

# BUILDING BLOCKS

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## ABANDONED DESIGN & CONSTRUCTION PROJECTS—SUSPENSION & TERMINATION OF DESIGN PROFESSIONAL AGREEMENTS

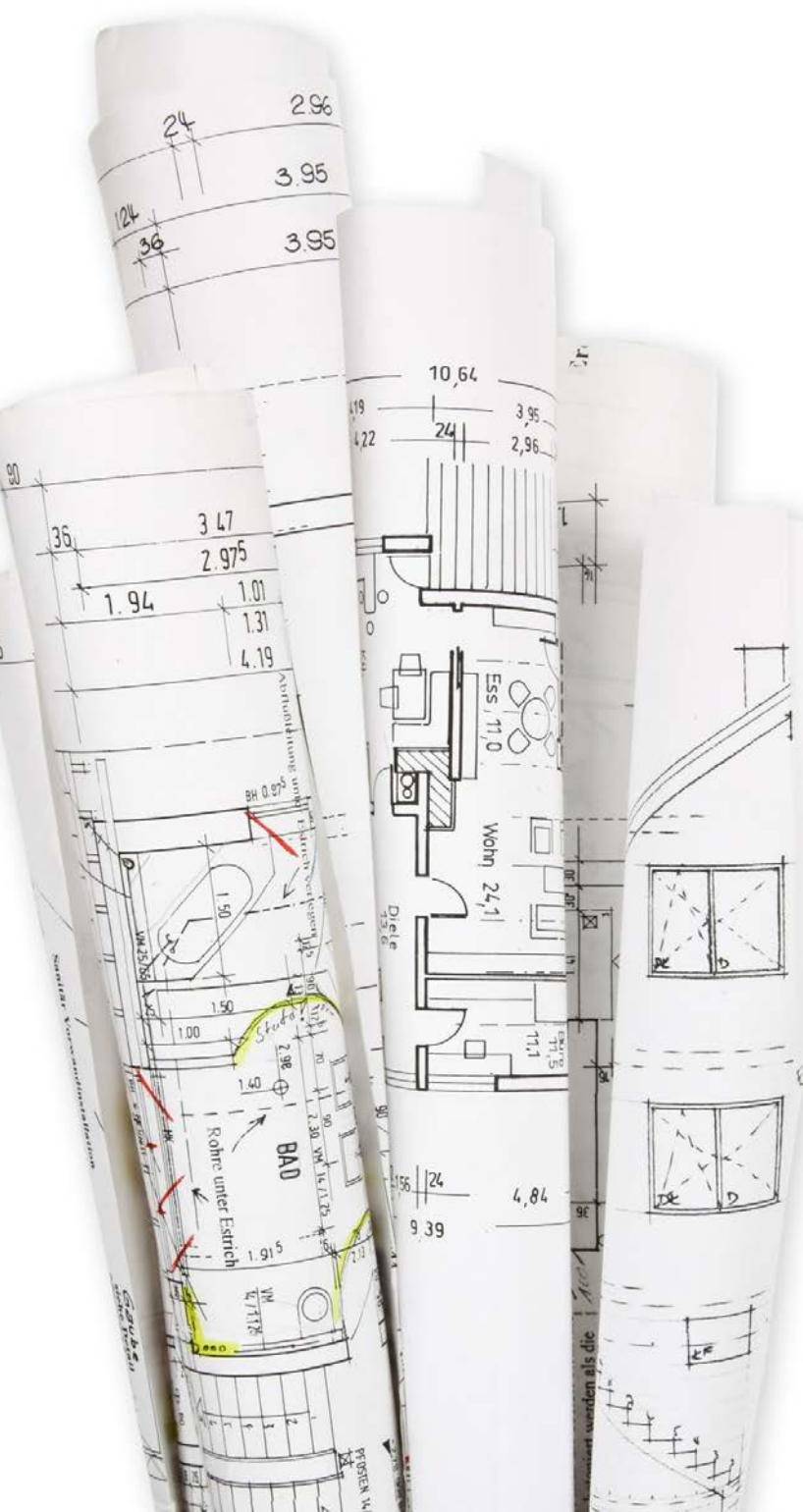
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At a project's inception, seldom do the parties involved envision how matters would be handled if the professional services agreement would be suspended or come to a premature end. Most projects begin in optimism, seeking mutual benefits and with no issues or disputes. But that is not always the case.

