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The Problem with Sole Discretion Clauses in Construction Contracts

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An increasingly popular trend in construction contracts is to include sole discretion language, which expresses that a breach of contract, change order, withholding, or right to terminate is at the “sole discretion” of the higher tiered contractor or owner (“the higher tiered party”). Depending on how the clause is written, this can lead to drawn-out negotiations over the contract language and disputes during the project.

The Problem with Sole Discretion Clauses

The biggest problem with sole discretion clauses is that they are ambiguous and could be interpreted in vastly different ways, some of which are oppressive and ripe for abuse. For example, a contract might state as follows: “A breach of contract occurs when the owner in its sole discretion determines that contractor has failed to perform under this contract.”

The ambiguity arises because the sole discretion language could be interpreted in either of these different ways:

- **Singular Authority** –The owner has the authority, in its sole discretion, to declare a breach of contract with no need for advance approval from the architect, owner’s representative, lender, surety, or other party. This could be a useful and practical clause in the contract to clarify that the owner does not need any other advance approval from other parties prior to declaring breach.
- **Initial Non-Binding Determination** –The owner has the right, in its sole discretion, to initially declare a breach of contract, which will become binding and conclusive *if the contractor does not dispute it through the claims process*. Usually, these types of process-driven clauses will include additional language that if the lower tiered party disputes the breach, it must respond in writing within a certain time period, and a failure to respond renders the declaration final and binding.
- **Binding Authority** – The owner has the right, in its sole discretion, to declare and deem a breach, and the declaration of breach by the owner is final, binding, and conclusive. When this is the intended meaning, the contract should provide additional context clarifying that the owner has sole discretion to determine the issue and the contractor has no right to recourse or challenge.

Sometimes, the context of the surrounding language will clarify which type of meaning is being given. But often the language is without context, similar to the above example. The clause is important because the outcome of the different interpretations is significant. The last type of meaning, binding authority, is a significant problem because it allows the higher tiered party to be the sole and final judge of rights under contract. While the higher tiered contractor must still use good faith and fair dealing in its enforcement of the contract, this clause is still ripe for abuse.

Simple Solutions

Instead of the sole discretion clause, it is best to stick to conventional contract language, which is much more straightforward. It usually states language similar to, “contractor is in breach of contract if it fails to perform the contract.” Under this traditional language, the higher tiered party can declare a breach of contract if it believes that a breach has occurred, but the ultimate outcome is decided through the claims process and eventually decided by arbitration or litigation.

Contract clauses must be precise with language to reflect the deal agreed to. That may sound obvious, but often a

sole discretion clause is inserted without any thought as to why it is being included in the contract. This is evidenced by the fact that the sole discretion language often lacks context to clarify which of the three uses is intended.

Negotiating and litigating contract clauses requires carefully tailored language and attention to detail. Best practice is to engage counsel for redlining and negotiating clauses and to also contact counsel early in event of a dispute. Saxton & Stump attorney [Ron Pollock](#) is available to discuss how our [Construction Law Group](#) can advise and assist on negotiating complex contract terms and litigating disputes.

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