

WHO DECIDES THAT A CONTRACTOR IS IN DEFAULT? A GUIDE FOR ARCHITECTS

Situations may arise from time to time where an owner is unhappy with the performance of its contractor. This may come as no shock to many seasoned architects who have worked with underperforming or uncooperative contractors in the past.

Reasons for the dissatisfaction with the contractor may vary and may include underperformance, slow progress of the work and/or lack of adherence to the schedule, poor workmanship, excessive deficiencies or inadequate supervision.

In these situations, confidence in the contractor's ability to complete the project competently, and on schedule, may be substantially eroded.

When this occurs, it is not uncommon for an owner to look to replace the contractor and perhaps call upon the surety under the performance bond. It is also not uncommon for an owner to instruct the architect to issue a Notice of Default as a precursor to terminating the contract.

Pro-Demnity has received a number of calls where the architect was instructed by the owner to issue the Notice of Default, and our guidance has remained consistent: **Architects must not issue a Notice of Default.**

Undertaking a determination of Default amounts to providing a legal opinion as to whether the contractor is in breach of contract. Architects cannot, and may not, provide legal opinions, unless the architect also happens to be licensed to practice law, which presumably is rarely the case.

OWNER'S RESPONSIBILITIES WHEN A CONTRACTOR IS IN DEFAULT

The determination should be made by the **owner**, who is a party to the construction contract, not the architect. Of course, this should be done **in consultation with the owner's legal counsel.**

ARCHITECT'S RESPONSIBILITIES WHEN A CONTRACTOR IS IN DEFAULT

The architect's role is to provide the owner with sufficient factual information and supporting documentation regarding any possible breaches of contract and leave it to the owner and its legal counsel, to make any final determination as to whether the apparent breaches warrant a Notice of Default.

From a risk-management and insurance perspective, the factual information that the architect prepares:

- **Avoids language** that implies legal judgment (e.g., "default," "breach,"").
- Sticks to **objective observations**, .
- Uses factual descriptors such as "the deficiencies remain unresolved as of [date]."
- Maintains consistent, contemporaneous documentation.
- Avoids taking on responsibilities that belong to the owner or construction manager.

WHAT FACTORS ARE CONSIDERED IN A POSSIBLE DEFAULT SITUATION?

A contractor is in default when there is an unremedied fundamental breach of contract due to its neglect in performing the work and failure to comply with the contractual requirements.

This is often due to failing to complete a project on time, not meeting specified quality standards, failing to adequately staff a job, failing to pay subcontractors, or otherwise neglecting their contractual obligations. Armed with the facts, the owner must provide opportunities to remedy the breaches in accordance with the terms and conditions of the contract before issuing a formal notice to the contractor.

APPLICATION UNDER THE CCDC2 DOCUMENT

Under the CCDC2 contract, an owner has the option to take over and perform the work, or terminate the contract. In addition, the prescribed default procedures must be followed in accordance with the provisions of the contract.

Construction contracts may reference the consultant's duties. However, it is important to remember that the architect is not a party to a construction contract between the owner and the contractor.

The architect administers the construction contract and provides a factual assessment, not legal enforcement of the contract, like issuing a Notice of Default. A well coordinated set of agreements often simplifies the process. You should ensure that your client-architect agreement reflects the consultant's role in the construction contract. Using a standard form architectural agreement, will go a long way in aligning with the terms used in a standard form construction contract.

FINAL THOUGHTS FOR ARCHITECTS AND OWNERS IN DEFAULT SITUATIONS

Declaring default under a construction contract may give rise to legal action and carries significant risk. An architect's role is to support the owner by providing pertinent documents and other factual information to allow the owner and counsel to determine whether sufficient basis exists for a finding of default.

Defaulting a contractor improperly can lead to litigation so this responsibility should remain with the owner, under the advisement of a lawyer, and issuing the proper notices in accordance with the provisions of the construction contract.

Architects are encouraged to contact the Risk Services team in these (or similar situations) for assistance and guidance.

