Scribbles Squibs* #80 (March 15, 2024)[1]:

TERMINATING THE CONTRACTS OF MASSACHUSETTS CONSTRUCTION CONTRACTORS

By Attorney Jonathan Sauer

I. INTRODUCTION

The first thing to keep in mind is that in terminating a contractor, one is not actually terminating the contract itself. What one is terminating is that contractor's right to *proceed* with the contract. No party to a contract can individually terminate the legal existence of a contract. The law treats contracts with something approaching reverence. While a contract's term isn't completely indefinite, what usually ends considerations of contracts is when a statute of limitations providing for a period of time to sue the contract expires. Or, when the parties to a contract release each other as to claims that could be made based on the contract. Or, when the contract itself includes a date within it providing for its conclusion.

The termination procedures discussed below exist at each level of the construction process. An owner might terminate a general contractor. Although more difficult, a general contractor might try to terminate an owner. A general contractor might terminate a subcontractor. A first-tier subcontractor – one with a direct contract with the general contractor – might wish to terminate the contract it has with a second-tier subcontractor.

For the purposes of this memorandum, we will use as an example a general contractor's termination of a subcontractor.

On my website, sauerconstructionlaw.com[2], I have a number of articles discussing a variety of contractual issues. Some are contained within my Construction Law Articles and

[1] A 'squib' is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a 'squib' as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

[2] I have more than one thousand pages of content on my website with my construction articles and my *Squibs*, all of which is intended to help my readers successfully proceed through a construction problem.

others are contained within my *Squibs*, which is my periodic newsletter. As one example, contract termination, along with what constitutes a material breach, was discussed in Scribbles Squibs #22 – November 22, 2013 – Issues Relating to Claimed Material Breaches of Contract (Fifth in a Series)**.**

During the performance of a construction contract, a party to that contract may wish to rid itself of an underperforming contracting party. A vexing question is how to do so without exposing the terminating party (the general contractor, in this memorandum) to litigation brought by the subcontractor for wrongful termination.

This memorandum discusses two common termination mechanisms, being 'terminations for convenience' and 'terminations for fault'.

II. TERMINATIONS FOR CONVENIENCE

A termination for convenience is a mechanism by which a general contractor can terminate a subcontractor for any reason or for *no* reason.

There has to be a contractual provision providing for this in the applicable subcontract.

The following is an example of just such a clause:

"Contractor shall have the right in its sole judgment to terminate for convenience Subcontractor's further performance under this Subcontract. In the event this occurs, Subcontractor shall be entitled to be paid for all of its labor, materials, equipment and work incorporated into Project and as is approved for payment by the Architect and/or by Contractor as of the effective date of the termination for convenience, such payment to Subcontractor being subject to any claims of Contractor against Subcontractor with regard to this Subcontract. Subcontractor will be entitled to no claims for lost overhead and profit as to any omitted work. If a termination for fault exercised by the general contractor is not found to have been appropriate or justified as decided through legal process, then that termination for fault shall automatically be converted into a termination for convenience."[3]

With such a clause, the general contractor would be able to make a claim against the amount of that payment, which would be in the nature of a backcharge. The general contractor would not be able to sue the subcontractor for damages for an amount in excess of such a payment. So, if the general contractor had a significant delay claim that it could bring against the subcontractor, it might not want to terminate the subcontractor for convenience.

This might especially be the case: (a) where the subcontractor is believed to have the ability to pay a judgment against it; (b) where the subcontractor's performance is secured by a performance bond, which would cover the subject matter of the general contractor's claim; or

[3] The last sentence of this paragraph has nothing to do with terminations for convenience. It has been inserted in here to (hopefully) help provide a more favorable result with a termination for fault that might otherwise cost the general contractor some money if the termination is found to not have been justified.

(c) where the subcontractor has no winnable claim it might make against the general contractor as a counterclaim.

