



project owner (client of the architect) on how the design could be enhanced. As it turned out, the project owner agreed to the change, unbeknownst to the client that the contractor would save some significant money.

When the architect returned from Italy, he discovered the change was underway, but was not completed. The architect determined that the change, though financially benefiting the contractor, would be a detriment to the project. In fact, the change could possibly have a life-safety issue on the project. The architect advised his client that the project change had to be reversed. However, the client sided with the contractor, and the construction proceeded.



<http://www.how-matters.org/2018/02/16/when-the-fox-guards-the-hen-house/>

## WOULD SHOULD THE ARCHITECT DO?

To begin with, the architect should put his objection to the change in writing, and send the letter to his client, his consulting engineers, and the contractor involved. However, the architect had a bit of a dilemma, deciding whether or not to copy his letter to building code officials. Knowing that the architect had a paramount duty to protect the health, safety and welfare of the public (which includes his client), he sent the letter to the local building commissioner. The pen is mightier than the sword. (first written by novelist and playwright Edward Bulwer-Lytton in 1839, in his historical play *Cardinal Richelieu*)



[https://pennyspoetry.fandom.com/wiki/The\\_pen\\_is\\_mightier\\_than\\_the\\_sword](https://pennyspoetry.fandom.com/wiki/The_pen_is_mightier_than_the_sword)

However, the client was not pleased at all with the architect's actions and terminated the professional services agreement for the project with the architect. The client had the right, under the owner-architect agreement, to terminate the contract without cause.

The architect, at that point, felt he had done everything he could do, and walked away from the client and project. Of course, a few of the architect's outstanding invoices were unpaid. The second architect's dilemma—should he file a claim against his client to recover his fees. Knowing the collective wisdom of walking away carefully before suing a client, balancing the chance of recovering money with the likelihood of a client's counterclaim, the architect decided not to get in the business of litigation, and got back to practicing architecture.

*"He thinks discretion is the better part of valor, and that is the reason he remains silent."*  
[cambridge.com/dictionary/english/discretion-is-the-better-of-valor](http://cambridge.com/dictionary/english/discretion-is-the-better-of-valor)

The fact of the matter, the American Institute of Architects' Standard Form of Agreement Between Owner & Architect, B101 (2017), states that:

**§ 3.1.4** The Architect shall not be responsible for an Owner's directive or substitution, or for the Owner's acceptance of non-conforming Work, made or given without the Architect's written approval.

Unfortunately, even with language contained in the B101 agreement, an architect has limited power over the ability to control the actions of others in the construction process.

## IN CONCLUSION

In the chicken coop case study above, the client (project owner) was able, contractually, to terminate the project in accordance with the provision in the Standard Form of Agreement Between Owner & Architect, B101, which states that:

§ 9.5 The Owner may terminate this Agreement upon not less than seven days' written notice to the Architect for the **Owner's convenience and without cause.**

Likewise, the concept of "termination for convenience and without cause" finds its place in standard engineering agreements as well. The Engineers Joint Contract Documents Committee (EJCDC) E-500, Agreement Between Owner and Engineer for Professional Services, C2.03 states that:

C.2 When estimated compensation amounts have been stated herein and it subsequently becomes apparent to Engineer that the total compensation amount thus estimated will be exceeded, Engineer shall give Owner written notice thereof, allowing Owner to consider its options, **including suspension or termination of Engineer's services for Owner's convenience.** Upon notice, Owner and Engineer promptly shall review the matter of services remaining to be performed and compensation for such services. **Owner shall either exercise its right to suspend or terminate Engineer's services for Owner's convenience,** agree to such compensation exceeding said estimated amount, or agree to a reduction in the remaining services to be rendered by Engineer, so that total compensation for such services will not exceed said estimated amount when such services are completed. If Owner decides not to suspend the Engineer's services during the negotiations and Engineer exceeds the estimated amount before Owner and Engineer have agreed to an increase in the compensation due Engineer or a reduction in the remaining services, then Engineer shall be paid for all services rendered hereunder.

The client's option was within its rights, as an escape hatch/exit strategy. As the fact pattern in the case study suggests, as an option, the architect could have sought an "Advisory Opinion" from the General Counsel of the American Institute of Architects regarding any ethical issues that could have been involved. Regardless, the architect could have filed a claim to recover his fees, suffer the likelihood of a counterclaim from his client (involving his professional liability insurance carrier for defense), but at least the matter could likely have brought to light the life-safety issue.

That is to say, if the building commission ignored taking action based upon the architect's letter, the litigation would have been a second opportunity to expose the possible problem. Situations like this are rarely black and white, and are fraught with shades of gray.



<https://www.color-hex.com/color-palette/7785>

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### **About the Author of this Risk Management Building Block Article**

*As a risk manager for the last 18 years for the design profession, Eric has experience in professional liability insurance and claims, architecture, engineering, land use, law, and a unique background in the construction industry. Prior to risk management, he has 25 years of experience in the practice of architecture/engineering, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 35 years at Kent State University's College of Architecture & Environmental Design.*

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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.

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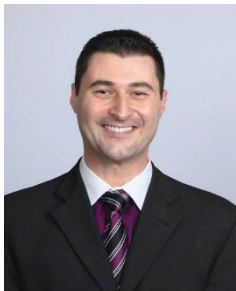
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