

Termination

When a contract is terminated, the parties are relieved from further unperformed obligations in accordance with the agreed terms and conditions. A contract may be terminated under distinct processes: Termination for Convenience and Termination for Default.

Termination for Convenience

A termination for convenience, also known as no-fault termination, allows the agency to terminate any contract, in whole or in part, at any time in its sole discretion, if it is determined that such termination is in the best interest of the agency.

- The agency shall provide the contractor with written notice specifying whether the agency is terminating all or part of the contract. The notice of termination shall give the date of termination. If the contract is being selectively terminated, the agency should specify which part(s) of the contract are being terminated.
- A termination notice should be issued which includes wording similar to:

Pursuant to Section ____, Termination, this contract is hereby terminated effective [date]. [Contractor name] is directed to immediately stop all work, terminate subcontracts, and place no further orders.

In accordance with this Notice of Termination, you shall:

- 1) Keep adequate records of your compliance with this notice, including the extent of completion on the date of termination.*
 - 2) Immediately notify all subcontractors and suppliers, if any, of this Notice of Termination.*
 - 3) Notify the agency Contract Administrator [name], of any and all matters that may be adversely affected by this Termination; and*
 - 4) Take any other action required by [agency name] to expedite this Termination.*
- The contractor will generally be paid for allowable costs incurred up to the termination. The agency will not be liable for payment to the contractor related to the terminated portion of the work or any work performed or costs incurred after the effective date of termination.
 - Upon receipt of any invoice from the contractor for work performed prior to the Notice of Termination, the agency should thoroughly review the invoice to ensure that no excessive costs are included.

Termination for Default

A contract may be terminated for default when the agency concludes that the contractor fails to perform, make progress, or in any way breaches the contract. An agency is not required to terminate a contract even though the circumstances permit such action. Agencies may determine that it is in their best interest to pursue other alternatives. Examples of such alternatives include extending the delivery or completion date, allowing the contractor to continue working or working with the contractor's surety to complete the outstanding work.

Termination for default should be used as last resort and not as punishment. The purpose of a termination for default is essentially to protect the interests of the agency while obtaining the necessary goods or services from another source.

Factors to consider prior to making a termination for default decision include:

- 1) Has the agency done everything within reason to assist the contractor in curing any default?
- 2) The provisions of the contract and applicable regulations.
- 3) The specific contractual failure(s) and the explanation provided for the failures.
- 4) The urgency of the need for the contracted supplies or services. The agency may need to weigh the respective benefits and/or disadvantages of allowing a delinquent contractor to continue performance or re-soliciting a new contractor.
- 5) The availability of the supplies or services from other sources and the time required to obtain them (compared to the additional time the current contractor needs to complete the work).
- 6) Availability of funds and/or resources to re-purchase in the event such costs cannot be recovered from the delinquent contractor. Under a termination for default, the agency is within its rights to demand re-procurement costs from the defaulting contractor. Nevertheless, the contractor may not be financially capable to finance the re-purchase, or such demand may result in protracted legal action.

If a vendor is terminated for default, the contractor is liable for actual damages and costs incurred by the state unless the contract states otherwise.^{lxxii}

Excusable Causes. A contract may not be terminated for default when the failure to perform is due to excusable causes. In order to qualify as an excusable cause, the cause must be beyond the control, and without the fault or negligence of the contractor. Such excusable causes include, but are not limited to:

Acts of God or of the public enemy	Acts of the agency	Fires	Floods
Epidemics	Strikes	Freight embargos	Unusually severe weather*

*Severe weather, although beyond the contractor’s control, will not generally constitute an excusable delay if it is not considered “unusually severe weather”. For example, a snow storm in Amarillo in February would not be considered unusual, while it would be considered unusual in Austin. On the other hand, a snow storm in Amarillo in June would indeed be unusual.

If the contractor’s failure to perform is due to the default of a subcontractor, in order to qualify as an excusable cause, the default must arise out of causes beyond the control and without the fault or negligence of both the contractor and the subcontractor. Even if this requirement is met, the cause will not be excusable if the supplies or services to be provided by the subcontractor could have been obtained from other sources in time to meet the contract delivery schedule.

See Legal Reference Section for additional information on issues related to Contractor Performance^{lxxiii}

Termination for Default Notifications

Prior to terminating a contractor for default, a cure notice should be sent to the contractor. A cure notice is a letter provided to the contractor that provides them a period of time, usually 10 days, to correct or “cure” the deficiency or violation.

Cure Notices. The format for a cure notice may be as follows:

[contractor name] is notified that the [agency name] considers [specify failures] a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days from the date of this letter, the [agency name] may terminate for default under the terms and conditions of the Termination clause of this contract.

Another format for a cure notice is:

Since [contractor name] has failed to perform the above referenced contract within the time required by its terms, the agency is considering terminating the contract under the provisions for default. Pending a final decision in this matter, it will be necessary to determine whether your

failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the questions to [agency point of contact] within 10 days from the date of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist.

