

STATE CONTROLLER TECHNICAL GUIDANCE

CROSS-DEFAULT UNDER CRS §24-103.5-101(5)

A. Statute

CRS §24-103.5-101(5) states in part: “If a vendor is deemed to be in default under any one particular contract with the State, the State may, upon a showing of good cause, declare any or all other contracts it has entered into with the vendor to be in default.” The purpose of this Technical Guidance is to provide agencies with direction regarding when and how to use this provision. The failure of an agency to follow all of the steps set forth in CRS §24-103.5-101(5), or to follow them in the sequence set forth below, will **NOT** preclude a determination to cross-default under circumstances deemed appropriate by the Office of the State Controller (OSC).

B. Definitions

- a. **Agency** – Any department, agency or institution of the State of Colorado.
- b. **Cross-Default** – Provided for under CRS §24-103.5-101(5). If a vendor has multiple contracts with one or more agencies, a Default by the vendor under one contract is Good Cause for the State to declare a Default under any and all of the other contracts, even though the vendor may be performing satisfactorily on those other contracts.
- c. **Default** - A failure to comply with a term(s) of an agreement or to fulfill a legal obligation or duty.
- d. **Good Cause** – A substantial or legally sufficient reason for a choice made or action taken, such choice or action is not unreasonable, arbitrary, or irrational. What constitutes good cause usually depends upon the facts and circumstances of a particular situation.
- e. **Performance Measures and Standards** – Provided for under CRS §24-103.5-101(2)(a), Performance Measures and Standards are developed specifically for and included in a contract, which has been negotiated by the agency and the vendor prior to execution of the contract.

C. Contract Management – Steps Leading to Cross-Default

Arriving at cross-default involves a number of steps that must be supported by sufficient documentation. Agencies should refer to “*Colorado’s Contract Management System and Vendor Performance Statutes Form Completion - Technical Assistance Guide – May 2010*” for further explanation of terms used in this guidance. Contract management includes the following steps in pre and post contract execution:

1. Pre-Contract Execution

- a. Development of a Scope of Work that clearly and concisely states the following (collaborative process between the agency, the vendor, and the contract drafter following selection process):
 - i Performance Measures and Standards tied to the work sought.
 - ii Deliverables and milestones tied to the Performance Measures and Standards.
 - iii Accountability language tied to the Performance Measures and Standards.
 - iv. Monitoring requirements tied to the Performance Measures and Standards.
 - iv Resolution methods specific to the work sought (opportunities to cure).
 - v Remedies for noncompliance (method of declaring default/breach).
- b. Execution of certification form entitled “Performance Measures and Standards Certification Original for Contract,” in compliance with CRS §24-103.5-101(4).

2. Post-Contract Execution

- c. Monitoring of vendor performance in accordance with contract-established oversight activities, written policies and procedures, standardized tools and forms, etc.
- d. End of the **first** year of the contract (and each subsequent year as applicable):
 - i. Completion of an “INTERIM Contractor Performance Evaluation Worksheet” and assignment of an Interim Rating to the vendor.
 - ii. Execution of certification form entitled “Annual Certification,” in compliance with CRS §24-103.5-101(5), **only if** the vendor has been determined to be in compliance with the Performance Measures and Standards of the contract.

3. Vendor Non-Performance Leading to Cross-Default

- e. Noncompliance and Breach: Any time that the vendor is not in compliance with the contract, the agency should clearly document such noncompliance using the “INTERIM Contractor

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Performance Evaluation Worksheet.” If the noncompliance concerns a material obligation of the vendor, the agency should consult with the OSC and the Office of the Attorney General (OAG), and if both concur, the agency should declare the vendor to be in default. If a vendor has breached the contract, the agency should rate the vendor as “below standard” and include an explanation of why the vendor’s performance is below standard in the “INTERIM Contractor Performance Evaluation Worksheet.”

- f. Notice of Default to Vendor and Opportunity to Cure The agency should provide the vendor with notice in writing describing the breach and declaring that the vendor is in Default. The agency should consult with the OSC and OAG to draft the notice of default to the vendor. The letter should include steps that the vendor needs to take to get back into compliance and the time period to complete these steps (referred to as “cure” consistent with contract terms) or to explain why its actions should not be perceived as noncompliant.
- g. Remedies If the agency is not satisfied with the vendor’s attempt to cure then the agency can exercise its remedies under the contract. Under terms of the model contract for personal services, these remedies include termination of the contract, suspension of performance, withholding of payment, and other remedies. After consulting with the OSC and OAG, the agency should send a second written notice to the vendor that includes the remedies that the agency intends to pursue.
- h. Vendor’s Response If the vendor disputes the agency’s notice of default or notice of remedies, the agency should consult with the OSC and OAG to determine the appropriate response.
- i. Settlement Agreement If the agency, the OSC or the OAG determine that the agency was partially at fault for the vendor’s noncompliance, and the agency in consultation with the OSC and OAG decides not to accept any further work from the vendor, the agency should develop a settlement offer drafted with the OSC and OAG. After the settlement offer is drafted, the agency should send such settlement offer to the vendor. The settlement must result in a release of all disputes between the agency and vendor. In rare situations where an agency decides to continue to work with the vendor, the agency should consult with the OSC and OAG to draft a contract amendment that includes a settlement agreement
- j. No Settlement Agreement If an agency has little or no fault in the vendor’s noncompliance, the agency should not settle with the vendor, and should pursue the agency’s remedies under the contract.
- k. Nature of Vendor’s Default If the nature of the vendor’s default could have statewide implications or the vendor demonstrated a gross failure to meet the contract terms, then an agency should consult with the OSC and OAG about the possibility of invoking the cross-default provision in CRS §24-103.5-101(5). The OSC will contact other agencies to identify the vendor’s contracts with other agencies and evaluate the impact to the State of putting the vendor in default under all these other contracts.
- l. Cross-Default If the OSC determines that putting the vendor’s contracts in default will not result in an adverse impact on the State and there is be an acceptable level of risk, considering alternatives to the vendor’s services, then the OSC will make a recommendation to the Executive Director of the Department of Personnel & Administration (Executive Director) for the Cross-Default of vendor’s contracts. If the Executive Director agrees with the OSC’s recommendation, then the Executive Director should send notice of Cross-Default to the vendor and copy all the affected agencies.
- m. Removal of Vendor Under CRS §24-103.5-101(6), the Executive Director may remove the name of the vendor from the database or prohibit the vendor from bidding on future contracts.