

## **Chapter 5**

### **Modification and Termination of Contracts for Commodities**

#### **5.101 Introduction**

The following contract clauses are available for use in commodity contracts at the discretion of the Chief Procurement Officer, the head of a purchasing agency, or the designee of either officer. Alternative clauses are provided in some instances to permit accommodation of differing contract situations.

#### **5.101.01 Variations in Estimated Quantities Clause**

##### **5.101.01.1 Definite Quantity Contracts**

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

##### **Variation in Quantity**

“Upon the agreement of the parties, the quantity of commodities specified in this contract may be increased by a maximum of ten percent (10%) provided:

- (1) The unit prices will remain the same (except for any price adjustments otherwise applicable); and
- (2) The Agency 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.”

##### **5.101.01.2 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 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 3.119, 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.

**5.101.02 Termination for Default Clause****Termination for Default****(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 Agency Procurement Officer may notify the contractor in writing of the delay or non-performance and if not cured in ten (10) days or any longer time specified in writing by the Agency 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 perform. In the event of termination in whole or in part, the Agency Procurement Officer may procure similar supplies or services in a manner and upon terms deemed appropriate by the Agency 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 Agency 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 supplies 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 Agency 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 Non-performance 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 Agency 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 supplies or 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 Agency Procurement Officer 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 Subsection 5.101.02 (4), Excuse for Non-performance 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. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the State, the contract shall be adjusted to compensate for such termination and the contract modified accordingly subject to the contractor's rights under Chapter 6, Legal and Contractual Remedies.

(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.

**5.101.03 Liquidated Damages Clause**

**5.101.03.1 With Termination for Default Clause**

The following clause is authorized for use in commodity 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 non-performance and the contract contains the termination for default clause set forth in Subsection 5.101.02, Termination for Default Clause.

**Liquidated Damages**

"When the contractor is given notice of delay or non-performance as specified in Subsection 5.101.02 (1), 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 commodities if the contractor is terminated for default, or until the contractor provides the supplies or services if the contractor is not terminated for default. To the extent that the contractor's delay or non-performance is excused under Subsection 5.101.02 (4), Excuse for Non-performance 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."

**5.101.03.2 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 Chief Procurement Officer or the head of a purchasing agency may approve the use of any appropriate liquidated damages clause.

**5.101.04 Termination for Convenience Clause****Termination for Convenience****(1) Termination**

The Agency Procurement Officer may, when the interests of the State so require, terminate this contract in whole or in part, for the convenience of the State. The Agency 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) Vendor's Obligations**

The vendor 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 Agency 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.