For such a termination, it is not necessary to give the subcontractor any specific number of days' notice before a termination for convenience is declared. The general contractor will want to establish in its notice of termination for convenience what the effective date of this termination is so that the value of the subcontractor's supply of labor and materials and equipment has a cut-off point after which date the subcontractor would have no claim for labor or material or equipment supplied to the project.

III. TERMINATIONS FOR FAULT

It should be kept in mind that an owner has an absolute right to terminate a general contractor. After all, the owner owns the property in question and has the right to say who can lawfully be on it. And, a general contractor has an absolute right to terminate any subcontractor because, as the general contractor, it has a contract right (and control) as to the entire general contract. This gets the unwanted general contractor or the unwanted subcontractor off of the job. But, the terminated party can always sue the terminating party for wrongful termination. If the terminating party can prove, however, that the terminated party materially breached the contract in question, the chances of a wrongful termination claim in court being successful are small.

It should always be kept in mind that often the initiation of a termination for fault process through the issuing of a notice to cure, as an example, is really intended to get the subcontractor's attention to make it perform better. This is especially more effective where the subcontractor is bonded. Once a surety receives a performance bond claim, there are any number of very unpleasant things that it can do to the subcontractor (the bonded principal) and to the individual indemnitors (generally, business owners and their wives) to improve its performance. These rights are given through the 'common law' and, also, through the general indemnity agreement the subcontractor (and the individual indemnitors) signed to get its surety line. My experience has been that bond principals seldom read the general indemnity agreement before they sign it. I have also found that many bond principals can't even locate a copy of the general indemnity agreement that they signed.[4]

For such a termination to be successful would generally require that the subcontractor has materially breached the subcontract. While a termination for convenience is a 'no fault' process, a termination for fault requires that there be fault on the part of the terminated contractor sufficient to justify termination.

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[4] For those having an interest, I have a paragraph-by-paragraph explanation of what a typical general indemnity agreement provides for and means. This is in the Construction Law Article with the title of "Understanding the General Indemnity Agreement and Other Surety Issues in 2013."

When a party has made a termination for fault which the finder of fact (usually, a judge) in a court case finds lacks a sufficient basis, the defaulted party can collect damages from the general contractor for wrongful termination. Typical damages in a wrongful termination case include the lost profits the terminated party would have earned for the remainder of the contract it was not allowed to complete, along with whatever monies it had earned and billed but had not been paid.

There is no one-size-fits-all definition as to what constitutes a material breach of contract. Some definitions have been supplied by various appellate courts, examples of which are discussed below.

Various examples of conduct that can rise to a material breach of contract are also provided in various industry-standard contract forms. Meeting the criteria of any of these forms is useful for the purposes of justification for the termination, as they create an objective standard that has been adopted by one or more of the standard forms discussed below, which standard had been promulgated prior to the act of termination. And, since the contract form pre-dated the termination, the terminating party said that it relied on what were contractual requirements before it terminated the other side.

We will discuss some of the forms giving us definitions of material breach of contract and then will provide some Massachusetts appellate case law that also provides us with definitions. It is interesting to note that one of the American Institute of Architects (AIA) contract forms provides the criteria by which the general contractor can terminate the owner.

A. AS PROVIDED FOR BY MASSACHUSETTS GENERAL LAWS (MGL) C. 149, S. 44F AND AS CONTAINED WITHIN THE FILED SUB-BID SUBCONTRACT:

"If the Subcontractor **should be adjudged a bankrupt**, or if he should **make a general assignment for the benefit of his creditors**, or **if a receiver should be appointed** on account of his insolvency, or if **he should persistently or repeatedly refuse or should fail**, except in cases for which extension of time is provided, **to supply enough properly skilled workmen or proper materials**, or if **he should fail to make prompt payment to subcontractors or for material or labor**, or **persistently disregard laws, ordinances or the instructions of the Contractor, or otherwise be guilty of a substantial violation of any provision of the contract**, then the Contractor may, without prejudice to any other right or remedy and after giving the Subcontractor and his surety, if any, seven days' written notice, terminate the employment of the Subcontractor and take possession of the premises and of all materials, tools and appliances thereon and finish the work by whatever method he may deem expedient." (Emphasis added)

