

# STATE CONTROLLER POLICY

## VENDOR SIGNATURE AUTHORITY

- 1) **Binding Authority.** Under agency law persons signing contracts on behalf of a vendor must have authority to do so in order to bind the vendor (principal) and make the contract enforceable against them. There are two types of authority, and signatories may have one or both of them.
  - a. **Actual.** Actual authority means that the signatory has formal (usually written) authority to sign. The extent of such authority, general or limited to certain types of contracts, can be ascertained by reviewing the basis for the authority. For example, corporate resolutions, partnership agreements, powers-of-attorney, and operating agreements.
  - b. **Apparent.** Apparent authority means that a vendor, by its own actions or omission and not just those of the signatory (agent), causes third parties to reasonably assume that the signatory has the authority to bind the vendor. For example, a mechanic could quote a rate to repair a particular issue with a State car, but not commit the shop to repair all State cars at a set rate for the next five years.
    - i. **Exception.** Apparent authority cannot be claimed if the vendee knows or reasonably should have known that the signatory lacks authority. For example, if there is a sign at the shop viewable by all customers stating that only the owner can provide any quote or if the vendee has been told this on a prior occasion.
    - ii. **Ordinary Course of Business.** Finally, as a general rule, apparent authority can only be assumed if the signatory is acting in the ordinary course of business; for example, it would be best to obtain a written basis for the car mechanic's authority to sign a CDPHE healthcare agreement while that may not be necessary for the president of Kaiser.
- 2) **Judgment Required.** Contract staff at Agencies and Institutions of Higher Education (IHEs) are required to exercise their sound judgment to ensure that reasonable indicia of reliability are present regarding the signatory authority of persons signing on behalf of vendors. Depending on the circumstances, a title may suffice, some investigation may need to occur, and/or documentary proof may be requested. For example, when contracting with a new small corporate vendor it is reasonable to request documented authorization of a "sales manager" to sign if nothing else is known about the person. However, if the same person continues to sign future contracts in that role, further documentation may not be necessary.
- 3) **Consequence of Lack of Authority.** If this authority is lacking and the vendor has not begun performing, vendors can seek to avoid performing their contractual obligations, and if successful, the State could lose the benefit of having negotiated a good deal or suffer untoward delays in performance. This rarely occurs (most vendors want the work), is easy to avoid, and is only important if the performance by the selected vendor under that contract is important. It is unlikely that vendors will be successful arguing lack of authority as a basis to void a contract once performance begins.
- 4) **Best Practices.** The following are advised to avoid issues of signatory authority:
  - a. **Early Inquiry.** Contract staff should ask vendors who will sign early in negotiations and resolve any questions regarding signatory authority at that time to avoid potential approval delays at critical times.
  - b. **Weigh the Risks.** Review risk factors such as:
    - i. Does it seem reasonable that the person in the position could bind the vendor to the contract at hand (for example, a janitor may be able to sign for paper towels but not for computers),
    - ii. Is this a new vendor, and if not what is has the past course of conduct been,
    - iii. Is this a new signatory,
    - iv. Are large sums involved and/ or is time of the essence,
    - v. Is it critical this vendor performs, and
    - vi. Does the contract justify extra verification efforts?

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- c. **Prioritize.** More scrutiny should be given to the issue of signatory authority whenever it is important to ensure that the selected vendor performs. For example, if immediate vendor performance is critical to proper performance of a critical Agency or IHE function and there is not time to replace the vendor.
- d. **Ask.** Contract staff are encouraged to contact their internal contract supervisors and/or Central Contracts Unit of the State Controller's Office whenever they are in doubt about a person's authority or what documentation to obtain.
- e. **Documentation.** Obtain appropriate documentation of authority if it is judged necessary and worth the effort to obtain it.

