



Legal Views

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A Resource from Montgomery County's Office of the County Attorney

November 2008

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A Convenient Truth

Richard H. Melnick

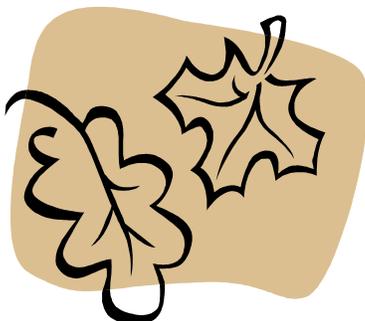
Montgomery County and other governments may terminate a procurement contract: (1) for default, when a contractor fails to perform; (2) by mutual agreement negotiated with a contractor; or, (3) for convenience. Termination for convenience is uniquely available to a government, giving it the ability to reasonably escape from its contractual obligations when circumstances make termination in the government's best interest. See Montg. Co. Proc. Regs, 2.4.95 & 12.3.2; see also General Conditions of Contract Between County & Contractor, paragraph 28. While the government has considerable latitude, this ability to terminate for convenience is not without limitation.

The concept of termination for convenience by the government was developed principally as a means to: (1) permit the government to re-allocate resources from contracts that provided goods and services during peaceful times, in order to fund efforts associated with protecting

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Elevator Owners and Operators Owe Passengers the Highest Degree of Care

Kathryn Lloyd

The Maryland Court of Appeals recently held that elevator owners and operators owe their passengers "the highest degree of care and diligence practicable under the circumstances to guard against injury." The Court examined a case involving Jane Correia, who was injured while riding in an elevator at Johns Hopkins Hospital. The elevator came to a jarring halt, due to a mechanical defect, causing Ms. Correia to sustain back and hip injuries. To determine whether Ms. Correia should be compensated for her injuries, the Court had to first decide what standard of care elevator owners and operators owe to elevator passengers.

Johns Hopkins asked the Court to reconsider earlier opinions, holding that elevator owners and operators owe passengers a heightened standard of care. The basis for Johns Hopkins' argument was that these prior decisions were made when attendants operated elevators and, therefore, any injury sustained from riding on an elevator was based on human error, not mechanical defect, which is what caused Ms. Correia's injuries. Further, Johns Hopkins argued that, today, elevators are serviced by independent maintenance companies. Accordingly, the elevator owners should be less liable for any mechanical difficulties that occur because the maintenance companies are the ones responsible for ensuring that mechanical defects are corrected.

The Court rejected Johns Hopkins' arguments and found that owners of elevators owe elevator passengers the "highest degree of care and diligence practicable

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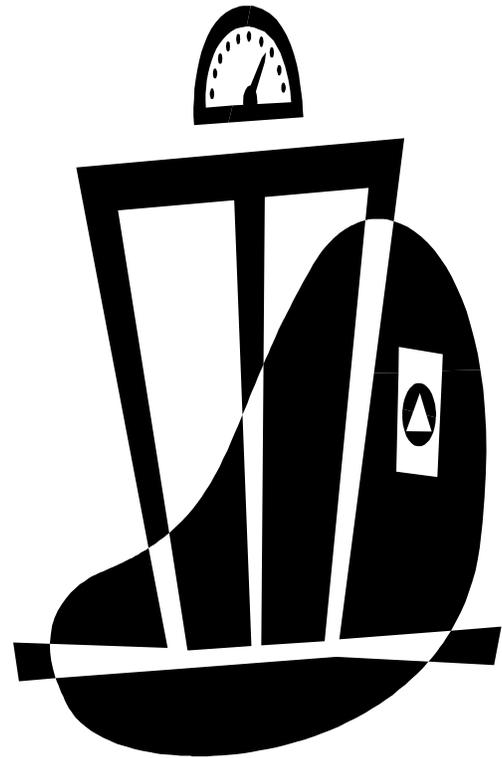
the general welfare during a war; and also (2) end the massive procurement efforts that accompanied major wars in order to allow the government to return to its normal operations without further obligation to the wartime contractors. The totality of all the circumstances will dictate whether a termination for convenience is proper. Courts and contract boards have looked favorably on a termination for convenience where unexpected financial burdens on the government require it to use the specific funds contemplated under the contract for other necessary, public interest purposes. Termination for convenience is most often used, and found proper, when the government no longer seeks the work that was the subject of the contract, and is frowned upon where the timing leaves the appearance that the government is terminating the contract simply to avoid paying compensation to a contractor. An improper termination for convenience may result in a finding of breach of contract by the government, and permit the contractor to receive anticipated profits as contract damages.