One notes that this is a very specific list of claimed sins of omission and commission. It is especially helpful because this occurs within the filed-sub-bid statute which, generally speaking, favors the rights of subcontractors over the rights of general contractors. Most of the time that a public general contractor would probably want to terminate a subcontractor would be with filed sub-bidders, the relationships with which can often be tenuous inasmuch as they are not chosen by the general contractor but by and through the filed sub-bid process and system where the subcontractor with the lowest bid amount usually gets the job. These are so-called "Item 2" subcontractors. "Item 1" subcontractors are subcontractors a general contractor works with job after job and with which the general contractor has a continuing relationship.[5]

[5] References to "Item 1" subcontractors and "Item 2" subcontractors refer to the statutory form for general bids for the construction of public buildings, as contained within Massachusetts General Laws (MGL) C. 149, s. 44E. "Item 1" subcontractors are non-filed sub-bidders, which are subcontractors the general contractor picks itself and

B. AIA A401 SUBCONTRACT DEFINITIONS:

As contained within this subcontract form is paragraph 7. 2:

"**If the Subcontractor repeatedly fails or neglects to carry out the Work** in accordance with the Subcontract Documents or **otherwise to perform in accordance with this Subcontract** and **fails within a ten-day period after receipt of notice to commence and continue correction of such default or neglect with diligence and promptness,** the Contractor may, by notice to the Subcontractor and without prejudice to any other remedy the Contractor may have, terminate the Subcontract and **finish the Subcontractor's Work by whatever method the Contractor may deem expedient."** (Emphasis added).

As will be discussed later in this memorandum, both of the first two subcontract forms discussed above require that before the general contractor can terminate the subcontractor it has to first give the subcontractor a 'notice to cure'. The first form applicable to Massachusetts filed sub-bidders requires seven days' notice to the subcontractor to cure and the form immediately above, which is a common AIA form not tied into any particular state, requires ten days' notice for a notice to cure. Since giving subcontractors a notice to cure is a condition precedent before the general contractor can terminate the subcontractor, the number of days required for the notice to cure should be strictly followed.

C. AIA A201 (GENERAL CONDITIONS FOR THE GENERAL CONTRACT), INCORPORATED BY REFERENCE INTO MOST SUBCONTRACTS.

This standard form underscores the fact that either party to a contract can declare the other to be in default. Usually, one thinks of a termination to be a downstream mechanism, affecting construction levels below that of the terminating party. This form establishes the basis for a termination for fault by the general contractor of an upstream party, the owner.

"14.1.1 "The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, for any of the following reasons:
.1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
.2 An act of government, such as a declaration of national emergency, that require all Work to be stopped;
.3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because

frequently uses job after job. The price and conditions by which the contract will be performed by Item 1 subcontractors are not public documents/information. "Item 2" subcontractors are filed sub-bidders who are the bidders for eighteen specific trades identified in the Massachusetts public bid laws. They bid to the owner and their bid amounts are public. The general contractor does not have the legal authority to attempt to negotiate with an Item 2 subcontractor for a lower price.

the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or

.4 The Owner has failed to furnish the contractor reasonable evidence as required by Section 2.2. **(ED.** Under this section, the owner is under an obligation to furnish the general contractor when it requests it with evidence that it has a sufficient amount of money with which to do the job.)

14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, repeated suspensions, delay, or interruption of the entire Work by the Owner as described in Section 14.3, constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less."