A project may be suspended or terminated due to intervening forces, such as a pandemic. There may be other reasons why a project may be suspended or terminated by a project owner's agreement with their architect or engineer. Likewise, there are reasons why a design professional may want to terminate or suspend the agreement with their client.

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## PROJECT OWNER TERMINATING OR SUSPENDING AN AGREEMENT WITH THEIR DESIGN PROFESSIONAL

Obviously, if a project owner's architect or engineer fails to substantially perform in accordance with the terms of the agreement, they may terminate the agreement.

But other reasons may occur, such as the client wishes to suspend or terminate the agreement for their convenience, and without cause on the part of the design professional. Perhaps the owner's financial resources have disappeared, or other factors outside of the owner's control. See the Engineers Joint Contract Document Committee E-500, Agreement Between Owner and Engineer for Professional Services 2014), as follows:



<https://pixabay.com/illustrations/termination-setting-1538203/>

### A. Suspension:

1. *By Owner: Owner may suspend the Project for up to 90 days upon seven days written notice to Engineer.*
2. *By Engineer: Engineer may, after giving seven days written notice to Owner, suspend services under this Agreement if Owner has failed to pay Engineer for invoiced services and expenses, as set forth in Paragraph 4.02.B, or in response to the presence of Constituents of Concern at the Site, as set forth in Paragraph 6.10.D.*

*B. Termination: The obligation to provide further services under this Agreement may be terminated (1) For cause ... or (2) For convenience, by Owner effective upon Engineer's receipt of notice from Owner.*

A “for convenience and without cause” or “for convenience” clause in an agreement is actually to the benefit of both the project owner and the design professional, because if the client did not have the contractual ability to suspend or terminate, the client would likely create a reason why their architect or engineer failed to substantially to perform their services. The likely result would be a dispute or claim on the project, and the design professional would have to defend themselves, involving their professional liability insurance agent and carrier. In other words, it is better to allow the design professional's client to have an exit strategy to suspend or terminate the project, rather than generating a claim on the architect's or engineer's hands. Normally, the right to suspend or terminate for convenience and without cause is not reciprocal (the design professional is not contractually permitted to suspend or terminate for their convenience—except for nonpayment of professional services), such that the client is left without a design professional for an uncompleted project (so to speak, up the creek without a paddle).

And in all fairness (and contractually), if the project owner suspends or terminates the agreement for its convenience and without cause, the client should compensate the design professional for services performed prior to suspension or termination, and any reimbursable expenses incurred, including costs attributable to the suspension or termination. In addition, the design professional's costs attributable to the design professional's termination of their consultants' agreements should also be compensated.

If the project owner decides to suspend their design professional's performance of services, there should be compensation for the interruption and resumption of services. And the architect's or engineer's fees for the remaining services and time schedules should be

equitably adjusted. Also consider what happens if the suspension is lengthy. The AIA B101 – Standard Form of Agreement Between Owner & Architect provides that:

**§ 9.3** *If the Owner suspends the Project for more than 90 cumulative days for reasons other than the fault of the Architect, the Architect may terminate this Agreement by giving not less than seven days' written notice.*

## **DESIGN PROFESSIONAL SUSPENDING OR TERMINATING THEIR AGREEMENT WITH THEIR CLIENT**

Obviously, if their client fails to make payments to the architect or engineering in accordance with their agreement, they may have no recourse but to terminate the project. Such failure would be “substantial nonperformance” and cause for termination, or at the design professional’s option, cause for suspension of services. Agreements can vary on the option to suspend services, but one example is as follows:

*If the Architect elects to suspend services, the Architect shall give seven (7) days' written notice to the Owner before suspending services. In the event of a suspension of services, the Architect shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Owner shall pay the Architect all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted. (2017 AIA B101 – Standard Form of Agreement Between Owner & Architect)*

During negotiating of agreements, be wary of your client’s position that the seven (7) days has to be changed to a much longer time, such as thirty (30) days. A scenario could occur as follows:

*The time had arrived when the design professional is within a couple of days of issuing their drawings and specifications (the Contract Documents) for bids, according to the strict project schedule that had been debated and agreed upon. However, their client has not been paying their design professional’s fees (for whatever the reason) for a length of time. The design professional wanted to suspend their agreement for non-payment, but now they must wait thirty (30) days before they are entitled to suspend under the negotiated terms. If the architect or engineer suspends their agreement within those thirty (30) days, they arguably could be materially breaching their agreement with their client. If the design professional issues their drawings and specifications for bids according to the strict schedule, they will lose their leverage to get paid. What is the design professional to do?*

Substantial nonperformance is different than their client’s minor failure to satisfy a duty or responsibility under the agreement. The context and every project and situation may vary of what substantial is, and is a matter of professional determination.

