

# Legal Scope

A Construction Law Newsletter by Bright Law Firm, PLLC

Advertising Material

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## Terminating Contracts

On a construction project, sometimes it is necessary to terminate the contract and stop work. Each particular circumstance is unique; however, certain issues tend to arise and should be given due consideration leading up to terminating a contract. This is true regardless of whether the terminating party is the owner, contractor, or a subcontractor. Here is a non-exhaustive list of factors for consideration.

**1. Have the contract clauses been followed?** Most contracts provide specific terms that govern termination rights and procedures. These clauses often require notice, periods to cure, and the right to terminate for certain reasons. The contract may also differentiate between terminations for cause, without cause, or for convenience. Some contracts require continued performance while a dispute is pending. It is important to closely review the contract to guide your decisions.

**2. Has there been proper documentation of the events?** Sometimes a dispute arises from a failure to properly communicate. Providing clear evidence and documentation of the issues and properly conveying your understanding of events can be useful to either (a) identify the problem and resolve the dispute; or (b) document the issues to

show that the other party failed to perform. Memories can be foggy years later when a case goes to trial. It is important that the issues are well-documented and a paper-trail of communications is preserved so that it is clear what happened at the time.

**3. Have all statutory requirements been met?** Certain statutes, such as the Contractor and Subcontractor Payment Act; the Prompt Payment Act; or the mechanics' lien laws may affect your decisions on how to address a dispute.

**4. Has the evidence been preserved to avoid spoliation?** If the issue is faulty workmanship, then, all parties should be notified of the issue so that the defect is properly documented before any curative work changes the condition. If a party destroys the original evidence through the repair work, it can cause an issue of spoliation that may prevent a party from presenting evidence due to having destroyed the original work.

**5. Has there been a good faith effort to resolve the issue?** Litigation is costly and time consuming. Generally, it is more efficient to resolve an issue rather than choosing the "nuclear option" of terminating the contract.

**6. Have other interest holders been put on notice?** Sometimes the contract documents require notice to other parties, such as the lender on the project. Other times, perhaps a surety or performance bond company should be put on notice.

**7. Do you want to suspend work or outright terminate the contract?** Perhaps it is necessary to fully terminate and end the contract and all work. But other times perhaps it is more appropriate to suspend the work (or payment).

**8. Has there been a material breach?** Generally, if you are going to suspend performance or outright terminate the contract, it is best to have a clear and material breach of contract by the other side. If it is merely a minor, trivial breach, then, termination/suspension may be improper and could be deemed a breach in itself.

Terminating a contract can be a costly and risky decision. Best practice is to communicate with counsel early and often to ensure proper deliberation of the issue. Avoiding litigation through early resolution is also wise, and counsel should be consulted to ensure proper memorialization of the resolution and any release of claims.

## The Numbers:

**6.4%**

- Year-to-date increase in Residential Construction through May 2018 (total value, not seasonally adjusted, compared to 2017).
- Total (public and private) construction year-to-date has increased 4.3%.

Source(s): U.S. Census Bureau, Release CB18-102 Monthly Construction Spending (July 2, 2018).



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