

# NOTICE AND OPPORTUNITY TO CURE PROVISIONS – FIVE TIPS TO HELP YOU AVOID DISPUTES

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Contract provisions providing a “notice and opportunity to cure” defects or default vary greatly. You have no doubt seen these provisions worded any number of ways, but generally they require that a contractor or supplier be provided with notice of an alleged defect or default and a chance to fix or “cure” it before being held responsible for costs associated with repairs.

The purpose of these provisions is threefold: (1) to provide the contractor an opportunity to investigate the alleged defect or default; (2) to provide the contractor an opportunity to document and photograph the alleged defect before repairs are made and build a defense should the contractor dispute there is a deficiency with its work; and (3) to provide the contractor with an opportunity to make the repairs and thereby control their cost.

Despite being commonly found in nearly all construction contracts, notice and opportunity to cure provisions are not always well-drafted and frequently are not followed closely in the field. As a result, they have earned the unprestigious honor of making my “top ten” list of the most frequently litigated contract provisions.

Fortunately, there are a number of ways to draft and implement these provisions that can help keep you out of the courtroom:

**Tip One:** Make the provision simple, specific and unambiguous. While this tip may not strike you as earth-shattering, you would be surprised by the ambiguity in many notice and opportunity to cure provisions. The less specific your provision is in setting out the rights and responsibilities of the parties, the more likely its application will end in dispute. Avoid using terms like “reasonable notice” in your cure provision. This type of verbiage is subject to interpretation, and by “subject to interpretation” I really mean “subject to dispute.” So be specific. State a specific length of time (number of days or hours) that is required before the opportunity to cure expires and repairs may commence. If stated in terms of days, be sure to clarify whether you intend the period to be measured in calendar days or working days.

**Tip Two:** Specify that “written notice” is required. Requiring written notice will help you avoid “he said-she said” disputes that so often arise in the context of these provisions. Recollections of verbal conversations and meetings vary like the shapes of snowflakes, and we frequently see disputes concerning whether notice was given and whether the content of the notice was sufficient. These are two fertile areas for dispute and litigation that a “written notice” requirement will help eliminate.

**Tip Three:** Specify to whom notice should be provided and in what format. A good method of delivery is facsimile transmission of the written notice to an agreed fax number/recipient with a successful fax confirmation. Certified mail is also good in that it provides receipt confirmation, but this method has an inherent time delay that may be problematic depending on the urgency of repairs. E-mail is good in that it provides immediate communication, but unless responded to, e-mail may lack the desired receipt confirmation. Give consideration to how you communicate, and select a method of delivery that is both fast and verifiable.

**Tip Four:** Once you have agreed upon a clearly-worded and unambiguous notice and opportunity to cure provision, follow it. Perhaps the most common problem we see with these provisions is the failure of field personnel and project management to follow them. Train your field personnel and project management to be familiar with and follow your provisions.

Make your representatives aware that when your provision is not followed, you run the risk that you will not be able to recover the repair costs. While some judges and jurisdictions do not interpret notice and cure provisions as strictly as others, many judges will interpret the provision to be a “condition precedent” to your ability to recover repair costs, particularly when the provision is part of a written contract negotiated and signed by two sophisticated parties. So if you fail to provide notice and opportunity to cure in compliance with your contract, you may likely be precluded from recovering the dollars you spent making the repairs.

If your representatives, despite your training and instruction, fail to follow the notice and opportunity to cure provision, do not give up as there may still be a chance you can recover your repair costs. In Missouri, there is a lesser known line of cases which hold that “the law does not require written notice to be given when doing so would be a vain and useless act.” Whether notice is “vain and useless” will obviously depend on the particular facts and circumstances of your case, but this line of cases may be helpful to you should your project team fail to comply with the notice and opportunity to cure provisions of your contract.

**Tip Five:** Exclude situations where you do not want the notice and opportunity to cure provision to apply. If you are drafting a

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notice and opportunity to cure provision for use with a subcontractor or supplier, determine when you do not want the cure period to apply, and then exclude application of the cure provision in those specific instances.

For example, for defects that present a safety concern, such as a defective electrical component, etc., you likely would not want the notice and opportunity to cure provision to apply, causing you to stand idle for several days while you dispatch notice and provide a chance for the subcontractor or supplier to come and investigate the problem.

Likewise, for some defects the repair costs may escalate greatly each day the repair work is delayed, so consider clearly stating the parties' intent that the cure provision not apply in those situations. Some defects and repairs may adversely affect the critical path of your project, so consider excluding application of the cure provision in those situations as well.

In conclusion, if you follow these five simple tips, your notice and opportunity to cure provisions will be more clearly understood and effective, and you will be better positioned to avoid the grey areas that so frequently lead to disputes and litigation. Who knows, perhaps in the coming years these provisions will fall off my top ten list of most frequently litigated contract provisions.

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