

CONSTRUCTION

SUPPORT TIPS

August 2021

Preventing Wrongful Defaults

Wrongful default claims are evaluated based on the procedures taken and substance of the letter. The purpose of this document is to help prevent wrongful defaults by providing guidance for composing Intent to Default and Default letters. It also goes through some examples of what should not be done when defaulting a Contractor.

Wrongful Defaults

For projects that let before January 2017, Contractors may request a review of their default per Article 8.7.2, “Wrongful Default” of the 2014 Standard Specifications, within 30 calendar days of having received their default notice. Construction Division (CST) will review their request and determine if the Contractor has been wrongfully defaulted. If CST determines the default is proper, and if the Contractor doesn’t agree with CST’s determination, they may file a formal claim in accordance with Article 4.7, “Dispute or Claims Procedure.”

For projects let in January 2017 and before April 2019, the above is voided, per Special Provision (SP) 008-023.

For projects let in and after April 2019, those found to have been wrongfully defaulted will be changed to a termination of convenience per SP 008-033. The termination will be issued in accordance to Article 8.8, “Termination of Contract.”

CST will review wrongful default claims to determine if the Contractor has been wrongfully defaulted. Therefore, it is important to ensure that default letters are written properly before sending and all procedures are followed correctly. Wrongful defaults have previously resulted from the following situations.

- An Intent to Default letter was delivered to the wrong address, so the Contractor never received it.
- An Intent to Default letter included a corrective action that was not attainable within the 10-day period.
- A Default letter was sent months after the Intent to Default letter.
- A Default letter was not signed by someone with signature authority.
- A Default letter was sent for work that had previously been approved.
- The Contractor was defaulted at the request of a third party.

These wrongful default examples will be addressed throughout the procedures in this document to prevent reoccurrence.

Reasons for Defaults

Article 8.7.1, “Declaration of Default,” of the 2014 Standard Specifications lists the potential reasons that a Contractor can be defaulted.

- Fails to begin the work within the number of days specified;
- Fails to prosecute the work to assure completion within the number of days specified;
- Is uncooperative, disruptive or threatening;
- Fails to perform the work in accordance with the Contract requirements;
- Neglects or refuses to remove and replace rejected materials or unacceptable work;
- Discontinues the prosecution of the work without the Engineer’s approval;
- Makes an unauthorized assignment;
- Fails to resume work that has been discontinued within a reasonable number of days after notice to do so;
- Fails to conduct the work in an acceptable manner; or
- Commits fraud or other unfixable conduct as determined by the Department.

At least one of these reasons should be used when drafting an Intent to Default letter. It is best to use the specific language from the Standard Specifications to minimize any confusion. Later sections will provide information to help develop corrective actions for these issues.

Writing the Intent to Default Letter

The Intent to Default letter (10-Day Notice of Intent) should be one of the last measures taken to get the Contractor to perform on the contract. Ensure the case against the Contractor is valid and have sufficient supporting documentation available. Before sending out an Intent to Default letter, CST recommends the following steps be taken.

- Perform an interim Contractor evaluation.
- Request that the Contractor develop a Project Recovery Plan (PRP) if the interim evaluation score is less than 2.0.

If those steps have been taken, draft an Intent to Default letter, and send it to CST for review.

Standard Template

A standard Intent to Default template is provided on the [CST Support](#) page (internal access only). It is recommended that Districts use this letter template to reduce the risk of a wrongful default. The letter should be tailored to include the Contractor’s information, project information, and specific reasons with corrective actions that the Contractor needs to take.

The Intent to Default letter should be signed by the Area Engineer, unless delegated to someone else in the District’s Delegation of [Signature Authority](#) document (internal access only).

Contractor's Information

The Contractor's information will be listed at the top of the letter and includes the following.

- Contact Name
- Company Name
- Address
- City, State (Zip Code)
- Known email (optional)

Verify the Contractor's name and address by using TxDOT's Mainframe system. If the mailing address listed is a post office box, mail the letter to the street address instead. (Contact the Contractor for this address.) A post office box may not be checked as often and could cause the Contractor to miss their 10-day window. The 10-day count starts once the letter has been delivered; therefore, sending the letter via certified mail is required, with the certified mail number included at the top of the letter.

Though not a substitute for the letter sent by certified mail, also send the letter to the Contractor's known email so that the Contractor is always informed and aware of the letter being mailed. This email address should be the one used for official communication between TxDOT and the Contractor.

Project Information

The project information includes the project number, CCSJ, contract number, highway, and county. The body of the letter template also includes an option for either Article 8.7 (2014 Standard Specifications) or Article 8.6 (2004 Standard Specifications) used in the project. Complete all of these fields in the letter template to match the project.

Reasons and Corrective Actions

The Intent to Default letter is used to communicate to the Contractor their risk of being defaulted and gives them an opportunity to remedy project issues. The letter should include issues listed in the previous above, under "Reasons for Default." It should also provide a corrective action that the Contractor should accomplish within 10 calendar days. If a Contractor fails to correct the issues within the allowed time, the District may proceed to default the Contractor in accordance with the specifications. Therefore, it is important that the corrective actions are attainable and relate to the issues that are listed.

