Notice to Cure Subcontractor Default

By Caroline Hall and Jeff Chapman

Unless they are fully self-performing projects, general contractors subcontract certain scopes of work and accept the risk of subcontractor performance. This article provides a discussion and tools for general contractors struggling with subcontractor performance. The discussion focuses on Notice to Cure provisions and the tools that such contractual language provides.

When a potential subcontractor default situation arises, one should first consider what the contract provides in all relevant provisions including any defined events of default, notice to cure, and termination provisions. These types of provisions are typically complimentary and are often drafted in one of two ways: (1) to facilitate a resolution of potentially significant problems and induce performance or (2) as a mere formality and condition precedent to termination. This article will focus on the first type under the presumption that you want to motivate your defaulting subcontractor to cure and finish performance.

Generally, a notice to cure letter should provide the party allegedly in breach the opportunity to formally learn of the alleged breach and to cure the same before the opposing party is allowed to avail itself of a remedy for such breach, such as termination. Although the default and notice to cure provisions can be drafted in multiple ways, under a typical opportunity or notice to cure provisions, the non-breaching party must provide the breaching party specific notice of the alleged events of default. The recipient would then typically have a certain amount of time to correct or cure the default before the non-breaching party could lawfully take any action.

For contractors struggling with subcontractor performance, or lack thereof, failure to adhere to the terms of a Notice to Cure provision may transform the non-breaching contractor into the party guilty of committing a material breach of contract. Failure to provide the requisite opportunity to cure prior to action terminating the subcontractor might expose the contractor to a wrongful termination claim.

When drafting a notice to cure letter, do so carefully and in a manner that does not waive rights or remedies under the contract. If the goal is to coax subcontractor compliance rather than termination, invoking a notice to cure clause necessarily involves potential termination and therefore care should be taken to protect one's legal position. Having said that, the manner in which such a notice is given can influence the reaction and likelihood of curative success.

Upon the occurrence of an event of default, put the subcontractor on notice of default as soon possibly following discovery of the default. At a minimum, the notice should include the specific acts of default and the deadline to commence or complete requisite curative measures to remedy the default. The notice should include all events of default, not just the most egregious ones. It should also include language indicating the list is not exhaustive and failure to specifically identify an event of default does not waive any rights. If the contract specifically states what constitutes an event of default, the notice letter should track that language and reference those specific provisions.

Additionally, to better induce the subcontractor to cure, one should also include information about the consequences for failure to cure. Inform the subcontractor that failure to cure may result in the exercise of all legal rights and remedies available under the contract and law. Identify that such rights may include termination, supplementation, correction, and completion of the subcontractor's work with any costs or damages incurred being assessed against the defaulting subcontractor. If available, including estimated or anticipated costs for any such remedy might help in securing the desired cure.

When drafting the notice to cure letter, also consider and be aware of who might ultimately see this letter. If the dispute does not get resolved and results in litigation, the arbitrator, judge or jury deciding the case will certainly see and analyze the letter as a key piece of evidence. Accordingly, the letter should be drafted in a way that highlights the subcontractor's defaults and addresses each in an easily understood manner. A cryptic or vague letter will not provide adequate notice to the defaulting subcontractor and, in the event of litigation, a poorly drafted letter will place the contactor in a disadvantageous position in attempting to justify termination.

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Bear in mind that a notice to cure letter serves as a final warning. The letter and the contractual provision from which it derives are intended to elicit a cure. Contractors and subcontractors who may disagree but recognize the value of completed projects should draft and view the letter a just that – a final warning. Maintaining a professional tone in the letter may serve the parties well. For example, closing the notice letter with a positive message concerning anticipated curative actions and comments acknowledging the shared goals of a successful project might ease tempers and allow the parties to constructively work past the default.

Closing the letter with suggestions or even demands of the types or required curative actions may also be wise. If the subcontractor accepts and complies with the suggested actions, the likelihood of the non-breaching party's satisfaction with the measures increases. Alternatively, if no actions follow and the dispute ends in litigation, have suggested cures in the letter will better position the non-breaching party in the eyes of the judge or arbitrator.

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Finally, be cognizant of the fact that every dispute is unique and must be evaluated on a case-by-case basis. Nevertheless, the principles, tips and discussion in this column should help in drafting a notice to cure letter that: (1) increases the likelihood the breaching subcontractor cures its default; (2) reserves the sender's rights in the event the subcontractor does not cure; and (3) clearly conveys the non-breaching party's position if the dispute escalates into litigation.