## **CONSIDERATIONS INVOLVING CONSULTANTS WHEN A DESIGN PROFESSIONAL AGREEMENT IS SUSPENDED OR TERMINATED**

It is not uncommon that a prime professional (architect or engineer) would engage consultants for the design and construction of a project. Should a project owner terminate or suspend the agreement with their prime professional, the same terms stated above flow down to the consultants. See AIA C401 Standard Form of Agreement Between Architect & Consultant (2017), which states that:

*§ 9.1 ..., the Architect may terminate this Agreement or suspend the Consultant's services pursuant to the same terms and conditions, other than the amount of any Termination Fee or Licensing Fee set forth in the Prime Agreement, under which the Owner may terminate the Prime Agreement or suspend the Architect's services under the Prime Agreement. Additionally, the Consultant may terminate this Agreement or suspend its services pursuant to the same terms and conditions under which the Architect may terminate the Prime Agreement or suspend its services under the Prime Agreement.*

Note that the prime professional and the consultant may terminate the agreement between each other at such time as the prime agreement is terminated. Such termination should be promptly sent to the other party. Under standard forms of professional association agreements, also note that consultants do not have the reciprocal right to terminate their agreement for convenience with their prime professional, so as to not leave the prime professional up the creek without a paddle.

### **OTHER CONSIDERATIONS WHEN A DESIGN PROFESSIONAL AGREEMENT IS SUSPENDED OR TERMINATED**

Some standard professional association agreements may terminate at a certain specified time, such as one year after the date of substantial completion of a project. Another term that can be included in agreement is the client's rights to use the design professional's documents, such as the drawings and specifications created for the project, if a project is terminated. If that is the case, the design professional should negotiate a fee if their client intends to continue to use the documents. Other issues arise, such as the possibility that the client engages a different architect or engineer to complete a terminated project. Those issues would should be addressed for further negotiations between the parties involved, so there is adequate protection of the design professional for any use of the documents.

### **IN SUMMARY**

In the construction industry, unfortunate disruptions in the normal course of projects may occur, be it a suspension or termination of a design professional agreement. Written agreements are extremely helpful in sorting out the duties and responsibilities of the parties involved, if such a disruption would occur. That is why a verbal agreement between architects or engineers and their clients is one of the worst forms of professional practice.

### **UNIQUE TO OHIO**

Ohio architects (interestedly—Ohio professional engineers do not have the same requirement) are required to have a written (and signed) agreement with their clients, which shall include the following minimum terms (certainly these abbreviated terms should be expanded as needed):

*A registered architect or architectural firm is required to use a written contract when providing professional services. Such contract between the registered architect and the client shall be executed prior to the registered architect commencing work on any project. The written contract shall include, but not be limited to, all of the following items: (1) A description and location of the site. (2) A description of the services to be provided by the registered architect to the client. (3) A description of the basis of compensation applicable to the contract and the method of payment agreed upon by both parties. (4) The name and address of the registered architect or architectural firm and the client's name and address. (5) A description of the procedure to be used by the registered architect and client or design-builder to accommodate additional services. 17 (6) A statement identifying the ownership of documents prepared by the registered architect and/or reuse of documents. (7) A description of the procedure to*

*be used by either party to terminate the contract. (Emphasis added - Ohio Administrative Code Section 4703-3-09 Written Contract)*

### **About the Author**

*Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for the last 15 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 33 years. As a Fellow of the American Institute of Architects and a member of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.*

*The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.*

***Disclaimer:*** *The viewpoints expressed in this article are those of the author(s) and are not necessarily approved by, reflective of or edited by other individual, group, or institution. This article is an expression by the author(s) to generate discussion and interest in this topic.*

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### Speaking Engagements:



***“Ethically Looking Outward – Architecture/Interior Design Perspectives”***

The Alberta Association of Architects, Banff  
Alberta, Canada  
April 24, 2021



***“World Around Us Panel Discussion on the Environment”***

Nashville, TN  
Rescheduled to spring 2021

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