

200 KAR 5:312. Termination of contracts.

RELATES TO: KRS Chapter 45A

STATUTORY AUTHORITY: KRS 45A.210(2), (3)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 45A.210(2) and (3) authorize the Secretary of the Finance and Administration Cabinet to promulgate administrative regulations for the termination of contracts for the procurement of supplies or services, or both supplies and services. This administrative regulation establishes requirements for the termination of contracts.

Section 1. General Terms. (1) Any contractor who is determined in writing by the purchasing officer to be in breach of any of the terms and conditions of a contract with the commonwealth of Kentucky, shall be declared in default and the contract may be terminated.

(2) Termination notice. The purchasing officer shall terminate a contract by written notice to the contractor. The notice to the contractor shall be sent certified mail, return receipt requested, and shall state:

(a) The contract is being terminated for the convenience of the commonwealth, for default by the contractor, or for nonappropriation, in accordance with Sections 2 to 4 this administrative regulation;

(b) The effective date of termination;

(c) The extent of termination; and

(d) Any special instructions.

Section 2. Termination for Default. (1) The commonwealth may terminate a contract because of the contractor's failure to perform its contractual duties.

(2) If a contractor is determined to be in default, the commonwealth shall notify the contractor of the determination in writing, and may include a specified date by which the contractor shall cure the identified deficiencies. The commonwealth may proceed with termination if the contractor fails to cure the deficiencies within the specified time.

(3) A default in performance by a contractor for which a contract may be terminated shall include, but shall not necessarily be limited to:

(a) Failure to perform the contract according to its terms, conditions and specifications;

(b) Failure to make delivery within the time specified or according to a delivery schedule fixed by the contract;

(c) Late payment or nonpayment of bills for labor, materials, supplies, or equipment furnished in connection with a contract for construction services as evidenced by mechanics' liens filed pursuant to the provisions of KRS Chapter 376, or letters of indebtedness received from creditors by the purchasing agency;

(d) Failure to diligently advance the work under a contract for construction services;

(e) The filing of a bankruptcy petition by or against the contractor; or

(f) Actions that endanger the health, safety or welfare of the commonwealth or its citizens.

(4) The commonwealth shall not be liable for any further payment to a contractor under a contract terminated for the contractor's default after the date of termination as determined by the purchasing officer except for commodities, supplies, equipment or services delivered and accepted on or before the date of termination and for which payment had not been made as of that date. The commonwealth may require the contractor to transfer title and deliver to commonwealth completed supplies and manufacturing materials. The contractor, and his surety, if a performance or payment bond has been required under the contract, shall be jointly and severally liable to the commonwealth for all loss, cost or damage sustained by the commonwealth as a result of the contractor's default. A contractor's surety liability shall not exceed the final sum specified in the con-

tractor's bond.

(5) The contractor shall be liable to the commonwealth for any excess costs incurred in acquiring supplies and services similar to those terminated for default, and for any other damages or remedies available either at law or in equity, whether or not repurchase is affected.

Section 3. Termination for Convenience of the commonwealth. (1) The commonwealth may terminate a contract for convenience if the purchasing officer has determined that termination will be in the commonwealth's best interests. The commonwealth shall provide the contractor thirty (30) calendar days written notice of termination of the contract, unless the secretary of the Finance and Administration Cabinet, or his designee, makes a written determination that a shorter notice of termination for convenience is in the best interest of the commonwealth.

(2) If a contract is terminated for the convenience of the commonwealth, the contractor shall have the burden of establishing the amount of compensation to which the contractor believes he is entitled by the submission of complete and accurate cost data employed in submitting his bid or proposal for the contract, and evidence of expenses paid or incurred in performance of the contract from the date of award through the date of termination. The contractor shall specify and provide documentation of all revenues resulting from the contract, expenditures associated with the contract, and all profit or loss attributable to the contract. The purchasing officer may request the contractor submit additional documents and data, and may request appropriate accounting, investigations and audits.

(3) After issuing a notice of termination for convenience, the purchasing officer may negotiate a settlement with the contractor according to terms deemed just and equitable by the purchasing agency and in accordance with this administrative regulation. The settlement shall be subject to the prior approval of the Secretary of the Finance and Administration Cabinet, or his designee. If the contractor and the purchasing officer cannot negotiate a settlement, the Secretary of the Finance and Administration Cabinet shall issue a determination of the amount, if any, due the contractor.

(4) Contractor responsibilities. After receipt of the notice of termination, the contractor shall take all steps necessary to minimize waste, including:

- (a) Stop work immediately on the terminated portion of the contract;
- (b) Terminate all subcontracts related to the terminated portion of the prime contract;
- (c) Immediately advise the purchasing office of any special circumstance precluding the stoppage of work;
- (d) Perform the continued portion of the contract;
- (e) Take action to protect and preserve property in the contractor's possession in which the commonwealth has or may acquire an interest, and, if directed by the purchasing officer, deliver the property to the commonwealth;
- (f) Promptly notify the purchasing officer in writing of any legal proceedings resulting from any subcontract or other commitment related to the terminated portion of the contract;
- (g) Settle outstanding liabilities and proposals arising out of the termination; and
- (h) If there is a terminated construction contract, ensure the cleanup of the site, protection of serviceable materials, removal of hazards, and other actions necessary to leave a safe and healthful site.

(5) Payment.

(a) Payment of the sum agreed to in settlement of a contract terminated for convenience of the commonwealth shall be made from the same source of funds or account as the original contract.

(b) The commonwealth shall not pay interest on the amount due under the settlement.

Section 4. Funding Out Provision. The commonwealth may terminate a contract if funds are not

appropriated to the contracting agency or are not otherwise available for the purpose of making payments without incurring any obligation for payment after the date of termination, regardless of the terms of the contract. The contracting agency shall provide the contractor thirty (30) calendar days written notice of termination of the contract. (5 Ky.R. 578; Am. 951; eff. 7-17-79; 18 Ky.R. 1365; eff. 1-10-92; 30 Ky.R. 679; 1467; eff. 1-5-2004.)