Any assistance given to you on this contract or any acceptance by [agency name] of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of [agency name] to condone any delinquency or to waive any rights the [agency name] has under the contract.

Notice of Termination. If the contractor fails to cure the situation or provide a satisfactory explanation as requested, the contract may be terminated. The Notice of Termination should contain the following:

- 1) The contract number, if any, and date of contract;
- 2) The effective date of termination;
- 3) Reference to the clause under which the contract is being terminated;
- 4) A concise, accurate statement of the facts justifying the termination; and
- 5) A statement that the supplies or services being terminated may be re-procured and that the contractor will be held liable for any additional costs incurred due to the re-purchase.^{lxixiv} Before including this statement, the contract should be reviewed to determine whether the right is available under the contract.

i Texas Administrative Code §113.9(d) 1.

ii **Elements for Breach of Contract.** The essential in a suit for breach of contract are: (1) the existence of a valid contract; (2) that the plaintiff performed or tendered performance; (3) that the defendant breached the contract; and (4) that the plaintiff was damaged as a result of the breach. Landrum v. Devenport, 616 S.W.2d 359, 361 (Tex. Civ. App. – Texarkana 1981, no writ); Bradley v. Houston State Bank, 588 S.W.2d 618, 624 (Tex. App. – Houston[14th Dist.] 1979, writ ref'd n.r.e.); Hussong v. Schwan's Sales Enterprises, Inc., 896 S.W.2d 320, (Tex. App. – Houston[1st Dist.] 1995, no writ); Wright v. Christian & Smith, 950 S.W.2d 411, 412 (Tex. App. – Houston [1st Dist] 1997, no writ); McCulley Fine Arts Gallery, Inc. v. "X" Partners, 860 S.W.2d 473, 477 (Tex. App.-El Paso 1993, no writ).

Elements for Breach of an Express Warranty. In order to recover for the breach of an express warranty, a plaintiff must prove: (1) an express affirmation of fact or promise by the seller relating to the goods;(2) that such affirmation of fact or promise became a part of the basis of the bargain; (3) that the plaintiff relied upon said affirmation of fact or promise; (4)that the goods failed to comply with the affirmations of fact or promise; (5) that the plaintiff was injured by such failure of the product to comply with the express warranty; and (6) that such failure was the proximate cause of plaintiff's injury. General Supply and Equipment Co., Inc. v Phillips, 490 S.W.2d 913, 917 (Tex. Civ. App. – Tyler 1972, writ ref'd n.r.e.); Tex Bus. & Com. Code Ann. Sec. 2.313 (Vernon 1968).

Privity of Contract. It is a fundamental rule of law that only the person whose primary legal right has been breached may seek redress from an Nobles v. Marcus, 533 S.W.2d 923, 927 (Tex. 1976); Sherry Lane National Bank v. Bank of Evergreen, 715 S.W.2d 148, 152 (Tex. App. – Dallas 1986, writ ref'd n.r.e.). Stated another way, one may not maintain an action based upon the harm suffered by another. Texas Industrial Traffic League v. Railroad Commission of Texas, 628 S.W.2d 187, 191 (Tex. App. – Austin 1982), rev'd on other grounds, 633 S.W.2d 821 (Tex. 1982).

In contract actions, privity of contract is an essential element of recovery. Republic National Bank v. National Bankers Life Ins. Co., 427 S.W.2d 76, 79 (Tex. Civ. App. – Dallas 1977, no writ). In order to maintain an action to recover damages flowing from the breach of a written agreement, there must be ordinarily be a privity existing between the party damaged and the party sought to be held liable for the repudiation of the agreement. *Id.* “A well defined exception to the general rule thus stated is that one who is not privy to the written agreement may demonstrate satisfactorily that the contract was actually made for his benefit and that the contracting parties intended that he benefit by it so that he becomes a third-party beneficiary and eligible to bring an action on such agreement.” *Id.* By its very definition, however, such a third party beneficiary exception arises when one party asserts that it is the third-party beneficiary of a written agreement and, therefore, does not have to be in privity of contract with another party to bring an action against that party for breach of contract. See Exchange Bank & Trust v. Lone Star Life Ins. Co., 546 S.W.2d 948, 953 (Tex. Civ. App. – Dallas 1977, no writ); Briercroft Sav. & Loan Ass’n v. Foster Fin. Corp., 833 S.W.2d 898, 902 (Tex. Civ. App. – Eastland 1976, writ ref’d n.r.e.).

