



CHAPTER 35

BREACH OF CONTRACT AND TERMINATION

If the Contractor fails to perform its Work according to the terms of the Contract, the Resident Engineer (RE) may take actions as appropriate, including suspension of Work, withholding payment, removal of Contractor personnel, correction of deficiencies at the Contractors expense, or initiation of termination. Section 00180.90 enables the Agency to terminate a Contract.

35-1 Corrective Actions

If the Contractor is not fulfilling its contractual requirements, the RE may initiate the corrective actions below. The RE would also include corrective actions in the required Prime Contractor Performance Evaluation, if any. [Refer to Chapter 34 – Contactor Performance Evaluation.]

A. Verbal Discussion, Notices, or Reminders

If the RE believes that an unacceptable event will, or is about to occur, or if an unacceptable event has occurred, discuss it with the Superintendent. Document the conversation in the RE's Diary or General Daily Progress Report, form 734-3474.

B. Suspending Work

The Inspector has authority to suspend Work when a situation poses immediate danger or needs immediate correction. The RE has authority to suspend work for the causes listed in Section 00180.70. [Refer to Chapter 13 - Contract Time.]

C. Written Notice

If verbal discussions or Work suspensions have failed to produce the desired results, write a letter (signed by the RE) to the Contractor. Copies should also be sent to the Construction Section and Contractor's home office.

The letter must describe the issue, refer to the applicable Contract provisions, and outline the corrective actions that must be taken within a stated timeframe.

D. Withholding Progress Payments

The RE may withhold progress payments if the Contractor, or a Subcontractor, has failed to take necessary action or to submit required documents. The RE may withhold an amount necessary to protect the Agency's interests until the action is corrected or the required documentation is submitted. (See 00195.50(e).)

E. Written Notice of Potential Breach of Contract

If the previous corrective actions were unsuccessful, the RE must inform the Region and should discuss the situation with the Contract Administration Engineer (CAE).

The RE will prepare a letter to the Contractor documenting their failure to rectify the situation. The letter will also include a notice that unless the situation is corrected by a specified date, it may lead to a finding of Breach of Contract.

Send a copy of the letter to the Region, CAE, Contractor's home office, and Contractor's surety.

35-2 Breach of Contract

The Agency may find the Contractor to be in Breach of Contract if the Contractor has willfully failed or refused to perform according to the terms of the Contract or to the orders of the Engineer. (See 00180.90.) Although the Contractor has breached the Contract, the Agency may determine that it is not a material breach and does not warrant termination of the Contract. A finding of breach by the Agency is a serious action. However, it may help the RE to get a Project back on track. Contact the CAE if you have questions.

For the Agency to pursue a Breach of Contract, the RE must prepare a letter describing the contractual requirement(s) and the Contractor's violations of the requirement(s). The RE must send the letter with supporting documentation to the Region requesting that a Breach of Contract be considered. The Region should review the request and send it with a recommendation to the CAE.

The CAE will confer with the Department of Justice (DOJ), the State Construction and Materials Engineer (SCME), and the Statewide Project Delivery Branch Manager, and will draft the required letter for signature by the Assistant Director for Operations.

35-3 Termination of Contract

The Agency can terminate the Contract for either of the following reasons:

A. Termination for Convenience

The Agency may terminate the Contract for convenience when, through no fault of the Contractor, it is necessary or in the public interest to do so (00195.70 (b)).

B. Termination for Default

The Agency can terminate the Contract for default for any of the reasons listed in 00180.90(a). When such action is initiated, the Agency must give the Contractor 10 Calendar Days' notice of the termination. The Contractor may avoid termination if it or its surety reaches agreement with the Engineer on needed corrective action and implements the needed action as discussed in 00180.90(b).

The Agency must also terminate the Contract (Termination for Default) if the Contractor is placed on the Construction Contractors Board (CCB) listing of firms not qualified to hold or participate in public improvement contracts at:

<https://www.oregon.gov/CCB/>

If this happens, the RE must suspend Work, arrange for public forces to maintain traffic control devices, and immediately initiate termination proceedings.

When the Agency terminates a Contract, it will pay the Contractor, according to Section 00195.70, for Work performed.

When the need for termination occurs, the CAE, with the recommendation of and information provided by the RE and Region, will work with Legal Counsel and others to prepare two (2) letters for the Assistant Director for Operations:

1. A letter to the Oregon Transportation Commission requesting approval to terminate the Contract, and
2. A letter to the Contractor informing it of the Agency's intent to terminate the Contract.

When the Contract is terminated, the RE must work with the CAE to assure that the Contractor receives proper payment for Work accomplished. The Region Assurance Specialist (RAS) must perform a review of all quality and quantity documentation supporting payment.

The Agency may allow the surety to provide a Contractor to finish Contract Work on a terminated Project. This is discussed in Subsections 00180.90(a) and 00195.70(a).