

Section 2.32

Contract Administration

The complexity of contract administration will depend on the type of contract. Contract administration is a critical element in the procurement cycle and must be carried out in all public purchasing operations.

Damages for failure to perform

A contractor who fails to perform as required under a contract shall be liable for actual damages and costs incurred by the state. If any merchandise delivered under a contract has been used or consumed by an agency and on testing is found not to comply with specifications, no payment may be approved by TPASS for such merchandise until the amount of actual damages incurred has been determined. A contractor who fails to pay damages assessed by the state may not be awarded additional contracts until such damages have been paid or the matter has been otherwise resolved. TPASS shall seek to collect damages by following the procedures established by the Office of the Attorney General for the collection of delinquent obligations for orders issued by TPASS.

Vendor Performance

TPASS administers a Vendor Performance Program for use by all ordering entities (see Section 2.36 Vendor Performance). This program relies heavily on the ordering entities' participation in gathering information on vendor performance. 34 Texas Administrative Code § 20.39

Substitutions

Substitution of items called for in a contract is not permitted without the agency's prior approval. No such approval will be granted unless substituted items are of equal quality and are offered at the same or a lower price.

A substitute brand and/or model may be offered by a contractor when it is unable to deliver the product ordered. The substitution offer must be in writing. The proposed substitution must:

- Meet and/or exceed the original advertised specifications;
- Be of equal quality and type; and
- Be offered at the same or a lower price.

[34 TAC Title 1 § 20.39 Contract Administration \(a\)\(3\)\(b\) Substitutions.](#)

On all TPASS TxSmartBuy; Managed and One-Time Open Market contracts, written approval must be obtained from TPASS before a substitution is permitted. Once a substitution is determined to be acceptable, TPASS sends a written notice to the contractor and the agency confirming that the substitution is authorized. Upon authorization, the TPASS contract and/or ordering system is updated to reflect the substitution.

For delegated procurements, the agency must approve the substitution and send written notice to If the substitution is determined to be unacceptable, the contractor will be requested to offer another possible substitution meeting the specification requirements. If the contractor is unable to supply an acceptable substitution, the purchaser should cancel the item or order, as applicable, and purchase the product elsewhere. Actual damages which include but are not limited to the cost difference in the products and any additional shipping charges may be assessed and charged to the original contractor.

Canceling a Contract/Purchase Order

Delegated Contracts/POs

Contractor Default

If a contractor does not meet its contractual obligations, the contract/purchase order may be cancelled. This applies both to individual line items of a PO (purchase order) and to complete POs. A Vendor Performance Report should be filed. (see Section 2.36 *Vendor Performance*).

Other Cancellations

To cancel an order for any reason other than the contractor not meeting its contractual obligations, obtain the contractor's permission.

Purchase Orders Issued by TPASS

TPASS-generated POs must be cancelled by TPASS. The same conditions for canceling agency-issued POs apply to TPASS-issued POs. First, either document a contractor's default or obtain the contractor's permission to cancel. Afterward, notify TPASS of your agency's desire to cancel the PO. The notification method depends on the type of purchase:

- **TPASS Term Contract Purchase Order:** Submit a Purchase Order Change Notice to TPASS
- **Open Market Purchase Order:** Submit written notification to the TPASS Purchaser responsible for the Open Market Contract stating that you wish to cancel the PO.

Shipments Resulting from Cancelled Orders

Agencies are not obligated to accept shipments against correctly cancelled purchase orders. If your agency intentionally accepts such a shipment, reinstate the purchase order (Texas Government Code §2155.384). To reinstate a TPASS Term Contract purchase order, submit a POCN to TPASS (see Section 2.35 *Purchase Order Change Notices [POCN]*). To reinstate an Open Market PO, submit a written request to TPASS to reinstate the PO.

Restocking Charges

Agency-Issued Purchase Orders

When the contractor is not in default on an order, you may pay a reasonable restocking charge or cancellation fee for canceling that order. Restocking fees should not exceed 15% of the original purchase price. Additionally, the contractor may require you to pay all of the freight charges for the cancelled order.

TPASS-Issued Purchase Orders

The restocking fee guidelines for agency-issued purchase orders apply to TPASS-issued purchase orders. Additionally, restocking charges exceeding 15% of the original purchase price must be approved by the TPASS Purchaser responsible for the Term Contract or Open Market purchase.