D. OTHER EXAMPLES OF POTENTIAL MATERIAL BREACHES OF CONTRACT:

1. The subcontract says that the subcontractor is supposed to work day-to-day until its work is done. It missed four non-consecutive days during a six-month construction period. This is probably not a material breach of contract on the part of the subcontractor.
2. The subcontractor has failed to pay its material suppliers and subcontractors for which it has been paid by the general contractor. This is probably a material breach of contract on the part of the subcontractor.
3. The subcontractor without justification has abandoned the job. This is probably a material breach of contract on the part of the subcontractor.[6]
4. The subcontractor files for bankruptcy or makes an assignment for the benefit of creditors or has a receiver appointed for it. Any of these events is probably a material breach of contract on the part of the subcontractor.
5. The subcontractor is five days late in getting its submittals in. This is probably not a material breach of contract on the part of the subcontractor.
6. The subcontractor fails to supply its 'safety policies/plan' as required by the subcontract but for which the general contractor has not made a specific request for prior to issuing a termination notice. This is probably not a material breach of contract on the part of the subcontractor.[7]
7. The subcontractor persistently or repeatedly fails to supply a sufficient number of properly skilled workmen to the project. This is probably a material breach of contract on the part of the subcontractor, particularly if the subcontractor is failing to keep up with the various milestones of an applicable schedule.
8. The subcontractor supplies materials that are significantly sub-standard and/or are not in accordance with the requirements of the contract documents and/or do not comply with its

[6] Under Massachusetts law, a subcontractor which is not getting paid without general contractor justification does not have an obligation to work until it is paid. So, in evaluating whether or not any particular period of time constitutes an abandonment or not may depend on the status of the general contractor's payment history with this subcontractor.

[7] In this type of situation, the general contractor has probably 'waived' its rights to receive the subcontractor safety plan, at least in terms of this not being justification for a termination. 'Waiver' is defined, legally, as 'an intentional relinquishment of a known legal right.'

approved submittals. This is probably a material breach of contract on the part of the subcontractor.

9. The subcontractor misses attending three non-consecutive safety or subcontractor meetings. This is probably not a material breach of contract on the part of the subcontractor.
10. The subcontractor is terminated on the current job based on the general contractor's discovery of the subcontractor's poor performance on a previous job and where the subcontractor has not failed to meet any of the contractual requirements of the present job. This is probably a material breach of contract on the part of the general contractor.
11. The general contractor terminates the subcontractor based on a belief that the subcontractor is going to materially breach the subcontract in the future, although as of the date of termination, the subcontractor has not failed to meet any significant subcontract requirements. This is probably a breach of contract on the part of the general contractor.[8]
12. The general contractor terminates the subcontractor where the subcontractor has not failed to meet any material contract term or legal requirement. This is probably a breach of contract on the part of the general contractor.
13. The general contractor of its own initiative – not required by the owner – significantly accelerates the job without the subcontractor's agreement, which causes the subcontractor to fall behind based on dates stated in the accelerated schedule. This is not an easy question. This would become an issue of fact between the parties in any legal case to determine which party, if either, has materially breached the contract. It may be that neither party has breached the contract.

E. JUDICIAL DEFINITIONS OF EVENTS THAT COULD BE CONSIDERED TO BE MATERIAL BREACHES OF CONTRACT AND THE RAMIFICATIONS FLOWING FROM THEM.

Before we get to these, here's a definition of 'material breach' from a leading legal dictionary: "A breach of contract that is significant enough to permit the aggrieved party to elect to treat the breach as total (rather than partial), thus excusing that party from further performance and affording it the right to sue for damages."

Massachusetts case law defines material breaches of contract and the results of a material breach of contract.

One case defines this thusly: "A material breach of a contract by one party generally excuses the other party from further performance."

Another judicial definition: "Material breach" of an agreement occurs when there is a breach of an essential and inducing feature of the contract.

Another case said this: "Generally, an intentional departure from precise requirements of a contract is not consistent with a good faith endeavor fully to perform it, and unless such departure is so trifling as to be *de minimis*, it bars all recovery."

[8] Legally, this is called an 'anticipatory breach of contract'.

