

***CHAPTER 35 – TERMINATION AND BREACH OF CONTRACT**

If the Contractor fails to perform its Work according to the terms of the Contract, the Project Manager (PM) may take actions as appropriate, including suspension of Work, withholding payment, removal of Contractor personnel, correction of deficiencies at the Contractor's expense, or initiation of termination. Section 00180.90 enables the Agency to terminate a Contract. The authority to terminate a Contract, however, rests only with the Oregon Transportation Commission (OTC).

The PM should be proactive in identifying and resolving problems before they occur. The PM also should communicate expectations about Contract requirements to minimize problems and misunderstandings.

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

35-1 CORRECTIVE ACTIONS

(a) Verbal Discussion, Notices, or Reminders

If the PM 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 PM'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 PM 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 PM) to the Contractor. Copies should also be sent to the Region/Bridge Delivery Unit (BDU), 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.

* All Marked Text Updated October, 2010

(d) Withholding Progress Payments

The PM may withhold progress payments if the Contractor, or a Subcontractor, has failed to take necessary action or to submit required documents. The PM may withhold the entire progress payment 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 PM must inform the Region/BDU and should discuss the situation with the Contract Administration Engineer (CAE) of the situation.

The PM 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 will lead to a finding for Breach of Contract.

Send a copy of the letter to the Region/BDU, 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. 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 PM to get a Project back on track. Contact the CAE if you have questions.

For the Agency to pursue a Breach of Contract, the PM must prepare a letter describing the contractual requirement(s) and the Contractor's violations of the requirement(s). The PM must send the letter with supporting documentation to the Region/BDU requesting that a Breach of Contract be considered. The Region/BDU 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 (SC&ME), and the Technical Services Manager and will draft the required letter for signature by the Executive Deputy Director.

The PM must address any breach letters when completing the required Prime Contractor Performance Evaluation. [Refer to [Chapter 34 - Contractor Performance Evaluation](#)]

35-3 TERMINATION OF CONTRACT

If the Contractor has repeatedly refused to correct unacceptable situations, is unable to perform satisfactory Work even after repeated attempts, or blatantly refuses to comply with orders of the Engineer, the Agency should pursue termination of the Contract. This action must be pursued promptly and efficiently and can only be executed by the Oregon Transportation Commission (OTC). Section 00180.90 describes the Contract remedy the Agency may use to terminate a 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.
- (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:

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

If this happens, the PM 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 PM and Region/BDU, will work with Legal Counsel and others to prepare two (2) letters for the Executive Deputy Director:

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 PM 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).