

## Legal Pipeline

# Terminate with Care: Avoiding Contractual Liability for Wrongful Termination



Carefully follow the terms of the subcontract to ensure there are proper grounds to part ways with a subcontractor.

By Steven Nudelman

**Y**ou are the general contractor for an industrial office complex project downtown. The final completion date is set in stone because the owner has already entered into a number of commercial leases for the project. Thus, it is critical that the project proceeds according to schedule.

Unfortunately, the framing subcontractor is falling behind schedule, stalling the overall progress on the project. This is the third time in four weeks that the company failed to have sufficient manpower on the job. You have had it with this subcontractor and are confident you can find another company to get the project back on schedule. What do you do next?

The first step: Read your contract! Even better — get an attorney to look at and explain your contract to you. Before taking any action to terminate the framing subcontract, you need to know, understand and carefully follow the terms of the subcontract regarding termination. You must ensure you have proper grounds under the subcontract to terminate.

Contract termination is a minefield; one wrong step and kaboom! You have a lawsuit seeking damages for breach of contract (wrongful termination), with potentially enhanced damages (including attorneys' fees) for violation of any relevant prompt-payment statutes.

### Key Questions

After reviewing your contract, ask yourself a series of questions: Does the subcontractor have to do anything specific — or is its conduct irrelevant as long as it causes a delay? Is lack of sufficient manpower sufficient grounds for termination? Are there any requirements for notice of defective performance before terminating the subcontractor? Is there a required grace period within which the defaulting subcontractor will be permitted to cure any defect(s)?

While these are only some of the questions you should ask before proceeding to terminate the subcontract, they provide an excellent starting point. Moreover, if you miss

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or otherwise disregard any of these important issues, then you are more likely to find yourself liable for wrongfully terminating the subcontractor.

The recent case of *High Tech Rail & Fence, LLC v. Cambridge Swinerton Builders, Inc.*, 871 S.E.2d 73 (Ga. Ct. App. 2022), illustrates the importance of following the terms of a subcontract agreement precisely in order to avoid such liability for wrongful termination.

In that case, general contractor Cambridge Swinerton Builders entered into a subcontract agreement with High Tech Rail & Fence, pursuant to which High Tech was to “furnish and install aluminum railings for the Centennial Park Project ... in Atlanta.” *Id.* at 76. During the project’s construction, Cambridge sent High Tech three separate notices to cure due to “High Tech’s inability to provide materials and complete the work on schedule.” *Id.* at 77.

After Cambridge sent the third notice to cure on Nov. 27, 2017, High Tech stopped sending any workers to the project site. Three days later, on Nov. 30, 2017, Cambridge terminated the subcontract with High Tech “for lack of progress under the project schedule, failure to procure materials in a timely manner, and abandonment of the job site.” *Id.*

In response, High Tech sued Cambridge for breach of contract, arguing that Cambridge’s termination of the subcontract agreement was not in good faith and was, thus, improper. Cambridge filed a motion for summary judgment on High Tech’s claims, which was granted by the trial court.

On appeal, High Tech argued that the trial court erred in finding that Cambridge properly terminated the subcontract in accordance with its terms.

The Court of Appeals of Georgia disagreed. Instead, the court found that Cambridge terminated High Tech properly, pursuant to the terms of the parties’ agreement. *Id.* at 78. The parties’ subcontract clearly outlined the circumstances under which Cambridge could terminate their agreement, as well as the precise process of termination. *Id.* at 76.

The relevant termination provision provided that if High Tech was to “fail in any material respect to prosecute the work according to [Cambridge’s] schedule ... cause in any way, the stoppage or delay or interference with the work of [Cambridge] ... [or] fail to comply with any material provision of [the] Subcontract,” Cambridge may issue a notice to cure. *Id.* If High Tech failed to cure the defect within 48 hours of written notice, Cambridge was permitted to terminate the subcontract agreement. *Id.*

Notably, the subcontract also included a common work-through provision, which stated: “No dispute shall interfere with the progress of construction, and High Tech shall proceed with its work as directed.” *Id.* at 77.

Based on the language in the parties’ subcontract, the

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court found that Cambridge's termination of High Tech was proper. *Id.* at 78. High Tech violated the work-through provision of the subcontract by failing to send workers to the project site after the Nov. 27 notice to cure and failed to cure the defects Cambridge brought to its attention within 48 hours of written notice — both proper grounds for termination under the subcontract. *Id.* at 76, 77.

Additionally, Cambridge provided High Tech with proper written notice of these defects and provided a reasonable amount of time to cure before terminating their agreement. *Id.* at 77. By closely following the terms of the parties' subcontract, Cambridge was able to avoid liability for wrongful termination.

### Takeaways

Since Cambridge demonstrates a textbook example of how to carry out a contractual termination, let's dissect its conduct.

First, Cambridge notified High Tech of defects that were explicitly stated as grounds for termination in its subcontract, such as failure to complete work according to schedule.

Second, Cambridge provided proper written notice to High Tech of these defects, as required by the subcontract.

Finally, Cambridge allowed the required 48-hour period to cure the defects and waited until that grace period had expired before terminating the subcontract with High Tech.

To minimize the likelihood of a claim for wrongful termination, the terms of the subcontractor agreement must be strictly followed. Review the provisions for termination, cure or grace periods, notice, work-through, claims and dispute resolution. Although the High Tech case comes from Georgia, the principles discussed are relevant in every jurisdiction. In sum, it is important to adhere to the express terms of your subcontract regardless of your jurisdiction.

In addition, you should consult an attorney before taking any action to terminate a subcontract. An attorney will be able to walk you through the process of terminating your agreement pursuant to the terms of your subcontract. Among other things, if written notice is required, your attorney could help you draft a letter with the language required under your subcontract.

By bringing an attorney on board, you are far less likely to miss any important steps that must be followed to avoid liability for wrongful termination. The best defense from liability for wrongful termination is a good offense — starting with a close and careful reading of the subcontract (by you and your construction attorney). ●

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