The following is an important thing to keep in mind. If a party materially breaches its contract, there is substantial Massachusetts case law that says it cannot sue the other party for *any* damages, even when the damages in question would otherwise be recoverable in the absence of the material breach of some other part of the contract. Because of this legal principle, I usually tell subcontractors to perform disputed work which they claim is an extra but which the general contractor claims is contract work. I suggest to the subcontractor that they get a specific direction in **writing** from the general contractor directing the subcontractor to perform the work. I further advise subcontractors to provide **written** notice to the general contractor that they are doing the work under protest, fully reserving their rights to collect for the claimed extra at some point down the road. Similarly, I usually advise subcontractors to not withdraw from jobs because they claim that they are being underpaid by the general contractor.

Note that I use the word 'written' several times, both immediately above and elsewhere. Oral statements don't really mean anything, unless they are witnessed, because there is no evidence to third parties of the fact that the statement was actually made. And, also, there is no evidence to third parties of what the substance of the oral statement was. When there is a writing of some kind – emails are excellent 'writings', by the way – both of these issues disappear.

One case defines what is 'material':

> "A breach is material where it is so serious and so intimately connected with the substance of the contract as to justify the other party in refusing to perform further. . . . In the construction contract context, the nonpayment of a substantial sum of money owed under the contract has been held to constitute a material breach warranting termination of the contract. . . (owner's failure to pay contractor monthly payments for work performed was material breach); (contractor's nonpayment of $25,000 owed to subcontractor was material breach of subcontract where contractor had been paid by owner for the work) . ."

F. IF TERMINATION FOR FAULT SEEMS LIKELY DOWN THE ROAD, CREATE A GOOD WRITTEN RECORD THAT WILL SUPPORT SUCH A CLAIM.

If either party sues the other with regard to a termination for fault, the finder of fact (either the judge or a jury) will determine which party was wrong. If the general contractor terminates a subcontractor for fault, a judge or jury might not agree that the termination for fault was justified. If such is the case, then it could be the general contractor liable to the subcontractor for damages for wrongfully terminating the subcontractor and not the other way around.[9]

[9] In the sample termination for convenience paragraph included above, that paragraph says that where a judge or jury finds the termination by the general contractor of the subcontractor to be wrongful, such termination is automatically converted from a termination for fault to a termination for convenience. In other words, this language takes a situation where the general contractor might be liable for damages for wrongful termination to being a situation where the general contractor is no longer liable for any damages to the subcontractor other than paying the subcontractor for whatever work it has supplied that has been approved by the general contractor and/or by the architect.

Establishing what the facts are in any civil case can be difficult, particularly where construction cases often don't come to trial for a period of five years, during which time key witnesses become unavailable and where the memories of those witnesses that are available are likely to fade.[10]

Creating a good, sequential, reasonably well-documented record of what is happening/has happened at the job *before* a termination notice is issued is a key factor in having more successful terminations. Where the record is strong in supporting the termination, a subcontractor is less likely to pursue the general contractor for a claimed wrongful termination in terminating the subcontractor for fault. This can occur when there have been a number of emails and letters from the general contractor to the subcontractor pointing out specific deficiencies with its work, particularly in terms of defective or incomplete work, failure to pay suppliers, failure to work continuously from day to day, failure to man the job with crews of sufficient size and, especially, demonstrating an inability to keep up with the schedule. Any of these events becomes stronger when the subcontractor does not provide a written denial or objection to any such statements made by the general contractor and does not otherwise have the records with which to rebut the general contractor's contentions.

1. DAILY REPORTS

Written daily reports are a good source of information to establish the facts necessary to support a given claim for termination for fault or for wrongful termination when the shoe is on the other foot.[11] When a contractor can demonstrate that it keeps daily reports for all of its jobs, whatever is contained on those daily reports goes into evidence just as is without establishing any other form of evidence foundation because under Massachusetts law, the written daily reports are what are called 'business records'. They can be especially important in that whatever is in those daily reports goes into evidence even where aspects of the daily reports wouldn't otherwise go into evidence for various evidentiary reasons, including being excluded as 'hearsay evidence' (out of court statements).

