

## **Annex to TNC-GCF Procedure Granting and Awarding GCF Funds – Guidelines for Contractual Default and Termination**

The following guidelines apply to all written and oral agreements between The Nature Conservancy (“TNC”) and contractors or grantees receiving Green Climate Fund (“GCF”) funds. These guidelines should be followed whenever there is a default or potential default (all of them, “Default”) by a contractor, grantee or any other type of non-TNC entity or person performing services for a GCF Funded Project or receiving directly or indirectly GCF awards through TNC. Although contractors, grantees, and partners are different from each other, and contracts, grants, subawards are different types of agreements, here the terms are used interchangeably unless specified.

Given the varied nature of projects, regions, activities, grantees (with different levels of sophistication and capacity) TNC does not favor a “one-size-fits-all” approach to suspension, termination, reduction or recovery of grants, subawards or contracts. Each event should be reviewed on a case-by-case basis and based on the best available information and informed business judgment.

These guidelines will assist Award Managers and Grant Evaluation Committees in making adequate decisions regarding the approach in case of a Default, in order to better protect the project, its funds, and TNC.

This document is divided in three sections: first, general notes on Defaults; second, guidelines on how to identify and assess a Default; and third, available options and steps upon a Default.

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### **General notes on Defaults:**

1. Although both “*potential events of default*” and “*defaults*” are defined here as “Defaults”, they are practically and conceptually different. A *potential event of default* is a circumstance or action that, with the passage of time or in the absence of appropriate corrective measures, will result in a default. Potential events of default should be managed with the same care and precaution as defaults. Early management of a potential event of default will lead to better outcomes and fewer defaults. Award Managers and Grant Evaluation Committee members need to be aware of the contextual differences between one and the other to make decisions related to a Default.
2. A Party is in *default* when it has failed to fulfill a contractual obligation (affirmative or negative, either as described in a covenant, a deliverable or any other clause, including general clauses about anti-corruption, anti-money laundering, insurance, etc.) or when it intentionally made or makes a false or misleading statement to TNC. A *default* or a *potential event of default* will also occur if the party is under a circumstance or has engaged in an action or omission that will cause such breach.
3. TNC’s written contracts normally list events and actions that can trigger suspension or termination events. In addition, non-compliance of any obligation –oral or written– may also be considered a breach of the contract and cause a suspension or termination of the agreement.
4. Even if an agreement is governed by a U.S. state law and subject to its jurisdiction, local legislation may provide for additional Defaults and remedies, or qualify the type of breach required for a Default to exist. A local jurisdiction may impose different requirements to terminate a contract; for example, it may require a cure period, specific notices or specific thresholds (quantitative or

qualitative). These local mandates should be observed when possible, even if the agreement is governed by a different law.

5. A Default not only negatively impacts TNC's activities but may also affect commitments that TNC has with third parties such as the GCF, other contractors, donors, partners, and local communities. A breach of contract may have important negative consequences in the project's budget, schedule, and compliance. It can delay or prevent the achievement of the ultimate goal of all TNC projects, which is to conserve the lands and waters on which all life depends.
6. Under GCF-TNC Performance Standards, a contractor or grantee may have the right to initiate an internal remediation procedure pursuant to the applicable Grievance Mechanism. Please consult the GCF-TNC Performance Standards to determine what other requirements are applicable.

