

CONSTRUCTION AND THE LAW IN TEXAS

Contractual Notice and Opportunity to Cure Provisions

Construction contracts contain many provisions that assign rights and responsibilities and shift risk between parties. The language that enables those assignments can also provide the parties tools for successful performance. These tools can be used by owners, contractors and subcontractors alike.

A Notice to Cure or Opportunity to Cure provision can create opportunities to resolve problems by facilitating resolution to potentially significant problems or inducing improved performance. An Opportunity to Cure implies that the party alleged to be in default has been granted an opportunity to make right what might have shifted towards the wrong. On the other hand, a notice to cure provisions implies a warning that failure to right the ship will result in a more severe consequence. Typically, when invoked, the provision provides a party allegedly in breach of a material obligation the opportunity to formally learn of the alleged breach and to cure prior to the opposing party being able to avail itself of a remedy for such breach. From another perspective, the provisions are sometimes merely conditions precedent to the invoking party's remedial action.

Typically, notice to cure provisions work in conjunction with other provisions in the contract: namely the provisions outlining what constitutes an event of default and those providing remedies for a non-breaching party. Absent a specific provision delineating the acts that will be considered an event of default, such as late delivery, nonpayment of downstream liabilities, or failure to pay, the opportunity to cure provision could be invoked if

the breaching party fails to comply with a covenant or obligation under the contract. These provisions are not typically limited in application to a material breach.

Cure provisions can be drafted in multiple ways. The way the clause works with associated clauses, such as a termination clause, impacts the manner of and style of drafting the Notice to Cure provision. For example, a cure provision that works with contract language outlining events of default might contain opportunity to cure language such as the following:

"Prompt notice of all defective Work of which the Owner or Engineer has actual knowledge will be given to the Contractor. Upon receipt of said notice, Contractor shall, within seven calendar days, commence curative action to resolve the default. Such curative action must continue without interruption until the default is fully resolved."

If the Owner considers the Contractor to be in default of the contract for one of the reasons listed as an event of default, the cure provision would provide the contractor the opportunity to resolve the alleged default before the owner becomes entitled to avail itself of a contractual remedy, such as termination.

Under a typical opportunity or notice to cure provision, the non-breaching party must provide the breaching party specific notice of the alleged events of default. The recipient would typically have a certain amount of time to correct or cure the default before any action could lawfully be taken by the non-breaching party. Action taken before the expiration of the cure period would typically reverse the parties' position and put the party giving the

original notice in breach of the contract.

Keeping these factors in mind when drafting contracts and subcontracts may be useful. To that end, you may want to consider addressing the following items in an opportunity to cure provision:

- A requirement that a detailed description of the alleged default be provided to the opposite party
- The provision of adequate information to inform the opposite party what will be considered a fully curative effort
- The requisite time frame for a cure or activities demonstrating curative efforts to begin
- Language allowing the allegedly breaching party to provide a response or challenge the imposition of the cure period
- An express acknowledgement that the cure has been accepted by the invoking party

Typically, if these five items are addressed in the provision, the parties will be positioned to utilize the opportunity to cure and ensure that either a breach is cured or that subsequent remedial rights may be properly invoked.

When drafting contracts with an opportunity to cure or notice to cure provision, contractors and owners may want to consider the inclusion of a remedial clause in the event curative efforts fail to relieve the default or fail to satisfy the non-breaching party's concerns. Together with an event of default clause preceding a notice to cure clause, the contract can provide the parties tools for effective contract administration and performance. And, after all, isn't the contract language most effective and the project best served when the parties use the contract to assign responsibility and then effectively manage that responsibility under the guidelines laid out in the contract?

Notice to cure provisions are not the only type of contract clause that can be a tool for effective project management. But, if one party's performance is lacking, the clause can be used to kick-start a cure and get the project back on track. Of course, in the alternative, it can be a tool for supporting a termination while providing a solid backstop against defensive counterclaims in an arbitration or litigation. Being able to say, "We gave them every opportunity and fully explained their breach and what it would take to cure it, but they simply didn't perform" is a compelling story to tell in a dispute.



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A Balanced Approach to Construction Law.

Of course, these two approaches differ greatly in their approach and effect. Accordingly, ask oneself the following questions when drafting language that will be an opportunity or notice to cure provision. Ask whether the clause intended to facilitate a collaborative relationship; is the clause there merely to provide notice sufficient to allow a non-breaching party the ability to terminate; or is the clause there to enable curative measures through multiple means while seeking to preserve the performance by both parties beyond any given dispute? The answers to these questions will direct you to the appropriate language to accomplish the goals illustrated by the answers.