A termination for convenience without justification may raise questions as to whether the government furnished adequate consideration to constitute a valid and enforceable contract. Accordingly, courts search for and enforce meaningful limitations on the government's right to terminate a contract for convenience. In addition, courts have consistently held that a government may not exercise its termination for convenience rights if such exercise demonstrates bad faith. The contractor's burden of proving bad faith is quite heavy, including the need to prove "specific intent to injure," or "clear abuse of discretion." But, regardless of the standard of proof, a contractor is entitled to present evidence of bad faith against the government. Furthermore, a government seeking to validate a termination for convenience should be able to show a change in circumstances between the time of contract award and the time of termination.

A government should consider these factors to properly terminate a contract for convenience and avoid the unintended prospect of paying anticipated profits to a vendor. ❖

under the circumstances." This heightened standard of care is the same standard owed to passengers of common carriers, such as trains and airplanes. The reasoning for this heightened standard of care is that elevator passengers rely upon the elevator owner for safety, and the elevator owner should be committed to the safety of passengers. The higher degree of care applies because passenger security is involved. ❖

The Johns Hopkins Hospital v. Correia, 954 A.2d 1073 (August 25, 2008).



Spearin Doctrine – Owner’s Liability for Defective Specifications

John Markovs

Long ago, the Supreme Court ruled that an owner has an implied duty to provide a contractor with accurate plans and specifications. If the faulty plans and specifications prevent or delay the completion of the contract, a contractor is entitled to damages for the owner’s breach of its implied warranty. This decision and the cases that have followed have evolved into what is commonly referred to as the “Spearin Doctrine,” which remains in effect today.

There are generally two types of specifications – design and performance. The Spearin Doctrine only applies to defective design specifications. Design specifications describe, in detail, the materials to be employed and the manner in which the work is to be performed. The contractor has no discretion to deviate from the specifications. When the owner issues a design specification, it must accept the result that it produces. The only issues are whether the design works and, if not, whether the contractor is delayed or otherwise required

to complete the job with the defective design. Performance specifications specify the results obtained, and leave it to the contractor to determine how to achieve those results. The amount of discretion provided to the contractor to choose the means and methods determines whether a particular specification is for design or performance.

There are several defenses to a Spearin claim available to the owner. An owner can assert that the contractor failed to follow the plans and specifications or that the defect in question is a performance specification and not a design specification. If there is a defective design specification, the owner can assert that the defect is so obvious that the contractor should have discovered the defect. Courts tend to apply this patent defect defense in the context of mitigation of damages under the theory that the contractor could have avoided some of the damages by reasonably discovering the design defect.

There are several methods to address the Spearin Doctrine in a contract. The first method is to have the contract contain a “disclaimer” as to the accuracy of the plans and the specifications. The second method is to have the contract contain a “verification clause” that requires the contractor, before commencing work, to verify the accuracy and completeness of the plans and specifications. The third method is to have an “omissions” clause in the contract that requires the contractor to acknowledge that the information contained in the contract documents may not necessarily reflect the conditions encountered on the project. All of the methods meet with varied results in Court because there are always factual issues regarding the information provided by the owner. While certain contract clauses may shift the risk of design defects to a contractor, the owner’s best chance of avoiding Spearin claims in a project is to issue accurate and complete plans and specifications. ❖

United States v. Spearin, 248 U.S. 132 (1918).

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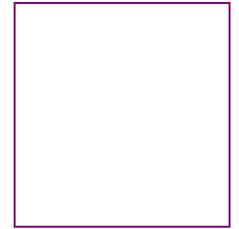
Patricia P. Via

Legal Views is a quarterly newsletter prepared as part of the County Attorney’s preventive law and education efforts. This information is not legal advice, but an informative tool. While we attempt to ensure the accuracy of information, the informal nature of Legal Views does not allow for thorough legal analysis. If you have an interest in a reported article, please contact us. If you wish to be placed on our mailing list, please send your request with your full name, address, and phone number.





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ADDRESS CORRECTION REQUESTED

Three Basic Ingredients of Integrity

T*elling the truth.*

K*eeping one's promises.*

T*aking responsibility for one's behavior.*



Dr. Ross Campbell,
From "Relational Parenting"