

## Section 8.6

### CONTRACT DEFAULT

#### 8.6.1 Purpose

To establish the definition of default and reasons for declaration of default as applied to all construction contracts entered into between the Department and Contractors; to establish remedies for completion of the defaulted contract; to establish cost liability and damage assessments; to establish details necessary for the pursuit of default proceedings.

#### 8.6.2 Authority

Sections 20.23(43)(a) and 334.048(3), Florida Statutes (F.S.)

#### 8.6.3 Reference

Sections 120.57, 337.16(2), 337.18, F.S.

Florida Administrative Code (F.A.C.) 14-22

Article 8-9, Standard Specifications for Road and Bridge Construction

#### 8.6.4 Default Provision

The Department shall provide in its contracts for the determination of default on the part of any Contractor and on the part of any Surety for cause attributable to such Contractor or Surety.

#### 8.6.5 Reasons for Default

The Department will give notice in writing to the Contractor and its Surety of delay, neglect, or default, due to reasons stated in ***Standard Specifications, Article 8-9***.

#### 8.6.6 Recourse and Remedies

If the Contractor, within a period of ten (10) calendar days after receiving the notice described above, fails to correct the conditions of which complaint is made, the Department shall, upon written certification from the Engineer of the fact of such delay,

neglect or default, and the Contractor's failure to correct such conditions, have full power and authority, without violating the contract, to take the prosecution of the work out of the hands of the Contractor and to declare the contract in default.

Upon declaration of default, the Department shall look to the Surety to provide a completion Contractor to complete the work. If the Surety refuses to complete the work, becomes unacceptable or unreliable in satisfactory completion of the work, the Department will have full power to appropriate or use any and all materials and equipment on the site which are suitable and acceptable, and may enter into an agreement with others for the completion of the work under the contract, or may use other methods which in the opinion of the Engineer are required for the completion of the work in an acceptable manner.

If after the ten (10) day notice period, and prior to any action by the Department to otherwise complete the work under the contract, the Contractor should establish its intent to prosecute the work in accordance with the Department's requirements, the Department may elect to permit the Contractor to resume the work.

A Contractor declared in default by the Department does not have hearing rights pursuant to **Section 120.57, F. S.** for challenging the Department's declaration of default.

### **8.6.7 Cost Liability**

All costs and charges incurred by the Department because of the Contractor's default, including the costs of completing the work under the contract, shall be charged against the Contractor and the Surety. In case the expense incurred by the Department is less than the sum which would have been payable under the contract if it had been completed by the defaulting Contractor or the Surety, the defaulting Contractor or the Surety shall be entitled to receive the difference. In case the expense exceeds the sum that would have been payable under the contract, then the Contractor and the Surety shall be liable for the amount of the excess.

In the event the Department elects to permit the defaulting Contractor to resume the work, any costs to the Department incurred by the delay, or for any reason attributable to the delay, will be deducted from any moneys owed the Contractor or which may become due under the contract.

The Department shall have no liability for anticipated profits for unfinished work on a contract that has been determined to be in default.

### **8.6.8 Determination of Number of Days of Default**

For all contracts, regardless of whether the contract time is stipulated in calendar days or working days, default days shall be counted in calendar days.

### **8.6.9 Liquidated Damages During Default**

Should the Contractor or, in case of its default, the Surety fail to complete the work within the time stipulated in the contract, or within such extra time as may have been granted by the Department, the Contractor or, in case of its default, the Surety shall pay to the Department, not as a penalty but as liquidated damages, the amount due as determined by ***Standard Specification, Article 8-10.2.***

In case of Contractor default and completion of the work by the Department, the Contractor and its Surety shall be liable for the liquidated damages under the contract, but no liquidated damages shall be chargeable for any delay in the final completion of the work by the Department due to any unreasonable action or delay on the part of the Department.

Permitting the Contractor to continue and to finish the work, or any part of it, after the expiration of the contract time allowed, including extensions of time granted the Contractor, shall in no way act as a waiver on the part of the Department of the liquidated damages due under the contract.

### **8.6.10 Termination of Contractor's and Surety's Responsibility**

The contract will be considered complete when all work has been completed and has been accepted by the Department, however, the Contract Bond provides a warranty applicable to any defects in the Work that appear, occur, or result within two years from final acceptance, and Specification 5-13 provides recovery rights subsequent to final payment.