So, for example, if the superintendent of the general contractor were to say outside of a court proceeding that the architect delayed the general contractor for this day or that day, such statements usually can't be introduced into evidence without meeting a variety of foundation requirements for that evidence, which may or may not be possible. But, if such statements are contained in a written daily report, they will go into evidence just as is.

Since construction cases take five years to come to trial in the superior court, at such time as testimony is needed, the witness may no longer remember the particulars of any particular job.

[10] Or, where the employee, who would have testified in favor of the general contractor at the time when the operative facts occurred, can now be expected to testify *against* the general contractor, possibly seeing the general contractor now as an enemy because of having been terminated or over disputes over pay and benefits or for a myriad of other reasons, including claimed incompetence.

[11] Although Procore is highly useful in performing a variety of construction functions, I have been told that the daily reports it generates can be subsequently altered after they have been created. In my view, the ultimate uncertainty as to this system's digital reports may make such reports less likely to be accepted into evidence by a judge as competent evidence.

Or, a necessary witness is no longer available to testify.[12] Or, a necessary witness is available to testify but s/he is likely to testify against the general contractor's interests because of the way s/he feels s/he was unfairly treated after this project. I can recall a trial where I subpoenaed a former employee of my client's to testify. He said: "if you call me as a witness, I'll make you wish that you hadn't". I took him at his word and didn't call him as a witness.

Creating a written record for all time as to what a witness would testify to is created when there are good, written daily reports. And, as in the last example given above, the daily report, which the witness prepared, would be very good in proving my client's case. Years later, he would have testified against my client's interests, even where that testimony would be contradicted by the daily reports he prepared years earlier.

Establishing what the weather is on any particular day can take a lot of time, work and expense to develop in the absence of what the daily reports lists as the temperatures for various parts of the day.

For example, was it too cold to paint? Many specifications require a minimum temperature to be maintained over a twenty-four hour period below which there can be no painting. That could be shown or not shown in a daily report based on the temperatures listed for various times during the day.

2. DATED PICTURES AND VIDEOS

Dated pictures and videos can also be evidence of any number of things, either establishing a material breach of contract or establishing a party's defenses to such a claim that might be made by the other party.

So, for example, a general contractor might contend that a mechanical subcontractor is falling behind on the job, thus justifying either its termination or establishing the basis for a future general contractor claim for delay damages.

The mechanical trades usually work concurrently and have similar percentages of completion at any particular time during the performance of the job. So, having pictures not only of what any particular mechanical trade has performed as of any particular point in time but also of the progress of the other mechanical subcontractors as of that same point in time can often establish the basis for a general contractor claim for delay or establish the basis for a defense to a general contractor's claim for delay.

[12] In my last superior court trial, a key witness would have been the general contractor's (my client's) site superintendent. By the time the case came to trial, he was out of state, which means he couldn't be subpoenaed. He might not have been a good witness in any event where he was in the process of dying from Agent Orange.

3. GOOD RECORDS MIGHT CAUSE A CASE TO SETTLE OR CONCLUDE EARLIER, SAVING YOUR COMPANY TIME, MONEY AND USING YOUR COMPANY'S SUPERVISORY PEOPLE MORE EFFECTIVELY

Good records shorten how long a trial might take. They can also make the introduction of evidence easier.

Apart from that, only about 1% of superior court civil cases actually goes through an entire trial. For any number of reasons, a case will either settle or get dropped or be resolved in some other way before a complete trial takes place.

These reasons include how expensive it is to prepare a civil case for trial from beginning to end. Also, key project management people may have to devote a great deal of their own time for both preparing and presenting a case. They seldom make as much money in court for their employer as they would make through good project management outside of court on a company's current jobs. As discussed above, key witnesses may no longer be available to testify or will testify against their formal employer. The rules of evidence are complex, which means proving something can be difficult or even impossible.