### **Guidelines on how to identify and assess a Default:**

1. Once there is a Default, the Award Manager and/or Grant Evaluation Committee, as applicable, will have to decide if: to provide a waiver, amend the specific agreement, reduce the amount of the grant, order the suspension or a termination of the agreement, or pursue legal actions. To make that decision, the following elements should be balanced and taken into consideration:
  - a. The nature, complexity and impact of the breached covenant.
  - b. If other covenants are in risk of being breached.
  - c. The direct consequences of the Default both for the agreement and the project, including contractual, practical, logistical, financial and reputational consequences.
  - d. The effect on compliance with the TNC GCF Performance Standards and with local laws.
  - e. The extent to which third parties, especially local communities and stakeholders, may be affected.
  - f. Other risks to the agreement, the project and TNC that could arise because of the breach.
  - g. The type of contractor or grantee responsible for Default. For example, the Award Manager and/or Grant Evaluation Committee should review if this is a common occurrence with the contractor or grantee, if it has been prompt in addressing the issues, if it actively notified TNC about the breach or tried to hide it, if it has answered to TNC questions and concerns, if it has the capacity to cure the Default, if the contractor can still perform the other covenants of the agreement, if it has defaulted on other contracts with third parties, and there is a risk of liquidation or bankruptcy.
  - h. The context and reasons for a Default. For example, the Award Manger and/or Grant Evaluation Committee should review if the Default is caused by external causes, the nature of those causes (are they force majeure? Were they foreseeable and/or preventable?), if it was due to the negligence or willful non-compliance of the grantee, if the Default relates corruption, money-laundering or criminal activity.
  - i. The availability of alternative grantees or contractors.
  - j. The possibility of the grantee's default being a consequence of a previous default or delay by TNC.
  - k. The terms and conditions of the GCF prime award.
2. No breach should be analyzed in isolation. The Award Manger and/or Grant Evaluation Committee needs to consider the context of the agreement, the project, the contractor or grantee, and should consult other team members, Grants, Finance, Legal and, when appropriate, other partners, to reach an informed decision.

3. When there is a clear risk of Default, the Award Manager must mitigate as soon as possible the negative effects of non-compliance. This includes notifying Finance to avoid additional disbursements and inform Legal to determine if any preliminary or preemptive action is needed. Also, some grant agreements require TNC to notify immediately the donor or auditors about Defaults. Finally, in these cases, documentation should be managed and filed with extreme care.
4. If there is a Default, give notice to the contractor or grantee that TNC is aware of the breach and is requesting compliance. Be careful when writing any communication regarding the status of compliance because it could be misinterpreted as a waiver or as an amendment to the original agreement.
5. Keep Legal informed of the compliance with the contract and of any other exchange of information with the contractor or grantee.

### **Available options and steps upon a Default**

1. If after the assessment the Award Manager decides to continue with the agreement despite the Default:
  - a. No Default should go uninformed, internally and with the defaulting contractor or grantee, and with the GCF if necessary. Inform the contractor or grantee that you are aware of the Default and that you are granting a waiver or deciding not to pursue legal remedies.
  - b. Have a serious conversation with the contractor or grantee to have a clear perspective on how much time it will need to fulfill the defaulted obligation and what internal measures it will implement to avoid future Defaults.
  - c. Internally assess the implication of the contractor's request in terms of time, money, impacts to commitments with other parties, and objectives of the project and, if necessary, adjust the project budget and schedule and inform donors and partners.
  - d. If necessary, make all the agreements in writing and amend the original contract or subaward accordingly. The agreement reflected on the amendment should be practically and economically reasonable and feasible.
  - e. Unless the default is not attributable to the contractor or grantee, if you decide to waive the breach, do not leave a non-compliance event unpunished. You could be increasing moral hazard and sending the wrong message about TNC's seriousness and professionalism. Negotiate and assess what to ask from the contractor or grantee in exchange of granting a waiver or signing the amendment. It does not need to be a substantial request, but it should be sufficient (even if only symbolic) to deter future breaches. The choice will depend on the analysis of the nature of the Default and can include: the payment of a penalty, the reduction of the agreed price, additional information requests and reports, additional monitoring, additional documentation, or the presentation of reports on the Default.
2. If after the assessment the Award Manager and/or Grant Evaluation Committee decides to terminate the contract or seek other legal or contractual remedies:
  - a. Notify Legal about the specifics of the case.
  - b. Avoid being contentious or litigious.
  - c. Make best efforts to terminate the relationship on good terms and encourage a bilateral termination agreement.
  - d. If TNC gave the contractor or grantee information, equipment or other assets, request their return (as required under the specific agreement).

- e. Follow any procedure required under the GCF-TNC Performance Standards Grievance Mechanism.
- f. In extreme cases where legal action is to be pursued, please refer to TNC's **Use of Outside Counsel and Litigation SOP**.

**Availability of Grievance Mechanism:**

Please note that the contractor/grantee may have access to the TNC-GCF Grievance Mechanism under the TNC-GCF Performance Standards of the Environmental and Social Management System. In such cases, the procedures and requirements of the Grievance Mechanism will have to be observed, without prejudice to implementing reasonable actions to minimize the adverse effects of a Default.