

Construction Termination Issues for the Architect/Engineer

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Termination, the dreaded “nuclear option” on a construction project, is fraught with issues for the architect or engineer that is performing contract administration for an owner. This paper addresses how to handle the matter while keeping your own risks at a minimum.

How to handle construction administration when the contractor is getting fired

If you’ve been working as a design professional for any length of time, you know that you must be a chameleon on the construction project. You need to “step into the skin” of both the Owner and the Contractor to determine who is at fault, and who should pay.

You are usually the Initial Decision Maker (IDM), and so you have a duty under the AIA documents to act fairly and impartially in making those decisions. *See* AIA B101§3.6.2.4.

Even if you are not under an AIA contract, you still have that duty if you are the IDM or handling construction administration for the project. More often than not, however, it will be the owner asking you to support its termination of the contractor “for cause”.

Should you do so?

Before making any decisions, see what the contract says about when a contractor can be fired. There is usually one set of specific facts that supports this. In A201§14.2.1, the Owner may terminate the Contractor if the Contractor:

1. repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
2. fails to make payment to Subcontractors or Suppliers in accordance with the respective agreements between the Contractor and the Subcontractors or Suppliers;
3. repeatedly disregards applicable laws, statutes, ordinances, codes, rules, and regulations, or lawful orders of a public authority; or
4. otherwise is guilty of a substantial breach of a provision of the Contract Documents.

You may have noticed that these are not set formulas. If job staffing varies from day to day, when does the lack of manpower rise to a justifiable reason to terminate a Contractor for cause? What if the lack of proper, sufficient material for the jobsite is due to outside forces like lack of manpower in the community due to post-pandemic shortages? And what is meant by the nebulous phrase “otherwise is guilty of a substantial breach?”

The Owner will be looking to the design professional to certify that one of these “causes” exists.

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If you make an independent investigation and decide the Owner does not have “cause”, you can remind the Owner of its ability to terminate “for convenience” at any time. For example, §14.4.1 of the A201 states: “The Owner may, *at any time, terminate* the Contract for the Owner’s convenience and *without cause*.” (Emphasis added.)

The difference between “cause” and “convenience” has to do with how much, if any, money the contractor is entitled to from the owner. Simply put, if it is for convenience of the owner, the contractor will get money for lost profit and opportunity; if he is fired with reason, he may end up owing the Owner money.

When terminating a Contractor for cause, the Owner risks a later finding that its action in terminating the contract was without just cause. If this happens and you assisted in making the determination that the Owner’s termination was justified, you will be sued. Almost as sure as the sun sets in the West—if there is a wrongful termination lawsuit, you will be part of it. So, make the decision carefully, and document, document, document the reasons for it.

First, are there any less drastic steps could be taken? For example, the Owner could elect to stop further work until a contractor corrects bad construction. (*See* AIA A201 §2.4). Or, the Owner can carry out work itself, with proper notice and a 10 day opportunity to cure. (*See* A201 §2.5). The Owner may not be aware of these options—so point them about if they could stop the nuclear termination option.

Second, review the contracts to ensure all proper notices are being given. Prior to termination, the Owner must give a 7 day written notice to the Contractor and, depending on the contract used, an opportunity to cure. *See* A201 §14.2.2. The notice should be given to both the Contractor and any relevant surety. If the Contractor does not begin work to correct the deficiencies within 7 days, then the Owner can terminate the agreement and complete the work through alternative Contractors. While the notice requirement is the Owners and not yours, tell the owner, in writing, what they must do.

How to handle contract administration when the contractor is firing the owner

What is your role as the architect when the Contractor is quitting?

First, be aware that there are valid reasons for a contractor to quit within the contract itself. Most of these have to do with time delays/stand stills or failure of the Owner to make payments as required.

The Contractor can suspend or terminate a contract with the Owner for cause, provided a 7 day written notice is given to Owner and Architect. *See* A201§14.1.3.

If this happens, what do you do? First, consult with the Owner to see if there is truth in the Contractor’s assertions. See if payment can be caught up, or any disputed money put into an escrow, or other options that will keep the Contractor working. Ultimately, if the project comes to a stand-still, money will be lost. Where money is lost, parties are sued. Keep the project moving to lower your own risks of being sued.

