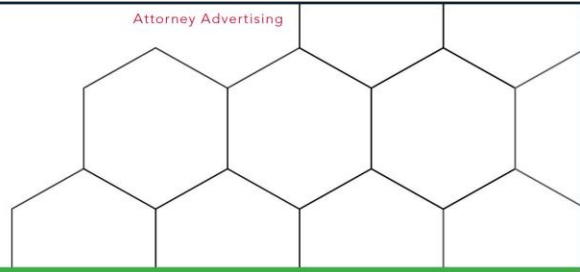


# Robinson+Cole

## Construction + Appellate



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## Termination for Convenience Contract Provision Retains Responsibility for Liquidated Damages

Most construction contracts between an owner and prime contractor provide the owner with the right to terminate the contract for cause or for convenience. In an important decision released in early April, the Connecticut Supreme Court unanimously held that a municipality that elects to terminate the contractor for its own convenience may still recover liquidated damages for project delay incurred prior to the termination of the contract. Under the prime contract, the owner explicitly preserved its right to terminate for convenience “without prejudice to any other right or remedy.”

The Court also rejected the contractor’s claim that the municipality could not collect liquidated damages because it was at least partially at fault for the delays in completing the project, clarifying that, if a contract provides for an extension of the contract’s termination date, due to delays not caused by the contractor, then collection of liquidated damages is not strictly abrogated under Connecticut law. These rulings were made in a lawsuit brought by a contractor against the Town of Southington (Town).<sup>1</sup> Robinson+Cole’s Construction Group defended the Town at trial on the merits; its Appellate Group defended the appeal.

In its appeal from the trial court’s judgment for the Town, the contractor claimed that the Town was precluded from seeking liquidated damages because it had elected to terminate the contract for convenience rather than for cause, relying exclusively on federal government contracting rules. The Court rejected the contractor’s attempts to have the Court adopt a general rule that liquidated damages could never be recovered when a contract had been terminated for convenience. Instead, the Court held that the language of the contract was critical to determining the question. Here, the parties’ contract contained an explicit clause that the Town could terminate the contract “without cause and without prejudice to any other right or remedy to [the Town].” The Court reasoned that, had the parties intended to limit the Town to nondefault remedies, they would not have used language providing such a broad and expansive reservation of rights.

The Supreme Court similarly rejected the contractor’s claim that Connecticut law bars an owner from seeking liquidated damages when it is partially at fault for the delays in the project. Clarifying its own 1975 opinion on the issue, the Supreme Court held that Connecticut law does not follow the strict rule urged by the contractor in all cases where there is dual responsibility for delays; instead, where the contract provides some process for adjustment of the project’s termination date (so that the contractor does not bear the brunt of others’ conduct), then the “strict abrogation” rule does not apply. The Court further noted that the modern trend has been for jurisdictions to abandon the strict abrogation rule in favor of one that apportions liquidated damages between at-fault parties but held that in the present case it did not need to consider whether the rule should be abandoned altogether.

The Court also reaffirmed the importance of a contract’s notice and claim requirements for obtaining adjustments due to delay. Finding that the equitable adjustments sought by the contractor were controlled by specific provisions in the contract, the Court held that the evidence fully supported the trial court’s conclusion that the contractor had failed to comply with those provisions and thereby take advantage of the contract’s procedures. Further, the contractor could not succeed on its claim that the Town had, by its conduct, waived those contract requirements or somehow modified the contract through approval of change orders. Without evidence of a mutual assent to new contract terms (and specification of what those new contract terms were), the contractor could not avoid the consequences of its own failure to

abide by the contract's terms.

[1] *Old Colony Construction v. Town of Southington*, SC 19346 (2015), available at <http://www.jud.ct.gov/external/supapp/Cases/ARocr/CR316/316CR37.pdf>.

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If you have any questions, please contact one of the lawyers listed below,  
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