Excerpt below of the Part 7, Default Notice, under a CCDC2-2020 Contract

PART 7 DEFAULT NOTICE

GC 7.1 OWNER'S RIGHT TO PERFORM THE WORK, TERMINATE THE CONTRACTOR'S RIGHT TO CONTINUE WITH THE WORK OR TERMINATE THE CONTRACT

7.1.1 If the Contractor is adjudged bankrupt, or makes a general assignment for the benefit of creditors because of the Contractor's insolvency, or if a receiver is appointed because of the Contractor's insolvency, the Owner may, without prejudice to any other right or remedy the Owner may have, terminate the Contractor's right to continue with the Work, by giving the Contractor or receiver or trustee in bankruptcy Notice in Writing to that effect.

7.1.2 If the Contractor neglects to perform the Work properly or otherwise fails to comply with the requirements of the Contract to a substantial degree and if the Consultant has given a written statement to the Owner and Contractor which provides the detail of such neglect to perform the Work properly or such failure to comply with the requirements of the Contract to a substantial degree, the Owner may, without prejudice to any other right or remedy the Owner may have, give the Contractor Notice in Writing, containing particulars of the default including references to applicable provisions of the Contract, that the Contractor is in default of the Contractor's contractual obligations and instruct the Contractor to correct the default in the 5 Working Days immediately following the receipt of such Notice in Writing.

7.1.3 If the default cannot be corrected in the 5 Working Days specified or in such other time period as may be subsequently agreed in writing by the parties, the Contractor shall be in compliance with the Owner's instructions if the Contractor:

- .1 commences the correction of the default within the specified time,
- .2 provides the Owner with an acceptable schedule for such correction, and
- .3 corrects the default in accordance with the Contract terms and with such schedule.

7.1.4 If the Contractor fails to correct the default in the time specified or in such other time period as may be subsequently agreed in writing by the parties, without prejudice to any other right or remedy the Owner may have, the Owner may by giving Notice in Writing:

.1 correct such default and deduct the cost thereof from any payment then or thereafter due the Contractor for the Work provided the Consultant has certified such cost to the Owner and the Contractor, or

.2 terminate the Contractor's right to continue with the Work in whole or in part or terminate the Contract.

7.1.5 If the Owner terminates the Contractor's right to continue with the Work as provided in paragraphs 7.1.1 and 7.1.4, the Owner shall be entitled to:

.1 take possession of the Work and Products at the Place of the Work; subject to the rights of third parties, utilize the Construction Equipment at the Place of the Work; finish the Work by whatever method the Owner may consider expedient, but without undue delay or expense,

.2 withhold further payment to the Contractor until a final certificate for payment is issued,

.3 charge the Contractor the amount by which the full cost of finishing the Work as certified by the Consultant, including compensation to the Consultant for the Consultant's additional services and a reasonable allowance as determined by the Consultant to cover the cost of corrections to work performed by the Contractor that may be required under GC 12.3 - WARRANTY, exceeds the unpaid balance of the Contract Price; however, if such cost of finishing the Work is less than the

unpaid balance of the Contract Price, the Owner shall pay the Contractor the difference, and

.4 on expiry of the warranty period, charge the Contractor the amount by which the cost of corrections to the Contractor's work under GC 12.3 - WARRANTY exceeds the allowance provided for such corrections, or if the cost of such corrections is less than the allowance, pay the Contractor the difference.

7.1.6 The Contractor's obligation under the Contract as to quality, correction and warranty of the work performed by the Contractor up to the time of termination shall continue in force after such termination of the Contract.

Our Contributor



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claims with architects, construction dispute, as well as interacting with insurance underwriters in product development and other initiatives within the Company. Most importantly, Sal passionately services the profession of Architecture by providing consultation to architects on avoiding liability and minimizing risk. He is a licensed Ontario architect with over 35 years' experience at Pro-Demnity (previously the OAA Indemnity Plan).