If there is no way to salvage the situation, make sure to fully document the Project status at the time the contractor quits work. Photographs, videos, a line in the file as to how much money had been earned and paid by the termination date. All will be key evidence in the inevitable law suit.

While the contractor's decision to quit is out of your hands (you don't have to certify anything), documenting the state of the Project can only help all parties later on.

What to do when they want to fire you, the architect or engineer

The Owner can fire you for cause. See B101 §9.4, as long as the Owner gives you 7 days written notice. The Owner may also terminate you for convenience (i.e., for any reason whatsoever) under B101 §9.5, again with 7 days written notice.

As with Contractor terminations, the money you get when fired for convenience is much greater than when you are terminated for cause. If you are fired "for convenience", you get paid for all services previously rendered as well as termination expenses, including anticipated profit on the value of services not performed. *See* B101 §9.7.

But, what about when you are terminated for cause? While rare, this can happen, and it generally means you will not be seeing the lost, but anticipated, profits on the job. Usually this is not as significant as a contractor termination, as during the construction phase you are presumably being paid monthly pursuant to a written contract.

If you are being fired, document everything! Document what has happened, the status of submittals or product samples that you may have but have not yet approved, the pending dates with inspectors—you name it. Put together a nice letter to the Owner telling them everything currently going on with the project. This will protect you as much as it protects the owner.

Secondly, notify your subconsultants. The owner may want them to continue on—you will have to have frank discussions with them about whether they are willing to continue if you are terminated, and in general they will not be able to do so unless you assign the agreement. This is leverage you can use while exiting stage left—use it to get better termination terms or protections from the Owner.

Finally, if you are being terminated because the Owner does not agree with your pay application or work completed determinations, document those disagreements as well.

What if You are the One that Wants to Quit?

Architects are sometimes pleasantly surprised to find out that they, also, can terminate those crazy, hard to deal with Owners—at least, if the Owners fail to make payments as required. You can also terminate for Owner delays to the work, or where you think the contractor should be fired but the Owner disagrees. Again, the standard 7 days written notice is required. (See B101 §9.4).

Do you have to walk off the job if they are not paying you? No—you could exercise the smaller remedy of suspending services (with 7 days written notice) until payments are caught up or the

contract performance is corrected by the Owner. (See B101 §9.1). Suspension rather than outright termination is a softer approach when working with an owner you do not want to burn (too many) bridges with.

Can the Owner use your plans and specs?

The default AIA design professional contract provides that the drawings and specifications are the copyrighted work of the DP (B101 §7.2) and that the Owner is given the limited, nonexclusive license to use them only for the Project. (B101 §7.3). However, if the DP terminates rightfully (due to Owner nonpayment, *see* B101 §9.4), the license of the Owner to use such work of the DP also terminates.

In that case, the DP should remind the Owner of its ownership of the design documents and advise the Owner that it is seeking to fully enforce those rights. The parties can negotiate a release of the documents in exchange for a release of liability or indemnity agreement. The AIA provides for a “licensing fee” under B101 §11.9.

The right to your designs is a critical one—protect it, and use it to protect yourself. Consider both the licensing fee and an indemnity agreement to protect you in the case where you are leaving a project that is still being constructed.

Summary Tips for the design professional

Whether your role is in helping analysis the contractor’s work on the project to certify a termination for cause, or being shown the door yourself, and everything in between, termination is a subject that is ripe with potential problems.

Consider these summary tips as part of your practice, every time the termination idea arises:

1. Remember that you are the neutral and must be impartial between Owner and Contractor
2. After you have made a fair decision, document your decision to the Owner and Contractor
3. Provide options less nuclear for Owners— stop work; removing scopes of work; etc.
4. Guide your Owner on proper termination, notice provisions, and the like
5. Document project status, regardless of who is doing the firing and who is leaving the project
6. Document next steps in the work on the critical path if you are the one leaving the project
7. Discuss the use of your subconsultants if you are leaving
8. Protect your plans and specifications, and only release them with protections (licensing fee; limiting language on the plans; and/or indemnity agreements)