

CHAPTER V Contract Administration

5-101 **Modification and Termination of Contracts for Services:**

The following contract clauses are available for use in the personal service contracts at the discretion of the head of a purchasing agency. Alternative clauses are provided in some instances to permit accommodation of differing contract situations. **See also Appendix D (Required Clauses in Contracts for Services); Appendix E (Required Clauses in Solicitations for Bids or Proposals); Appendix F (Clauses Available for Use In Service Contracts); and Appendix G (Clauses Available for Use In Solicitations for Bids or Proposals).**

5-101.04 *Stop Work Order Clause: Use of Clause.*

The clause set forth in subsection 5-101.04.3 of this section is authorized for use in any fixed-price contract under which work stoppage may be required for reasons such as advancements in the state of the art, production modifications, engineering changes, or realignment of programs.

5-101.04.2 *Use of Orders*

- (1) Because stop work orders may result in increased costs by reason of standby costs, such orders shall be issued only with prior approval of the head of a Purchasing Agency, or designee. Generally, use of a stop work order will be limited to situations in which it is advisable to suspend work pending a decision to proceed by the state, and a supplemental agreement providing for such suspension is not feasible. A stop work order may not be used in lieu of the issuance of a termination notice after a decision to terminate has been made.
- (2) Stop work orders shall not exceed 90 consecutive days and shall include, as appropriate:
 - (a) a clear description of the work to be suspended;
 - (b) instructions as to the issuance of further orders by the contractor for material or services;
 - (c) guidance as to action to be taken on subcontracts; and
 - (d) other instructions and suggestions to the contractor for minimizing costs.

Promptly after issuance, stop work orders should be discussed with the contractor and should be modified, if necessary, in the light of such discussions.

- (3) As soon as feasible after a stop work order is issued:
 - (a) the contract will be terminated; or
 - (b) the stop work order will be cancelled or extended in writing beyond the period specified in the order.

In any event, some such action must be taken before the specified stop work period expires. If an extension of the stop work order is necessary, it must be evidenced by a supplemental agreement. Any cancellation of a stop work order shall be subject to the same approvals as were required for the issuance of the order.

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5-101.04.3 *Clause*

"STOP WORK ORDER

- (1) **Order to Stop Work.** *The Procurement Officer of the [State], may, by written order to the contractor at any time, and without notice to any surety, require the contractor to stop all or any part of the work called for by this contract. This order shall be for a specified period not exceeding 90 days after the order is delivered to the contractor, unless the parties agree to any further period. Any such order shall be identified specifically as a stop work order issued pursuant to this clause. Upon receipt of such an order, the contractor shall forthwith comply with its terms and take all reasonable steps to minimize the occurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or within any further period to which the parties shall have agreed, the Procurement Officer shall either:*
 - (a) *cancel the stop work order; or*
 - (b) *terminate the work covered by such order as provided in the 'Termination for Default Clause' or the 'Termination for Convenience Clause' of this contract.*

- (2) **Cancellation or Expiration of the Order.** *If a stop work order issued under this clause is cancelled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or contractor price, or both, and the contract shall be modified in writing accordingly, if:*
 - (a) *the stop work order results in an increase in the time required for, or in the contractor's cost properly allocable to, the performance of any part of this contract; and*
 - (b) *the contractor asserts a claim for such an adjustment within 30 days after the end of the period of work stoppage; provided that, if the Procurement Officer decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this contract.*

- (3) **Termination of Stopped Work.** *If a stop work order is not cancelled and the work covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowed by adjustment or otherwise.*

- (4) **Adjustments of Price.** *Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract."*

5-101.05 *Variations in Estimated Quantities Clause*

5-101.05.1 *Definite Quantity Contracts*

The following clause is authorized for use in definite quantity service contracts:

VARIATION IN QUANTITY

"Upon the agreement of the parties, the quantity of services specified in this contract may be increased by a maximum of ten percent provided:

- (1) the unit prices will remain the same (except for any price adjustments otherwise applicable); and*
- (2) the Procurement Officer makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract."*

5-101.05.2 Indefinite Quantity Contracts:

No clause is provided here because, in indefinite quantity contracts, the flexibility as to the State's obligation to order and the contractor's obligation to deliver should be designed to meet the using agency needs while making the contract as attractive as possible to potential contractors, thereby attempting to obtain maximum practicable competition in order to assure the best economy for the State of Mississippi. However, in each case, the contract should state:

- (1) the minimum quantity, if any, the State is obligated to order and the contractor to provide;*
- (2) whether there is a quantity the State expects to order and how this quantity relates to any minimum and maximum quantities that may be ordered under the contract;*
- (3) any maximum quantity the State may order and the contractor must provide; and*
- (4) whether the State is obligated to order its actual requirements under the contract, or in the case of a multiple award as defined in section 3-504 (Multiple Source Contracting), that the State will order its actual requirements from the contractors under the multiple award subject to any minimum or maximum quantity stated.*

5-101.06 Price Adjustment Clause

"PRICE ADJUSTMENT

- (1) Price Adjustment Methods. Any adjustment in contract price pursuant to a clause in this contract shall be made in one or more of the following ways:*
 - (a) by agreement on a fixed price adjustment before commencement of the additional performance;*
 - (b) by unit prices specified in the contract;*
 - (c) by the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as specified in the contract; or*
 - (d) price escalation clause.*
- (2) Submission of Cost or Pricing Data. The contractor shall provide cost or pricing data for any price adjustments subject to the provisions of Section 3-403 (Cost or Pricing Data) of the Mississippi Personal Service Contract Procurement Regulations."*

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5-101.07 Claims Based on a Procurement Officer's Actions or Omissions Clause

"Claims Based on a Procurement Officer's Actions or Omissions

- (1) **Notice of Claim.** *If any action or omission on the part of a Procurement Officer or designee of such officer requiring performance changes within the scope of the contract constitutes the basis for a claim by the contractor for additional compensation, damages, or an extension of time for completion, the contractor shall continue with performance of the contract in compliance with the directions or orders of such officials, but by so doing, the contractor shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:*
- (a) *the contractor shall have given written notice to the Procurement Officer or designee of such officer:*
 - (i) *prior to the commencement of the work involved, if at that time the contractor knows of the occurrence of such action or omission;*
 - (ii) *within 30 days after the contractor knows of the occurrence of such action or omission, if the contractor did not have such knowledge prior to the commencement of the work or;*
 - (iii) *within such further time as may be allowed by the Procurement Officer in writing.*

This notice shall state that the contractor regards the act or omission as a reason which may entitle the contractor to additional compensation, damages, or an extension of time. The Procurement Officer or designee of such officer, upon receipt of such notice, may rescind such action, remedy such omission, or take such other steps as may be deemed advisable in the discretion of the Procurement Officer or designee of such officer;

- (b) *the notice required by Subparagraph (a) of this Paragraph describes as clearly as practicable at the time the reasons why the contractor believes that additional compensation, damages, or an extension of time may be remedies to which the contractor is entitled; and*
 - (c) *the contractor maintains and, upon request, makes available to the Procurement Officer within a reasonable time, detailed records to the extent practicable, of the claimed additional costs or basis for an extension of time in connection with such changes.*
- (2) **Limitation of Clause.** *Nothing herein contained, however, shall excuse the contractor from compliance with any rules of law precluding any state officers and any contractors from acting in collusion or bad faith in issuing or performing change orders which are clearly not within the scope of the contract.*
- (3) **Adjustment of Price.** *Any adjustment in the contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract."*

5-101.08 Termination for Default Clause

- (1) **Default.** *If the contractor refuses or fails to perform any of the provisions of this contract with such diligence as will ensure its completion within the time specified in this contract, or any extension thereof otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this contract, the Procurement Officer of the [State] may notify the contractor in writing of the delay or nonperformance and if not cured in ten days or any longer time specified in writing by the Procurement Officer, such officer may terminate the contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly*

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perform. In the event of termination in whole or in part, the Procurement Officer may procure similar services in a manner and upon terms deemed appropriate by the Procurement Officer. The contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.