When determining the corrective actions, ask, "**How can this be resolved?**" and "**Will this be possible to accomplish within the 10-day period?**" Below are some common reasons for default with a list of acceptable corrective actions that have been used in previous letters.

- The Contractor stopped work without approval.
 - Mobilize and resume prosecution of work on the project in a continuous manner.
 - Resume prosecution of work in a continuous manner.
 - Must begin work on, or before, (date) and continuously pursue the contract to completion.

- The Contractor is behind schedule.
 - Submit a recovery plan and schedule that shows how the Contractor plans to minimize additional delays.
 - Provide a recovery schedule, as requested, in conformance with the contract requirements.
 - Set up a prosecution and progress meeting with the AO within the 10-day period to discuss action plan for proceeding with construction.
- The Contractor has failed to submit documentation.
 - Provide status of materials purchases along with supporting documentation.
 - Provide documentation of the application for all remaining electrical services.

The following are some unacceptable corrective actions that should not be used in the letter, as they may not be possible to accomplish.

- The Contractor is to complete all work in Milestone 3.
 - Depending on how much work is left in Milestone 3, it may not be attainable within the 10 days.
- Complete work as requested.
 - This corrective action is too vague and should specify what actual work should be completed.
- Open the Eastbound segment by 4/30/21.
 - This letter was to be sent on 4/2/21. Therefore, the corrective action was not measurable or attainable within the 10-day period.
- Earn a minimum of \$2,380,000 per month through October 2021.
 - This corrective action is also not measurable or attainable within the 10 days.
- The Contractor is to provide appropriate shop drawings and other appropriate contract items.
 - This corrective action does not mention specifically what the other contract items include. There may be some contract items not attainable within the 10 days.

Informing Other Parties

While the letter is addressed only to the Contractor, all parties to the contract should be informed throughout this process. The bottom of the letter template lists those who should be copied, as shown below.

- District Construction Office
- Construction Division, Construction Section

- Surety Name
 - Surety Address
 - Bond Number
 - Official email address (optional)

It is important that the Surety is informed of any potential defaults, so they are not surprised if the project is defaulted. Often, the mailing address for the Surety will be provided in the executed contract under the bond information. Send the Surety's copy of the letter via certified mail. If possible, also add a known official email address used to contact the Surety.

Good Practices for Sending the Letter

It is important to determine when to send the letter. If it is sent during a holiday period, there may be uncertainty when counting down the 10-day period. For example, during the winter time, time suspensions due to Christmas and New Year's may interfere with the letter. Consider this when determining a send date. Additionally, do not wait to send the letter until liquidated damages start being charged; in the event the Contractor is defaulted, the Surety's takeover Contractor is left with no time to complete the project.

Writing the Default Letter

After sending the Intent to Default letter and after the 10-day period has passed, determine if the Contractor accomplished all the corrective actions. If not, the District may consider defaulting the Contractor.

Before sending the Default letter, the District should ensure their case against the Contractor is valid. Additionally, documentation should be available supporting their reasons for default. A good practice is to discuss their case with an AE who is not familiar with the Contractor or issues to see if they agree that a default is needed.

A template for the Default letter is provided on the [CST Support](#) page (internal access only). The Default letter should be tailored to include the Contractor's information, project information, and selecting the Specification version (2014 vs. 2004). Additionally, the letter should list the specific reason(s) for default based on the Intent to Default letter sent to the Contractor. The only reasons listed should be those the Contractor left unresolved within the 10-day period and directly resulted in the default. Lastly, if the project has no performance bond, the paragraph relating to the Surety may be removed.

The Default letter should be signed by the District Engineer or as delegated in the District's Delegation of [Signature Authority](#) (internal access only)

The following parties should be copied when sending out the Default letter.

- Area Office
- Construction Division: CST-ALL

- Surety Name
 - Surety Address
 - Bond Number
 - Official email address (optional)

When not to Default a Contractor

There are some instances where a Contractor may not be defaulted as stated in the *Construction Contract Administration Manual (CCAM)*, Chapter 10, Section 8.

- The Contractor has filed for bankruptcy protection.
- The Contractor has insufficient insurance.
- The Contractor has insufficient Surety bond coverage.
- The Surety requests it.

One of the previous wrongful default causes was when a Contractor was defaulted at the request of a third party, which includes the Surety.

What should be done after defaulting

Once a Contractor is defaulted, there are several things that need to be done.

- The Area Engineer should conduct a final evaluation and enter the score in SiteManager (for projects that were let after September 2018).
- The Contractor will be referred to the Department's Performance Review Committee (PRC) for consideration of remedial action. Because of this, the District should compile all backup documentation for the PRC. Backup documentation may include the reason for default and any information that may be relevant to the default and Contractor.
- The District should contact the Surety to start the process for completing the project with a takeover Contractor.
- The Construction Division will assist the District in preparing the takeover agreement.

Additional Information

It is important to use the provided letter templates and have attainable corrective actions to prevent any wrongful defaults.

More information related to defaults can be found in Article 8.6 (2004 Standard Specifications), Article 8.7 (2014 Standard Specifications), and the CCAM, Chapter 10, "Prosecution and Progress," under Section 8, "Default of Contract."

Contact CST-ConstructionSupport@txdot.gov for review of the 10-day notice and Default letters prior to sending them out.