in his *Guide to the 1997 AIA Document A201* (Federal Publications, Inc., 1997), that paragraph 14.4.3 can be read to give the contractor only profit on unexecuted work, not on work performed.

If I am right, what is the difference between a default termination (for cause) and one for convenience (without cause)? Since A201-1997, paragraph 4.3.10, requires that each party waive its right to consequential damages (unless paragraph 4.3.10 is deleted), it did not take the termination for convenience to bar consequentials. This expansive remedy may have been needed to get the Associated General Contractors to endorse A201. But why give this power to the owner if the contractor still gets its profit on unperformed work? Looks very much like a default termination, does it not?

The termination for convenience in A201-1997 raises another issue. Will federal procurement jurisprudence (governing by complex regulations, maintaining maximum procurement flexibility, avoiding waste of public funds, barring excess profits, preventing corruption, furthering social and economic objectives, preserving competent defense suppliers, using special dispute resolution, etc.) apply in disputes between private parties?

Bruce Shirk, as I have suggested, draws a distinction between the world of federal procurement and "the private sector." Will "private sector" construction lawyers be able to handle complicated federal procurement concepts? Will Judge Allworthy in the Wisconsin Circuit Court for Dane County consider decisions from the Claims Court or the Court of Appeals for the Federal Circuit? (I believe he would.)

Even more, will the private owner believe its power is absolute (for convenience and without cause)? But as we have seen, this is not the way federal procurement law sees it. Moreover, if even the smart feds do not seem to agree on the limits to the power, has the AIA added unneeded additional confusion?

It should seem clear by now that I do not think much of the owner having a power to terminate for convenience as given in A201-1997. I would strike paragraph 14.4.

Endnotes

1. *Krygoski Constr. Co. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996), cert. denied, 117 S. Ct. 1691 (1997).
2. *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982).
3. 700 A.2d 185 (D.C. App. Aug. 28, 1997).

Construction Lawyer

PUBLICATIONS

Construction Lawyering in the 21st Century: Learning from the Past—Building for the Future (4/98)

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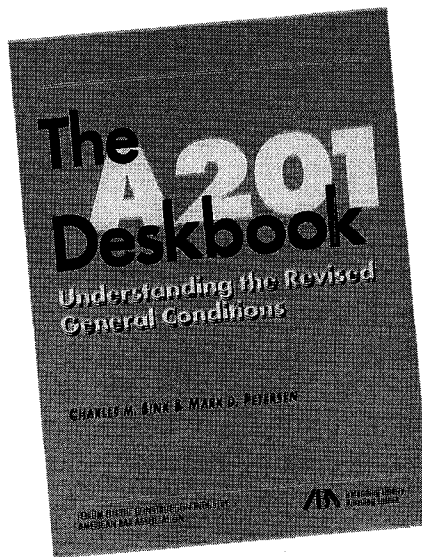
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