### **8.6.11 Default Proceedings**

#### **(A) District Level Responsibilities**

Since the primary responsibility for the implementation of the Department's transportation programs has been delegated to the Districts, each District Construction Engineer will be responsible for identifying conditions of delay, neglect, or default on the projects in his/her district. After consulting with the District Director of Operations, the District Construction

Engineer will recommend that the Director, Office of Construction sends a **Notice of Default** to the Contractor.

The District Construction Engineer will keep the Director, Office of Construction apprised of developments on such project during the ten-calendar day periods.

### **(B) Central Office Level Responsibilities**

In conjunction with its monitoring function to ensure uniform compliance and quality performance by the Districts, the Office of Construction will review the Districts' recommendations in regard to declaration of default, consult with legal counsel, and issue the written notice of intent to default to the Contractor and its Surety.

If the Contractor, within ten (10) calendar days after receipt of the **Notice of Intent to Default**, does not correct the conditions of which complaint is made, final Agency action, in the form of a written **Notice of Default**, taking the prosecution of the work out of the hands of the Contractor and declaring the contract in default, will be issued by the Chief Engineer or designee.

If the Surety becomes unacceptable or unreliable in satisfactory completion of the work, the Director, Office of Construction will issue a written **Notice of Intent to Default** to the Surety. And if the Surety, within ten (10) calendar days after the Notice of Intent to Default, does not proceed to correct the conditions of which complaint is made, final Agency action, in the form of a written **Notice of Default**, taking the prosecution of the work out of the hands of the Surety and declaring the Surety as unacceptable and unreliable, will be issued by the Chief Engineer or designee.

The Department shall refuse to accept as a Surety on subsequently awarded contracts, to any company, that it deems to be unreliable or otherwise unsatisfactory as a result of its actions on a previously awarded contract.

### **8.6.12 Suspension of Certificate of Qualification**

Department **Rule 14-22, Florida Administrative Code (F.A.C)** allows the Department to suspend, for a specified period of time, or revoke, or deny for good cause, any Contractor's qualification to bid. A suspension, revocation, or denial for good cause shall prohibit the Contractor from bidding on any Department contract regardless of the dollar amount of the bid, and from acting as a material supplier, subcontractor or a Consultant on any Department contract or project during the period of suspension, revocation, or denial. Good cause shall include if the Contractor defaults on any Department contract or the contract surety takes over any Department contract from the Contractor.

## Central Office Level Responsibilities

A notice of the Department's intent to suspend, revoke, or deny any Contractor's qualification to bid on Department contracts as a result of default on a previously awarded contract is subject to the Contractor's right to request an Administrative Hearing pursuant to **Section 120.57, F.S.** and Department **Rule 14-22 F.A.C.**

- (1) The written notice shall contain:
  - (A) The specific facts relied upon to show that the Contractor has defaulted on a Department contract, justifying the suspension.
  - (B) A statement that within ten (10) days of receipt of the **Notice of Intent** to suspend, the Contractor has the right to request an Administrative Hearing pursuant to **Section 120.57, F.S.**, by filing a written request with the Clerk of Agency Proceedings. The Contractor's request for hearing shall be in writing and shall be filed with the Clerk of Agency Proceedings, 605 Suwannee Street, Tallahassee, Florida 32399-0458 within ten (10) days of receipt of the notice of intent to suspend.

The request for hearing shall include:

- The name and address of the party making the request.
  - A statement that the party is requesting a formal hearing. Florida Statutes require a formal proceeding whenever the proceeding involves a disputed issue of material fact, unless waived by all parties. Department policy is not to waive a formal proceeding in any case involving a disputed issue of material fact.
  - All specific facts and circumstances that the Contractor believes legally excuses him from the Department's determination of default.
- (C) A statement that the suspension shall be conclusive and final agency action if no request for a hearing is filed with the Clerk of Agency Proceedings within ten (10) days of receipt of the notice of intent to suspend.

- (D) If the Contractor fails to file a request for hearing within ten (10) days of receipt of the notice of intent to suspend, the suspension shall become conclusive and final Agency action.
- (E) If the Contractor files a timely request for hearing, the hearing officer shall hold a hearing within thirty (30) days of receipt of the request for hearing. The officer shall complete and submit to the Agency and all parties a recommended order within fifteen (15) days after the hearing.

### **8.6.13 Contractor Suspension Report**

A list of Defaulted Contractors whose Certificates of Qualification has been suspended or revoked, and unacceptable Sureties will be shown in the Contractor Suspension Application maintained by the Office of Construction and made available on the Office of Construction website at the following hyperlink.

<https://www.fdot.gov/construction/legal/NewSuspension.shtm>