Substantial Performance. Generally, a party to a contract who is itself in default cannot maintain a suit for its breach. See Dobbins v. Redden, 785 S.W.2d 377, 378 (Tex. 1990). The doctrine of substantial performance has ameliorated this rule by allowing a contract action by a builder who has breached, but nevertheless substantially completed, a building contract. *Id.* The doctrine is an equitable action that allows a contractor who has substantially performed a construction contract to sue on the contract rather than being relegated to his cause of action for quantum meruit. See Vance v. My Apartment Steak House of San Antonio, Inc., 677 S.W.2d 480, 482 (Tex. 1984). The doctrine does not permit the contractor to recover the full consideration provided in the contract because, by definition, the doctrine recognizes that the contractor is in breach of the contract. *Id.* Although the contractor is allowed to sue on the contract, his recovery is decreased by the cost of remedying those defects for which he is responsible. *Id.*

A contractor seeking recovery on a substantial performance theory has the burden to prove substantial performance, to provide that he did substantially perform, and to prove the consideration due him under the contract, and the cost of remedying the defects due to his errors or omissions. *Id.* at 483. Carr v. Norstok Bldg. Systems, Inc., 767 S.W.2d 936, 940 (Tex. App. – Beaumont 1989, no writ). A finding that a contract has been substantially completed is the legal equivalent of full compliance, less any offsets for remediable defects. Uhler v. Golden Triangle Development Corp., 763 S.W. 2d 512, 515, (Tex. App. – Fort Worth 1988, writ denied).

To establish substantial performance of a contract, the defendant must show that the essential elements of the parties’ contract were performed and that the defects in performance did not prevent the parties from accomplishing the purpose of the contract. Matador Drilling Co. v. Post, 662 F.2d 1190, 1195 (5th Cir. 1981). Acceptance of performance alone does not constitute substantial performance, although it is a factor to be considered in determining whether there was substantial performance. Measday v. Kwik Kopy Corp., 713 F.2d 118, 124-25 (5th Cir. 1983).

Condition Precedent. A contract may include conditions precedent that must be satisfied before a vendor has an obligation of performance. A condition precedent may be either a condition to the formation of the contract or to an obligation to perform an existing agreement. Hohenberg Bros. Co. v. George E. Gibbons & Co., 537 S.W.2d 1, 3 (Tex. 1976). To make performance conditional, terms such as “if”, “provided that”, “on condition that”, or some similar phrase of conditional language must normally be included, although there is no requirement to utilize such language. Criswell v. European Crossroads Shopping Ctr., Ltd., 792 S.W.2d 945, 945 (Tex. 1990).

Promissory Estoppel. The doctrine of promissory estoppel is derived from § 90 of the Restatement of Contracts, which states: A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does not induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Restatement (Second) of Contracts § 90 (1971); Aubrey v. Workman, 384 S.W.2d 389, 393 (Tex. Civ. App. – Fort Worth 1964), writ ref’d n.r.e.). Promissory estoppel does not operate to create liability where it does not otherwise exist. Hruska v. First State Bank of Danville, 747 S.W. 2d 783, 785 (Tex. 1988). Promissory estoppel does not create a contract where none existed before, but only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them. “Moore” Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934, 937 (Tex. 1972).

The requisites of promissory estoppel in Texas are: (1) a promise; (2) foreseeability of reliance thereon by the promisee; and (3) substantial reliance by the promisee to his detriment. English v. Fischer, 660 S.W.2d 521, 524, (Tex. 1983). When promissory estoppel is raised to bar the application of the statute of frauds, there is an additional requirement that the promisor promised to sign a written document complying with the statute of frauds. Nagle v. Nagle, 633 S.W.2d 796, 800 (Tex. 1982); “Moore” Burger, 492 S.W.2d at 936-37 (Tex. 1972); Margin v. Norwest Mortgage, Inc. 919 S.W.2d 164, 167 (Tex. App. – Austin 1996, no writ); Coastal Corp. v. Atlantic Richfield Co., 852 S.W.2d 714, 718 (Tex. App. – Corpus Christi 1993, no writ); Cobb v. West Tex. Microwave Co., 700 S.W. 2d 615, 616 (Tex. App. – Austin 1985, writ ref’d n.r.e.).

Revocation of Acceptance (UCC). Under the UCC, a buyer may reject or revoke acceptance of non-conforming goods. Tex. Bus. & Com. Code Ann. §2.608 (Vernon 1994). Otherwise known as the “perfect tender” rule, a buyer may reject non-conforming goods in whole or in part. Tex. Bus. & Com. Code Ann. §2.608 (Vernon 1994). Rejection or revocation of acceptance will impose additional duties on a buyer.

Anticipatory Breach. The term anticipatory breach is a term that is described as a basis to avoid performance. To prove that affirmative defense of anticipatory breach of a contract, the defendant must show either words or actions by the plaintiff that indicate an intention to not perform the contract according to its terms. Builders Sand, Inc. v. Torture, 678 S.W.2d 115, 120 (Tex. App. – Houston [14th Dist.] 1984, no writ). The plaintiff must have distinctly, unequivocally, and absolutely refused to perform either the whole contract or a covenant which affects the whole consideration. American Bankers Inc. Co. v. Moore, 73 S.W.2d 620, 622 (Tex. Civ. App. – Fort Worth 1934, no writ). The refusal to perform must be unexcused. Taylor Pub. Co. V. Systems Mktg. Inc. 686 S.W.2d 213, 217 (Tex. App. – Dallas 1984, writ ref’d n.r.e.).