## 5) Vendor Signatories. The following is a list of potential signatories for various types of vendors:

- a. **Corporations (also called "Corp., Inc, Co., Company, etc").** Corporations consist of a board of directors (they set broad policy and appoint officers), officers (the executives in charge of corporate operations), and shareholders (the owners). In small corporations, a person may be a director, officer, and shareholder, while this is uncommon in large and publicly-traded corporations. Employees work for a corporation, but are not part of the corporation unless they are also a director, officer, or shareholder. Any person authorized to do so by corporate articles, bylaws, or resolutions can sign for a corporation; however, in general the following are the most common:
  - i. **Officers.** Corporate officers perform the executive function for corporations. Presidents (sometimes called chief executive officers or CEOs) and vice-presidents are the most common signatories and documentation of their authority is not necessary unless there is reason to doubt it. Other officers such as treasurer (sometimes chief financial officer or CFO), secretary, chief operating officer (COO), and chief information officer (CIO) are less common signatories, but may be authorized, especially if the contract involves matters related to their function. Requests for documentary evidence regarding their authority are judgment calls. Officer signatures are the most common, especially for small corporations where a few people hold several roles or contracts that are important to large corporations. It is unusual for the president of a large corporation to sign small dollar or routine contracts.
  - ii. **Directors.** Directors usually act collectively to direct the actions of officers and individual directors rarely sign on behalf of corporations, although can do so if authorized. Such authorizations are generally given to a single Executive Director. However, "director" is often loosely used as part of an employee's title; for example, "director of national sales". This is not the same as being a member of the "board of directors".
  - iii. **Shareholders.** Shareholders, solely by being shareholders, do not have authority to bind a corporation. They must have some other basis to do so.
  - iv. **Documentation.** Articles of incorporation, bylaws, board resolutions, and delegations from officers to employees or agents in memo, letter, or other form are acceptable evidence of authority.
- b. **Limited Liability Corporations (LLCs).** LLCs consist of members (owners) and may also have managers (vested with managing the LLC-CRS §7-80-402) and officers or other agents ("...with such titles...as the LLC may determine."-CRS §7-80-403).
  - i. **Managers.** CRS §7-80-405(1)(b) provides that managers have presumptive authority to bind LLCs in the ordinary course of business unless the manager lacked such authority in a particular matter and the State had notice thereof.
  - ii. **Members.** CRS §7-80-405(1)(a) says that members, solely by being members, do not have authority to bind an LLC in the ordinary course of business; however, CRS §7-80-405(2) states that members may have such authority if provided in the LLC's articles of organization, unless the member(s) lacked such authority in a particular matter and the State had notice thereof.
  - iii. **Officer and Agents.** CRS §7-80-403 states that officers and agents may have "...such rights, duties, and authority as the LLC may determine." Given this language documentary evidence

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that specifically sets forth such authority is recommended if there is any question on apparent authority.

- iv. Documentation.** Articles of organization, member resolutions, and delegations from managers to employees or agents in memo, letter, or other form are acceptable evidence of authority.
- c. Partnerships.** Partnerships can be formed with or without a written agreement. Under CRS §7-64-301 every partner has presumptive authority to bind a partnership in the ordinary course of business unless the partner lacked such authority in a particular matter and the State had notice thereof. Partners may bind the partnership for actions not in the ordinary course of business only if the act is authorized by all partners. Under CRS § 7-64-20 a limited liability partnership is treated as a partnership. See CRS §7-64-303 for information related to partnerships and real estate contracts. Partnership agreements, partnership resolutions, and delegations from partners to employees or agents in memo, letter, or other form are acceptable evidence of authority.
- d. Sole Proprietorships.** Sole Proprietorships are businesses, generally small and informal, consisting of one person not carried on as part of any legally recognized entity. The sole proprietor may be using a fictitious name (“dba”) and even have filed a trade-name affidavit, but that does not create a corporation, LLC, or partnership. This is the only time the title “owner” is appropriate. Sole proprietors are acting as individuals and have the authority to bind themselves to any contract into which they may lawfully enter. Specific documentation is not necessary for sole proprietors themselves. Delegations from sole proprietors to employees or agents in memo, letter, or other form are acceptable evidence of authority.
- e. Other Vendors.** CRS Title 7 Articles 30, 40-52, and 55 authorize various other corporate entities which are very specific and fairly rare. Refer to §4, above, if such entities are encountered. Documentation varies, but is often similar to that of corporations.
- f. Employees.** Any of the forgoing business types can have employees. Employees have a plethora of titles limited only by the imagination of human resource departments; for example, “director, manager, supervisor, etc. coupled with adjectives like “national, regional, state, government, local, etc” and “sales, operations, maintenance, accounting, etc”. Employees often have limited signatory authority allowing them to sign contracts dealing with specified subject matters up to certain dollar amounts.
- g. Agents.** Any of the forgoing business types can have non-employee agents; for example, real estate brokers. Agents may have signatory authority; however, in this instance, documentary evidence that specifically sets forth such authority is recommended.

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