AUTHORITY:  
Wis. Stats. 402.106(1) & (7)

SCOPE:  
- to establish guidelines to be used in determining when a contract may be ended before its scheduled time
- to establish a procedure to follow in cancelling or terminating a contract

DEFINITIONS:  
I. A "contract" is any agreement between two or more parties which creates an obligation to perform or refrain from performing some act. Acceptance of a purchase order constitutes a contract.

II. "Cancellation" occurs when either party ends a contract for breach by the other. The cancelling party retains any remedy for breach of the whole contract or any unperformed balance.

When one party violates the terms and conditions of a contract, the other party has the right to cancel. The entire contract may be rolled back, payments previously made may be refunded, and any remaining obligations are immediately ended.

III. "Termination" occurs when either party ends a contract other than for a breach. Any parts of a contract that already have been completed will be left alone, but obligations for the future, not yet performed, will cease.

CONTENT:  
I. Types of cancellations:

A. Cancelling for cause/breach of contract

1. 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. Cancelling for an anticipated breach

1. A situation may arise where there has not as 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 good 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 to the costs in excess of the contract price, when alternate procurement is necessary.

II. Examples of the type of violations that may cause a breach of contract include, but are not limited to:

A. Nondelivery or late delivery of a product or service. NOTE: Caution must be exercised because if the failure to deliver or late delivery was caused by factors beyond the contractor’s control (e.g., labor strike, fire, floods, act of God, etc.), the contractor usually is protected. Also, if there is a history of acceptance of late deliveries, the buyer’s right to cancel may be challenged.

B. Failure to supply a product or service meeting the agreed upon specification or in the quantities ordered.

C. Improper invoicing—charging prices or imposing terms different from those agreed upon.

D. Seller unable to maintain or to provide parts and repair services, or to honor warranty on equipment or products sold.

E. Unwillingness of seller to submit an acceptable affirmative action plan.

F. The disclosure of collusion or price-fixing involving the successful bidder, after the contract has been awarded.

G. Failure of the contractor to comply with insurance and/or surety requirements.

H. Violation of state statutes (e.g., failure to supply information concerning hazardous materials or substances).

I. Federal debarment where federal funds are involved.
III. 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. It is an effort by both parties to agree on a reasonable estimate of otherwise hard-to-determine damages at the inception of the contract in the event that 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.

IV. Types of terminations:

A. Termination for convenience

1. Some contracts allow either party to terminate for any reason (or for no reason), under certain conditions or facts. Terms of the contract govern such terminations and usually specify that if either party suffers any hardship because of actions of the other, they will be reimbursed with a satisfactory, documented adjustment. If the amount of the compensation cannot be determined by mutual agreement, it may be necessary to submit to the courts for a final decision.

2. An example of a termination for the convenience of the state is found in a phrase usually inserted into contracts extending over more than one biennium period; “the state may terminate the contract without penalty if subsequent legislatures (or the funding agency) fail to appropriate the funds necessary to carry on the contract.”

B. Termination by mutual consent

1. 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.
2. 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.

V. Contract administration procedure:

A. Since a great deal of time and effort have been invested in a contract, usually it is in the best interests of all parties to work together to resolve differences and save the contract.

1. When a problem arises, the purchasing department should immediately notify the contractor. If verbal communication is made, written confirmation should always follow.

2. All costs should be evaluated; if it is determined that the contract cannot be salvaged, or that it is more cost effective to bring it to a conclusion, termination or cancellation proceedings should be initiated. It is a good precautionary procedure to incorporate termination/cancellation procedures into the special conditions at the time bids are solicited. Depending upon the type of product or service under contract, and its relative importance to the state operations, conditions may vary. When writing the bid, the type of cancellation language in the bid document should be considered. Products such as food, hospital and medical supplies, heating fuels, etc., are so necessary and vital to human needs that a single violation may be cause for immediate cancellation and a search for a new source. Sample language to include may be: "late delivery of required medical supplies by more than 24 hours shall result in immediate termination of this contract." Or, in the instance where insurance is vital the language may read: "lack of insurance by the bus company shall result in immediate termination"
of this contract.” Other products or services that merely cause inconvenience to the state if not delivered in a timely manner may allow for more leniency and one, two, or even three warnings may be allowed before cancellation/termination proceedings begin. If any procedures were written into the original contract, they should be followed closely.

3. If a definite time period for notification is not explained in the original contract, specific circumstances usually will dictate the time interval to be used. In most situations, 30 days notice should be the minimum period allowed. The exception to this rule is the example of a seller making a late delivery of a purchase order where time is an important element of the contract. Unless it is desirable to extend the delivery date, the order should be cancelled immediately and placed elsewhere. In those situations where new bids will have to be solicited, but where it is impossible to do without a product or service in the interim period, a weak or even a bad contract may be the better alternative than none. In this instance, 60 or even 90 days notice may be required to keep the old contract in place while a new one is being developed.

4. 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.

5. All bids should include elements that will result in cancellation should they occur. Each bid must be customized to reflect the appropriate criteria. The following example is from a bid for bituminous coal.

Causes for Rejection of Shipments or Cancellation of Contract:

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<td>CONTRACT CANCELLATION AND TERMINATION PROCEDURES</td>
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Authorized:

Director
State Bureau of Procurement
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A. Performance of the coal in the furnaces is not satisfactory.

B. Excessive clinkering or destruction of grates or other parts of the furnace or boiler due to overall quality or coal performance.

C. Spontaneous combustion of the coal in bunkers or outside storage piles, despite good engineering or operating practices by the purchaser in the handling or storage of the coal.

D. Coal shipments repeatedly exceeding the maximum limits or falling below the minimum limits set forth in the specifications.

E. Repeated shipments of coal varying widely in chemical analysis.

F. Repeated shipments of coal in damaged or unsuitable rail cars or trucks.

G. Repeated shipments containing pieces of wood, metal, stone, straw or hay, ice, snow, or other foreign matter.

H. Repeated deliveries of frozen coal.

I. Persistent failure to make deliveries or shipments as ordered.

J. Repeated delivery of coal containing a higher percentage of fines than specified, or a top size larger than specified.

K. The repeated delivery of coal:
   - Exceeding guaranteed as-received ash by more than 2%.
   - Falling short of the guaranteed as-received Btu by more than 300.
- Exceeding calculated S02 emission rate of 1.5 lbs./mm Btu.
- Having an ash-fusion temperature lower than that specified.

L. Delivery of coal having a calculated sulfur dioxide emission rate exceeding 2.0 lbs./mm Btu is cause for cancellation of contract.

M. Failure of the contractor to comply with all the terms and conditions of this contract.