- (2) **Contractor's Duties.** Notwithstanding termination of the contract and subject to any directions from the Procurement Officer, the contractor shall take timely, reasonable, and necessary action to protect and preserve property in the possession of the contractor in which the State has an interest.
- (3) **Compensation.** Payment for completed services delivered and accepted by the [State] shall be at the contract price. The [State] may withhold from amounts due the contractor such sums as the Procurement Officer deems to be necessary to protect the [State] against loss because of outstanding liens or claims of former lien holders and to reimburse the [State] for the excess costs incurred in procuring similar goods and services.
- (4) **Excuse for Nonperformance or Delayed Performance.** Except with respect to defaults of subcontractors, the contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the contractor to make progress in the prosecution of the work hereunder which endangers such performance) if the contractor has notified the Procurement Officer within 15 days after the cause of the delay and the failure arises out of causes such as: acts of God; acts of the public enemy; acts of the State and any other governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, the contractor shall not be deemed to be in default, unless the services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit the contractor to meet the contract requirements.

Upon request of the contractor, the Procurement Officer of the [State] shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the contractor's progress and performance would have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of the [State] under the clause entitled (in fixed-price contracts, "Termination for Convenience," in cost-reimbursement contracts, "Termination"). (As used in this Paragraph of this clause, the term "subcontractor" means subcontractor at any tier).

- (5) **Erroneous Termination for Default.** If, after notice of termination of the contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contract was not in default under the provisions of this clause, or that the delay was excusable under the provisions of Paragraph (4) (Excuse for Nonperformance or Delayed Performance) of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the [State], be the same as if the notice of termination had been issued pursuant to such clause.
- (6) **Additional Rights and Remedies.** The rights and remedies provided in this clause are in addition to any other rights and remedies provided by law or under this contract."

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5-101.09 *Liquidated Damages Clause*

5-101.09.1 *With Termination for Default Clause:*

The following clause is authorized for use in service contracts when it is difficult to determine with reasonable accuracy the amount of damage to the State due to delays caused by late contractor performance or nonperformance and the contract contains the termination for default clause set forth in Section 5-101.08.

"Liquidated Damages

When the contractor is given notice of delay or nonperformance as specified in Paragraph [(1) (Default)] of the Termination for Default Clause of this contract and fails to cure in the time specified, the contractor shall be liable for damages for delay in the amount of \$ _____ per calendar day from date set for cure until either the [State] reasonably obtains similar services if the contractor is terminated for default, or until the contractor provides the services if the contractor is not terminated for default. To the extent that the contractor's delay or nonperformance is excused under Paragraph (4) (Excuse for Nonperformance or Delayed Performance) of the Termination for Default Clause of this contract, liquidated damages shall not be due the State. The contractor remains liable for damages caused other than by delay."

5-101.09.2 *In Other Situations:*

If the contract will not have a Termination for Default Clause or the liquidated damages are to be assessed for reasons other than delay, the head of a purchasing agency may approve the use of any appropriate liquidated damages clause.

5-101.10 *Termination for Convenience Clause*

- (1) *Termination. The Procurement Officer of the [State] may, when the interests of the [State] so require, terminate this contract in whole or in part, for the convenience of the [State]. The Procurement Officer shall give written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective.*
- (2) *Contractor's Obligations. The contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The Procurement Officer may direct the contractor to assign the contractor's right, title, and interest under terminated orders or subcontracts to the State. The contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so."*

5-102 Monitoring Contract Performance

The agency head shall ensure that contracts are monitored at least monthly to confirm acceptable performance, timely fulfillment of deliverables and compliance with terms of the agreement.

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5-102.01 *Duties of the Procurement Officer shall include, but are not limited to the following:*

- (1) reviews and approves contract deliverables
- (2) ensures compliance with contractual terms
- (3) coordinates the flow of information between the parties
- (4) responds to request of the contractor
- (5) monitors disbursements against the contract budget
- (6) monitors actual progress against work schedules
- (7) coordinates the furnishing of necessary materials
- (8) authorizes no cost modifications
- (9) makes recommendations on modifications involving increased cost