WHAT TO DO IF AN OWNER OR GENERAL CONTRACTOR WANTS TO TERMINATE YOUR CONTRACT BEFORE YOU HAVE STARTED WORK OR WITHOUT ANY FAULT ON YOUR PART

DETERMINE THE BASIS FOR THE TERMINATION

The first step you should take when a general contractor or owner is seeking to terminate your contract before you have commenced work or without any fault on your part is to contact the general contractor or owner or make other inquiries to determine the basis for the termination. Is the owner having trouble obtaining the appropriate permits? Has funding for the project run out or fallen through? Has the owner terminated its contract with the general contractor? Has the owner or general contractor negotiated a better price with one of your competitors? Determining the true reason for the termination is important in two respects: First, depending on the cause for the termination, you may be able to work with the owner or general contractor to find a solution that will allow the project to continue and ensure you do not lose anticipated profit on the project and/or incur unnecessary costs related to the termination. Second, the reason the owner or general contractor is seeking to terminate your contract will be important in analyzing your rights and course of action in response to the intended termination.

READ YOUR CONTRACT

As you seek to determine the true cause for the owner’s or general contractor’s intended termination of your contract, you also should review the contract in detail to determine whether the owner or general contractor has a contractual right to terminate your contract without any
default on your part. In most cases, your contract will contain a provision—the termination for convenience clause—that will allow the general contractor or owner to terminate the contract at any time without cause. These clauses, which set out when your contract can be terminated in the absence of a default and what you will be paid in the event the clause is exercised, vary substantially from contract to contract. For instance, Article 7.2.2 of the AIA A401-2007 subcontract form only allows the contractor to terminate the subcontractor for convenience when the contractor’s contract with the owner has first been terminated for the owner’s convenience. When contracting directly with an owner, the applicable AIA contract form broadly allows the owner to terminate the contract “at any time … for the Owner’s convenience and without cause” (see Article 14.4.1 of the AIA A201 General Conditions for the Contract for Construction). The AIA contract documents also allow for liberal recovery in the event of a termination for convenience, providing the terminated contractor will be entitled “to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed” (see Article 14.4.3 of the AIA A201 General Conditions for the Contract for Construction and Article 7.2.4 of the AIA A401 Standard Form of Agreement Between Contractor and Subcontractor). Almost all owner- and general contractor-drafted contract forms will contain much stricter language on payments that will be made to you upon a termination for convenience, typically limiting your payment to the value of work performed to date and specifically excluding any recovery for anticipated profits on work that was not completed before the termination.
ASSESS WHETHER THE CONTRACTUAL RIGHT TO TERMINATE IS BEING EXERCISED PROPERLY

If your contract with the owner or general contractor contains a termination for convenience clause, you will need to assess whether the clause is being exercised properly. This obviously is a complex, fact-intensive analysis to perform and may depend on the specific state law applicable to your contract, so it is advisable to obtain the assistance of a competent construction attorney.

Subject to that caveat, there is a general rule that can be applied whenever an owner or general contractor is seeking to terminate your contract under a termination for convenience clause. Any party seeking to exercise a termination for convenience clause generally is required to exercise that clause fairly and in good faith. Generally, this means the general contractor or owner must have a good reason to terminate your contract or, at the very least, not have unjust motives for the termination.

For example, a termination for convenience because of the loss of public funding for a project or because the general contractor was terminated for convenience by the owner likely would be viewed as terminations for convenience made in good faith. Conversely, if the general contractor or owner is terminating your contract to obtain better pricing from another contractor, to evade paying profit and overhead on completed work, or to avoid issuing a valid change order, the termination likely would be considered in bad faith.

If the termination is being made in good faith, it is unlikely you will have legal grounds to fight it. However, you will need to ensure you are being paid in accordance with the applicable contract provisions dictating your payments in the event of a termination for convenience. If the termination appears to be in bad faith, you should advise the general contractor or owner, in writing, that the termination would constitute a breach of your contract.
Generally, a breach of contract entitles you to damages commensurate with your expectations on the project—for example, the profit you would have made if the project was completed less the savings realized by not being required to perform the work. An offer by the general contractor or owner to pay for overhead and profit on the work not performed, in addition to payment for the work executed and reasonable costs incurred as a result of the termination, usually should be accepted because your damages recoverable under the law for a breach of contract are unlikely to exceed that sum, even before accounting for your court costs and attorney’s fees. Any lesser offer from the general contractor or owner would be at your discretion to accept or reject depending on the specific circumstances.

**WHAT TO DO IF YOUR CONTRACT DOES NOT ADDRESS THE ISSUE OF TERMINATION FOR CONVENIENCE**

When your contract does not specifically allow for your termination for convenience, any effort by the general contractor or owner to terminate you without cause also likely will be viewed as a breach of contract, entitling you to a full slate of remedies under the law. In these instances, you should contact the general contractor or owner in writing, stating you reject the termination for convenience because of lack of authority under your contract and requesting that the general contractor or owner provide proof of a contractual right to terminate your contract. If no such right is identified, you should advise the general contractor or owner in writing (as you would in the case of a bad faith termination under a valid termination for convenience clause) that such a termination would constitute a breach of your contract.