



# State Procurement Manual

Department of Administration, State Bureau of Procurement

Number  
PRO-411

<b>Section</b>	<b>Effective</b>	<b>Replaces</b>
CONTRACT ADMINISTRATION AND TRANSACTIONS	9/16/19	PRO-E-21 5-1-97
<b>Title</b>		<b>Page</b>
CONTRACT CANCELLATION AND TERMINATION PROCEDURES		1 of 5

**SCOPE:** The purpose of this policy is to establish guidelines and procedure for determining if, and how, a contract is to be ended before its scheduled time due to cancellation or termination, or damages are to be assessed.

**POLICY:** A "contract" is any agreement between two or more parties which creates an obligation to perform. Acceptance of a purchase order constitutes a contract.

Contract cancellation occurs when either party ends a contract for breach by the other under the circumstances outlined herein in section I, B or C. The cancelling party retains any remedy for breach of the whole contract or any unperformed balance.

Termination occurs when either party ends a contract for cause (performance breaches of contract as outlined herein, other than those circumstances outlined in section I, B or C) or for convenience. Any parts of a contract that already have been completed will be left alone, but obligations for the future, not yet performed, will cease.

- PROCEDURE:**
- I. Cancellation for Cause/Breach of Contract
    - A. An actual breach occurs because of the failure of one of the parties to perform at the time and in the manner required by the terms and conditions of the contract.
    - B. The state reserves the right to cancel in whole or in part without penalty, and without prior notice, if the contractor:
      - 1. Files a petition in bankruptcy, becomes insolvent, or otherwise acts to dissolve as a legal entity
      - 2. Makes an assignment for the benefit of creditors



### Legal Authority

Wis. Stats. 402.106(1), (7)  
Agencies Affected: All, unless otherwise noted

Authorized:  
Sara Redford, Director  
State Bureau of Procurement



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<b>Title</b>		<b>Page</b>
CONTRACT CANCELLATION AND TERMINATION PROCEDURES		2 of 5

3. Fails to maintain and keep in force all required insurance, permits and licenses as provided in this Contract
  4. Fails to protect the state’s confidential information, as defined by applicable law or in contract
  5. Performs in a manner that threatens the health or safety of a State employee, citizen, or customer
- C. The state reserves the right to cancel a contract in whole or in part without penalty, with 30 days’ notice, if the contractor:
1. Fails to follow the sales and use tax certification requirements of s. 77.66 of the Wisconsin Statutes, and/or incurs a delinquent Wisconsin tax liability. See PRO-415, Vendor Collection of Sales and Use Tax; Agency Tax Exemption and Payments of Certain Taxes.
  2. Fails to follow the non-discrimination or affirmative action requirements. See PRO-403, Non-Discrimination and Contract Compliance.
  3. Becomes a state or federally debarred contractor.

## II. Termination for Anticipated Breach

A situation may arise where there has not yet been a failure of performance. However, there is strong reason to believe that one of the parties to the contract will not be fulfilling their obligations. The burden of proof is upon the party potentially being harmed who must show convincing evidence of the anticipated breach and reasons why they must go elsewhere to seek performance or take some other course of action. If any damages are involved, usually they are limited



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CONTRACT ADMINISTRATION AND TRANSACTIONS	9/16/19	PRO-E-21 5-1-97
<b>Title</b>		<b>Page</b>
CONTRACT CANCELLATION AND TERMINATION PROCEDURES		3 of 5

to the costs in excess of the contract price, when alternate procurement is necessary.

### III. Termination for Cause

- A. The state or a contractor may terminate a contract for failure of a party to perform their obligations under the terms of a contract. These circumstances will be outside of those identified in I and II above.
- B. Agencies will provide a written notice to a contractor offering a right and period to cure performance deficiencies. That written notice should also contain a notice that a failure to cure the performance issues may result in contract termination.

### IV. Termination for Convenience

- A. Either party may terminate a contract for convenience, meaning the service is no longer needed as specified in the contract. Because termination for convenience is not based on breach, there will not be a cause provided or cure period offered when a party terminates for convenience.
- B. In the event of a termination for convenience, the contractor shall be entitled to receive compensation for any completed or partially completed services rendered or goods provided under the contract. Compensation for partially completed services will be provided, in the state's discretion, based on:
  1. No more than the percentage of completion of the services requested multiplied by the corresponding payment for completion of such services; or



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<b>Title</b>		<b>Page</b>
CONTRACT CANCELLATION AND TERMINATION PROCEDURES		4 of 5

## 2. Actual service hours provided

- C. The state shall be entitled to a refund for goods or services paid for but not received or implemented, such refund to be paid within a prescribed number of days' of written notice to the contractor requesting the refund.
- D. Termination due to non-appropriation of funds is handled as a termination for convenience. See PRO-406, Contract Funding and PRO-404, Standard Terms and Conditions.

## V. Termination in the Public Interest/Mutual Consent

- A. Termination is not necessarily a cause for legal action. There may be a mutual agreement for termination with a satisfactory adjustment worked out between contracting parties (e.g. termination in part, not whole).
- B. Change orders which are common purchasing practice technically constitute a termination of a part of, or the whole original contract, and a substitution of a new contractual agreement. These generally are accepted by the buyers and sellers as a natural condition of doing business and carry no implication of a breach of faith or contract.

## VI. Liquidated Damages

- A. When it is difficult to determine exact reimbursement costs in advance, liquidated damages may be used as a method of assessing damages for failure of performance, prior to termination of a contract.



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<b>Title</b>		<b>Page</b>
CONTRACT CANCELLATION AND TERMINATION PROCEDURES		5 of 5

B. Assessment of damages is an effort by both parties to agree on a reasonable estimate of otherwise hard-to-determine damages at the inception of the contract if performance is not forthcoming. Liquidated damages are not a penalty. They must be written in detail into the bid language, contract or other written agreement.

## VII. Managing Performance Issues, Corrective Action

The best interests of all parties include offering reasonable rights to cure contract issues before escalating to cancellation, termination or assessment of damages.

Documentation of all events is the most important aspect of good contract administration. If verbal warnings are issued, they always should be confirmed in writing as soon as possible.

A complete historical record is the best policy to minimize the state's liability and to support evidence in damage claims. See PRO-405, Contract Administration and PRO-413, Reporting Supplier Complaints.



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