

Design Professional Newsletter



THE IMPORTANCE OF CONTRACTUAL TERMINATION PROVISIONS

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The primary purpose of a contract is to expressly detail the rights and obligations of the parties. As such, a well-crafted contract will provide guidance on how to proceed in specific situations. For instance, what are the available options for the design professional when the owner has breached its contractual obligations by failing to submit payment for services? Here, a termination provision would provide strong leverage for payment and the means for the design professional to safely exit the project. Unfortunately, many contracts neglect to specifically address the process for, or the consequences of, such termination. Even worse yet, we see a lot of contracts containing one-sided provisions solely favoring the owner. In either situation, the design professional is faced with a distinct disadvantage and a path toward potential liability. Thus, it is imperative that the design professional acts proactively to address termination within the contract.

Termination provisions are typically divided into two groups: (1) termination for cause; and (2) termination for convenience. Each of these provisions effectively concludes the contract but with differing motivations and effects. The following is a brief overview with tips on the best approaches.

A termination for cause provision identifies certain events that act as a trigger for a party to terminate the agreement. Here, a contractual provision listing the failure to pay as a “cause” would provide the unpaid design professional a legally safe avenue to remove itself from the project (we note that a suspension of services provision would also be helpful). The AIA B101 Standard Form of Agreement Between Owner and Architect (the “B101”) contains such a provision at § 9.1. Beyond this, it is advantageous to the design professional to include the inability to agree on additional services or changed conditions as “causes.” On the defensive side, the design professional should start by seeking to define and limit the “causes” for which an owner may terminate. In addition, a notice requirement permitting the design professional the opportunity to cure the triggering event is helpful. Finally, the design professional should work to soften the type and amount of damages recoverable under this provision.

Unlike for cause, a termination for convenience clause does not require any triggering event. The ease with which the design professional's contract can be terminated can pose significant problems in two key areas. First, the design professional's fee is based on the completion of the project. When it is terminated prematurely the design professional can be left without a significant amount of its fee unless the clause contains protections such as a termination fee. This negotiated fee is included in the B101 at § 9.7 in the form of a specified amount or a percentage. Frankly, such a fee is only fair since the design professional is subsuming costs not only from shutting down its services but also from the opportunity costs of accepting this project in lieu of another project that would have permitted completion of services. A termination fee is aimed at softening the impact of termination on the design professional.

Second, if not appropriately protected, the owner could utilize termination for convenience to use the design professional's instruments without full payment or in order to avoid paying for construction administration services. Thus, clearly and expressly maintaining ownership with the design professional in the contract will foreclose this situation. Moreover, the provision could include a licensing fee for any continued use of the documents thereby allowing the design professional to recoup some of its anticipated profits. The B101 contains a licensing fee at § 9.7. In this scenario, the contract should also be negotiated to protect the design professional by expressly shifting the liability to the owner and any others who use or advance the design. The B101 seeks to accomplish this at § 7.3.1. However, this provision expressly states that it does not apply where the architect has been terminated for cause. While § 7.3.1 is a good starting point, the design professional should try to negotiate more favorable terms that provide better protections.

Should you have any questions regarding termination, please feel free to contact Steven Bardsley, Esq. at sbardsley@bardsleylawfirm.com or Sean Ryan, Esq. at sryan@bardsleylawfirm.com.

About the Authors: As a civil trial lawyer for the last twenty-five years, Steve Bardsley has developed extensive experience in multiple practice areas, with recognized skill in professional liability, environmental law, and construction law. He has achieved positive results for his clients in all manner of cases, from slip-and-fall personal injury cases to multi-million-dollar claims related to alleged errors and omissions, construction delays, environmental contamination, fire, collapse, catastrophic personal injury, and death. Steve has an undergraduate degree in engineering, which serves him well in sorting through technically complex construction issues.

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