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Don’t Just Kick a Contractor Off the Project

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Have you ever had a personality clash with a lower-tier contractor and wanted to get a different contractor on the project? Have you ever thought that the general contractor was making your job unnecessarily difficult for no good reason, just to run you off the site? Let's take a look at some things that will help you decide whether terminating the contract makes sense.

Always double-check your reason for terminating a contract. As with most of the decisions you make on your project, not only what you do but also how you do it can have costly repercussions. Terminating a contract is one occasion when it pays to do it right. Don't be the contractor who gave a reason for ending the subcontractor's contract that was not supported by what happened during the project or the language of his contract. When this happens, you might have wrongfully terminated the contract and have to pay significant damages.

In one example, a general contractor said he terminated his subcontractor because the subcontractor failed to complete the contract on time. However, the parties' contract did not have any specific time requirements or work schedules, and the replacement subcontractor's contract also did not have any time requirements or schedules. In addition, when the original subcontractor's pace of work was compared to the replacement contractor's schedule, the replacement subcontractor worked at the same speed as the original subcontractor. Was the termination appropriate? No. Remember: the contract is the first place to look. In the absence of a specific contractual time requirement – the contract did not require the subcontractor to finish by a set schedule – the court concluded that the work only had to be completed in a reasonable time under the circumstances, and the general contractor had wrongfully terminated the contract.[1]

Why can't you just ask the contractor to leave the project? Simply put, if you don't do it right, you could face monetary damages. There are good reasons to end a contract, and there are bad reasons, too. Here are just a few of the well-known good reasons:

- The contractor is fully unable to complete or incapable of completing the contract.
- The contractor abandons the contract and just leaves the project.
- The contractor indicates he is no longer going to be bound by the contract terms.
- The contractor commits fraud involving the project.[2]

The list of bad reasons is endless. Many of them arise because of conflicts not related to the project that cloud your good business judgment. Keep in mind that one of your goals on every project is to complete the project within budget. Abruptly terminating a contractor can derail this goal and ultimately result in greater costs.

A frequently given reason for terminating a contract is faulty performance. Giving this as the reason, though, could be a trap of your own making. For example, if you fail to give your contractor sufficient notice, you may be breaching your contract. In this situation, the contractor can argue that he was denied the opportunity to cure any defects, and he may be entitled to damages.

But what if your contract does not have a specific notice provision? As a matter of fairness, equity, and common law, it still is a good idea to give notice. Why? Perhaps the most significant reason for giving notice and an opportunity to cure is that it can promote the informal resolution of disputes and the cost-effective and timely correction of faulty work. Make it a rule of thumb to give notice and an opportunity to cure before terminating a contract for faulty performance. It allows you to

- make clear what you think the problems are,
- state how you want them corrected, and
- determine what the other party intends to do about them.

At the same time, it gives the other contractor the opportunity

- to show you there is no problem,
- to repair any defective work if there is a problem,
- to reduce damages, and
- to avoid additional defective performance.[3]

After a dispute has arisen between you and your contracting partner, and someone else is looking at what went wrong and why, one of the elements of the analysis will be the extent to which everyone communicated about the problems and the solutions. If you alone are aware of defective work, and you fail to communicate your concerns, don't you run the risk of being found to have accepted the work?

But what happens when you and the other contractor are similarly familiar with the facts about the alleged problems? In this situation, it is possible that you may not be required to give notice. In one Tennessee case, the court found that an owner was not obligated to pay damages to the contractor even though the owner had failed to give the contractor an opportunity to cure. This makes sense. Both sides had similar access to knowledge about the problems, which nullified the owner's obligation to give formal notice and an opportunity to cure.[4]

1. *Southeast Drilling and Blasting Services, Inc. v. Hu-Mac Contractors, LLC*, 2003 WL 22055964, at p. *4 (Tenn. Ct. App. Sept. 4, 2003).

2. *City of Bristol v. Bostwick*, 240 S.W. 774 (Tenn. 1922); McClain v. Kimbrough Constr. Company, Inc., 806 S.W.2d 194 (Tenn. Ct. App. 1990); *Church of Christ Home for Aged, Inc. v. Nashville Trust Co*., 202 S.W.2d 178 (Tenn. 1947); *W.F. Holt Co. v. A & E Electric Co*., 665 S.W.2d 722 (Tenn. Ct. App. 1983).

3. *McClain*, 806 S.W.2d at 198.

4. *Greeter Construction Co. v. Tice*, 11 S.W.3d 907, 911 (Tenn. Ct. App. 1999).