

Contractor Doctor: What can the agency do if I cancel my contract before starting it?

Dear Contractor Doctor,

I recently secured a contract via an agency, and it's due to start in two months.

However, I have had to withdraw from the contract immediately and without notice.

What can the agency do if I cancel my contract before starting it?

Thanks

Diane

Contractor Doctor says:

The options available to an agency if a contractor unilaterally cancels a contract before it starts will depend on the provisions of the contract, the reason for cancellation and, quite possibly, on whether the contractor secures professional assistance, according to [Roger Sinclair](#) of contractor legal specialist Egos.

"The contractor may be in [breach of contract](#) and the agency could as a result have the expectation of compensation," Sinclair explains. "By sharing with the agency the reason for the withdrawal, if it was a personal tragedy for example, the contractor could engender sympathy and an amicable resolution. Securing legal advice at an early stage can often help to mitigate any potential liabilities."

Contracts with a termination clause

If there is a [termination clause](#) in the contract and the contractor provides sufficient notice as required by that termination clause, then it may be possible for a contractor to withdraw from a contract before it starts without being in breach of the contract.

But as Sinclair explains, even if there is a termination clause in the contract, the provisions of the contract might mean that time for the purposes of the termination clause would not start to run until the contract actually starts: "If this were the case, for a contract starting on 1 April that has a one month termination clause, the earliest a contractor could leave would be 1 May."

It's a case of understanding what any wording in the contract on the question of termination actually means.

The good news is the existence of a termination provision should limit any liability on the part of the contractor to the agency to the agency's losses during the period of termination notice the contractor is actually required to give, rather than during the length of the entire contract.

Penalty clauses are unenforceable, but reasonable pre-estimates of loss can be enforced

"[Penalty clauses are unenforceable](#), so that's not a route an agency can take," continues Sinclair. "But if the contract contained a liquidated damages provision setting out a reasonable pre-estimate of its loss in the event of such a breach by a contractor, the agency might well be able to enforce such a provision."

Where a breach of contract occurs, under English contract law, the agency has the right to be put in the position in which it would have been, had the breach not occurred. Having breached the contract, the contractor would be the party responsible for paying such compensation.

"However, the injured party, in this case the agency, has a duty to mitigate," says Sinclair. "The agency cannot simply sit back and take no action in the expectation that the contractor will make up the entire loss. Its duty to mitigate is likely, for example, to require the agency to seek a replacement."

Even if the agency loses the client and the contract to another recruiter because of the contractor's withdrawal, the contractor's total liability for damages is likely to be limited to the earliest date that the contractor could lawfully have terminated, according to the contract.

Negotiation and legal action if breach of contract is clear

Sinclair highlights the principle of civil law practice requiring that parties must make reasonable attempts to resolve a dispute before resorting to legal action: "The agency's first step should be to set out what it is looking for from the contractor and, if the situation is not resolved, the action it will take."

If the contractor can answer the agency's complaint, they should do so. If they cannot, Sinclair considers it crucial to seek professional legal advice at this stage, and from a lawyer with experience in this type of dispute: "Early intervention from someone who deals regularly with this kind of dispute may achieve

lower costs and a better result for the contractor.”

Should all attempts to negotiate fail, the agency would be entitled to pursue the contractor through the courts. A letter before action from the agency is the first step on this path, and the point when the contractor knows the agency means business. The agency could eventually take the contractor to court to secure compensation, although during this period it still has a duty to mitigate.

Conduct regs are no protection

What are generally known as the ‘conduct regs’ provide no defence against breach of contract, warns Sinclair: “whether or not contractors expressly opt out of the [Conduct of Employment Agencies and Employment Businesses Regulations 2003](#), they should still expect to honour their contractual obligations.

“The regulations expressly provide that a requirement to give a reasonable period of notice does not in itself amount to an unlawful detriment (reg. 6).”

Sinclair emphasises that if a contractor enters into a contract, they are liable for its performance.

“But if the contractor has a good reason for withdrawing, such as a bereavement or serious illness in their family, they should inform the agency,” he says. “It is unlikely to change their legal position, but it may get the agency to think harder before taking action.”

Good luck with your contracting!

Contractor Doctor

Published: Thursday, March 29, 2012

© 2016 All rights reserved. Reproduction in whole or in part without permission is prohibited. Please see our [copyright notice](#).



ABCe verified website - last audit confirmed 134,482 monthly unique visitors

© Copyright 2016 Byte-Vision Limited UK. All rights reserved [Copyright notice](#)

“
Early intervention from
someone who deals regularly
with this kind of dispute may
achieve lower costs and a
better result for the contractor
”

Roger Sinclair, Egos