

# Real Estate Journal

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## Breaking up is hard to do: Terminating an under performing subcontractor isn't always simple



Brad Croft

Your site guy did it to you again. He mobilized two weeks late, then, when he finally showed up, he had too few guys, the wrong concrete, and no insurance certificate. Now your project manager is on the phone telling you that the slab elevations are too low and, as if that wasn't bad enough, you learn that his masonry sub just liened the job. That's it. You pick up the phone and tell him to get his "asphalt" off the job immediately. You follow it up with a letter, with a copy to your attorney, telling the sub he's on the hook for any damages caused by his defaults, including your overhead and markup on any replacement sub, plus all of your attorneys' fees incurred dealing with his unpaid subs and suppliers. Ah, that's better. Out with the old, in with the new and back to work.

But then your attorney calls and everything changes. Did you provide written notice of default before terminating the site sub? Did you give the five days to cure as required under the contract? Did you give him the second written notice of default? Did you demand that he bond off the masonry sub's lien? Did you read the subcontract? You're soon wishing you had a "do-over" and worrying that terminating the sub may have caused more problems than it solved.

Although most contractors think of "termination" as a way to end a relationship, many have learned the hard way that if termination is not handled properly, it can be the beginning of headaches, delays, and legal bills. That's because terminating a non-performing contractor or subcontractor is not as simple as it sounds. Usually there are specific contractual provisions which spell out exactly how and under what circumstances a termination can happen. Fail to follow those provisions, and the relationship that you hoped to end could become the litigation with no end in sight.

Although it's perfectly normal to go into a job expecting things to go smoothly, a little dose of cynicism sometimes can be healthy. Here are a few important rules to follow that will help give you the upper hand in the event of a termination for cause:

### **\*Know Your Contractual Termination Procedures Before the Job Starts**

Contractual termination-for-cause provisions come in all shapes and sizes. Some require sending a single notice of default as a condition precedent to terminating a sub, while others require providing multiple notices plus a cure period within which the sub may remedy its default to ward off a termination for cause. It is critical that you are familiar with these contractual requirements before your project starts.

Failing to follow these procedures not only may expose your company to claims by the subcontractor for improper termination, but also may result in an inadvertent waiver of your rights to offset the damages caused by the subcontractor from the amounts otherwise owed.

**\*Terminate on Your Own Terms**

Direct your attorney to draft termination provisions in your contract documents that allow for immediate termination in the event of gross negligence or persistent delays and otherwise make the termination process less cumbersome and complicated. Be sure to include an express right to offset your damages, including attorneys' fees and lien bond premiums, from anything that you may otherwise owe the terminated sub. Maintain close controls over the flow of payments to your subcontractors' suppliers by requiring partial lien waivers and releases as a condition for making future payments. Preserve a right to directly pay any second-tier subcontractors and suppliers.

**\*Keep the Owner in the Loop**

For better or worse, contractors are often judged by the quality of their subcontractors. Contractors may be reluctant to terminate a bad sub simply to save face with the Owner. That's a mistake. The delays, defects, and distractions that a non-performing subcontractor can cause present a much greater risk to a contractor's reputation than the temporary discomfort of telling the Owner that it had to replace its electrician. If the termination means that the project will get done sooner, there's no reason why an Owner should object.

Deciding whether or not to terminate a subcontractor is easy. The hard part is making sure you do it right. Pay attention to the termination procedures in your contract. Call your attorney. Notify the Owner. Be less emotional and more deliberate. Termination should solve your problems, not compound them.

**Brad Croft** is a shareholder and member of the litigation department at Ruberto, Israel & Weiner, P.C., Boston, Mass.