In the ordinary Massachusetts civil case trial, the party that wins is not awarded its attorneys' fees with two exceptions, one of which only occurs infrequently. Having one's day in court usually comes with a high price tag. And, the statue of Lady Justice is usually depicted as having her eyes covered, possibly because she cannot bear to see the level of dishonesty that can occur in the trial of a civil case, whether it's a witness lying about the facts or a lawyer misrepresenting to the court what the applicable law is.[13]

Since reviewing the other side's relevant documents is one of the first steps that occurs in litigation, which side has the better records will be fairly obvious fairly quickly. Assuming both sides have reasonably decent lawyers, which party is likely to win should be fairly obvious in most cases. And, a significant factor that will determine that is which side has the better records.

G. GIVE THE SUBCONTRACTOR A WRITTEN 'NOTICE TO CURE' PRIOR TO ACTUALLY TERMINATING THE SUBCONTRACTOR, EVEN IF THE CONTRACT DOES NOT REQUIRE THAT BECAUSE DOING SO IS WHAT MOST JUDGES WOULD CONSIDER TO BE WHAT A 'REASONABLE MAN' WOULD DO.

A general contractor should give a 'notice to cure' to a subcontractor it is intending on terminating prior to terminating that subcontractor even if the contract does not require that. This notice to cure should allow the subcontractor at least seven days to correct its claimed defects.

A general contractor never wants to put itself in the position of having the subcontractor testify in court as follows: "The general contractor never wrote to us that there was an issue

[13] Since the breadth of 'the law' is so extensive, judges, who have to be jacks of all legal trades as to a *lot* of legal trades, may enter a trial knowing less about the applicable law than the lawyers.

between us. We didn't realize that there was one or that it was as serious as we later learned the general contractor believed it to be after we were terminated. Had the general contractor advised us in writing prior to its issuing a termination notice that it was displeased with our performance for this reason or that reason, we could easily have rectified that situation."

Exactly how could a general contractor intelligently respond to such statements, particularly where everyone is in court and there is no further time to develop and prepare evidence?

In the legal world, things that are oral are frequently useless. One should never assume that s/he can tell the truth better than the other party can lie. For many years, I represented a general contractor which had a printed notepad, at the top of each page of which said "VERBAL ORDERS DON'T GO".

In the law, there is something that is known as the 'statute of frauds'. Basically, what this means is that for any number of legal transactions, such as conveying real estate, the transaction has to be in writing to be valid. One might ask why. Well, the answer is in the title of that requirement: 'statute of *frauds*'. When things are in writing, there is a greater certainty as to what is going on with less possibility of a party's simply making up claimed 'facts'.

My near fifty years' experience as a lawyer has demonstrated time and time again that most judges don't like construction cases and one of the reasons for that is that they don't understand the process of construction.[14] An even greater number of judges don't know or understand the public bid laws.

What non-lawyers don't understand is that 'the law' has any number of subject matters for which there is no governing law.

One thing that tends to lend assistance in such situations is the 'reasonable man standard'. This has been described thusly:

> "The Restatement favors the standard of the reasonable person which demands no more than ordinary care in the circumstances. The mythical character, "the reasonable man of ordinary prudence", was first introduced into the law of negligence in 1837 in an English case. In reality, he has never existed, but he is necessary in the law. He sets the standard. The reasonable person or person of ordinary prudence never takes the unreasonable risk. Risk taking which results in harm to another may or may not be actionable, depending upon the nature of the risk. A person is not liable for taking reasonable risks. The reasonable person does this. Liability is founded on unreasonable risk taking." 37 Mass. Prac., Tort Law § 11.5 (3d ed.) § 11.5. Standard of care— Reasonable person—Nature of risk—Foreseeability.

[14] Construction trials tend to be boring to those who are not involved in the construction process because of how dry (boring) they are. Also, non-mechanical types don't understand or appreciate the technical aspects of construction that are frequently part of these trials. Construction trials can often have exhibits that are several *feet* high. And, from a judicial standpoint, these cases take too long to try. This concerns judges because, rightly or wrongly, one way that a judge's superiors evaluates the judges performance is how many cases a judge can process (get rid of) during any particular time period.

That definition was given within the context of a negligence case. But, that same concept exists in contract law. Namely, whatever one has done, has s/he acted reasonably?

Terminating a contractor's right to proceed with a contract can have many negative and very serious consequences for the terminated party. Termination might cause the terminated party to go out of business, thus ending the employment of its various employees, severely adversely affecting their families.

So, a judge reviewing issues pertaining to the correctness of a contract termination will be looking to see if the terminating party acted reasonably. And, where the terminating party brings a case for damages, it will have the burden of proving that it *did* act reasonably. One way to prove that reasonableness will be for the terminating party to demonstrate that it gave the party to be terminated an opportunity to correct its behavior. In the absence of the receipt of a notice to cure, that party may have been unaware of the extent of the terminating party's dissatisfaction and concerns or at least can claim that it wasn't aware of these things.

Not giving the party to be terminated written notice of its contracting party's extreme dissatisfaction with its performance might cause a judge to draw the inference that there weren't sufficient grounds to terminate the contractor because, if there were, the terminating party would have been given **written** notice to the party whose rights were going to be seriously affected by the termination that there was a problem. And, also, that party would have been given an opportunity to remedy that problem. Because, that is what a *reasonable* person would do.

H. SUPPLEMENTING A SUBCONTRACTOR'S PERFORMANCE IS OFTEN A GOOD ALTERNATIVE TO TERMINATING THAT SUBCONTRACTOR.

This can be useful if the subcontractor's performance throughout the job has been basically adequate but for one specific period of performance or as to one specific item of construction. For whatever reasons, the subcontractor simply cannot supply sufficient workmen and crews that the job requires at a specific point in time where a greater number of workers and increased crew size is what the job requires.

Like a termination for convenience, to supplement a subcontractor's performance, one needs to have contractual language allowing the general contractor to do this in the underlying contract.

Such a clause might read as follows:

"Contractor shall have the right, but not the obligation, to supplement Subcontractor's forces in the performance of the Subcontract work, if the Contractor determines in its sole judgment that such is necessary to keep up with the Schedule**.** Any costs that Contractor incurs as to any supplementation it supplies Subcontractor, including project management fees, shall be deducted from the next available monies due Subcontractor."

There is no inherent right to supplement another's performance with regard to the performance of a construction contract. Attempting to supplement a subcontractor's performance without language such as the above quite likely is a breach of contract on the general contractor's part inasmuch as such supplementation is interfering with the subcontractor's property rights to perform (and get paid for) all of the work described in the subcontract. If a party gets supplemented, that means it will not be able to perform all of the work of its trade and will lose the overhead and profit it would have earned in the absence of termination.

IV. CONCLUSION

As the above makes clear, terminations for convenience can be quite useful as they can't be contested. They have it all over terminations for fault because they *can* be contested.

When it looks like a termination for fault is likely to occur in the future, the general contractor should document its position as early as possible, trying to tie the potential grounds for termination into one or more of the concepts that support termination above.

The general contractor should provide the subcontractor to be terminated with a 'notice to cure', which both advises the subcontractor as to the seriousness of its situation with identified claimed negligent or insufficient acts and omissions and which also provides the subcontractor with a certain period of time within which to correct its claimed insufficient performance.

This accomplishes two things that a judge or jury will be looking at if they are asked to decide an issue relating to claimed wrongful termination.

First, was the subcontractor advised in **writing** prior to its termination that its performance was claimed to be defective and/or did not comply with the contract documents in some way? And, once so notified, was the subcontractor given an opportunity to correct or remedy its performance?

My sense is that in many (most?) cases, the subcontractor will be unable to correct its performance within the short period of time it is given within which to do so.

But, at the very least, it should be given that chance.

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