



## Judicial Council of California · Administrative Office of the Courts

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on April 24, 2011

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Title

Judicial Branch Administration: *Judicial Branch Contracting Manual*

Agenda Item Type

Action Required

Effective Date

April 24, 2012

Rules, Forms, Standards, or Statutes Affected  
Revise *Judicial Branch Contracting Manual*

Date of Report

April 12, 2012

Recommended by

Administrative Office of the Courts  
Mary M. Roberts, General Counsel  
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### Executive Summary

At the Judicial Council's regular business meeting on December 13, 2011, the council adopted revisions to the Introduction chapter of the *Judicial Branch Contracting Manual* and directed staff to report further to the council in April 2012 about comprehensive revisions to the manual. With the concurrence of the *Judicial Branch Contracting Manual Working Group*, the Administrative Office of the Courts recommends the council revise the manual as proposed in this report and direct staff to report further to the council in August 2012 about additional revisions to the manual. Based on the volume and content of feedback that staff received about the manual and the revisions circulated for public comment, adoption of the proposed revisions and subsequent revisions to the manual would make it more effective and workable for judicial branch entities' procurement and contracting.

### Recommendation

The Administrative Office of the Courts (AOC) recommends that the Judicial Council, effective April 24, 2012:

1. Revise the *Judicial Branch Contracting Manual* as proposed in this report; and
2. Direct the AOC to report further to the council at its regular business meeting in August 2012 about additional revisions to the manual.

The text of the proposed revised manual is included as Attachment A.

## Previous Council Action

At the council's regular business meeting on August 26, 2011, the council: (1) adopted the *Judicial Branch Contracting Manual* effective October 1, 2011, the operative date of substantive requirements of the California Judicial Branch Contract Law; and (2) directed the AOC to report back in December 2011 and present to the council proposed revisions to the manual resulting from further consultation with the *Judicial Branch Contracting Manual* Working Group<sup>1</sup> as well as feedback from judicial branch entities<sup>2</sup> (JBES). At the council's regular business meeting on December 13, 2011, the council: (1) revised the provisions in the Introduction chapter of the *Judicial Branch Contracting Manual* concerning the use of words signifying mandatory and discretionary actions; and (2) directed the AOC to report further to the council at its regular business meeting in April 2012 about additional, comprehensive revisions to the manual.

## Rationale for Recommendation

### Statutory requirement

With certain exceptions<sup>3</sup> the California Judicial Branch Contract Law (Judicial Branch Contract Law), enacted March 24, 2011, requires JBES to comply with the provisions of the Public Contract Code (PCC) applicable to state agencies and departments related to the procurement of goods and services. The Judicial Branch Contract Law applies to all covered contracts initially

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<sup>1</sup> The Judicial Branch Contracting Manual Working Group comprises the following judicial branch personnel: Presiding Judge Lee Smalley Edmon, Superior Court of Los Angeles County; Ms. Charlene Ynson, Court Administrator, Court of Appeal, Fifth Appellate District; Ms. Kimberly Flener, Court Executive Officer, and Mr. Rich Holst, Assistant Court Executive Officer, Superior Court of Butte County; Ms. Jean Field, Assistant Director, Habeas Corpus Resource Center; Ms. Tammy L. Grimm, Court Executive Officer, Superior Court of Inyo County; Mr. Chris Anderson, Procurement Administrator, and Mr. D. Brett Bianco, Court Counsel, Superior Court of Los Angeles County; Mr. Geoff Brandt, Assistant Court Executive Officer, Superior Court of Placer County; Ms. Sherry Clifford, Contract Officer, and Ms. Deborah Coel, Senior Contract Administrator, Superior Court of Orange County; Mr. Michael J. Cappelli, General Counsel, and Ms. Lynda Chang, Contracts Attorney, and Mr. Luke McDaniel, Procurement Manager, Superior Court of Riverside County; Ms. Karen Brewer, Senior Contract Officer, and Mr. Fred Cabrera, Contract Services Manager, Superior Court of Sacramento County; Ms. Debra Meyers, Chief Counsel, Superior Court of San Bernardino County; Ms. Susan Patrick, Principal Management Analyst, Contracts and Purchasing, Superior Court of San Francisco County; Mr. James Flohrschutz, Business Services Manager, Superior Court of San Joaquin County; Ms. Rhonda Mobley, Procurement Specialist, Superior Court of Sonoma County.

<sup>2</sup> Public Contract Code section 19205 defines "judicial branch entity" as "any superior court, court of appeal, the California Supreme Court, the Judicial Council, the Habeas Corpus Resource Center, or the Administrative Office of the Courts."

<sup>3</sup> PCC §§ 19204(c), 19207, and 19208.

entered into or amended by JBEs on or after October 1, 2011.<sup>4</sup> The Judicial Branch Contract Law also requires the council to adopt a judicial branch contracting manual containing procurement and contracting policies and procedures that must be followed by all JBEs.<sup>5</sup> The policies and procedures in the manual must be “consistent with” the PCC and “substantially similar” to the provisions contained in the *State Administrative Manual (SAM)* and the *State Contracting Manual (SCM)*.<sup>6</sup>

### **Development of the manual**

Staff drafted the manual to implement the Judicial Branch Contract Law by setting forth policies and procedures that are required by applicable sections of the PCC and that are substantially similar to the provisions in the *SAM* and *SCM*.

Development of the manual was complicated by the inapplicability of the *SAM* and *SCM* to the organization and operations of JBEs. The *SAM* and *SCM* were developed for use by executive branch agencies, with the Department of General Services (DGS) as the entity charged with administering those agencies’ procurement and contracting activities. In contrast, management in the judicial branch is decentralized; for the superior courts, by way of example, the presiding judge of each court is responsible for approving procurements and contracts and the court executive officer is responsible for contract negotiations.<sup>7</sup> In addition, PCC 19207 acknowledges that neither DGS nor any other state entity is involved in approval or review of judicial branch procurement, except as specifically required by law. As a result, much of the material in the *SAM* and *SCM* either does not apply to JBEs or is incompatible with judicial branch organization and operations.

To incorporate provisions that are “substantially similar” to those contained in the *SCM* and *SAM*, the manual drafters followed a general process in preparing the manual. First, staff analyzed the PCC to determine which provisions are made applicable to JBEs through the Judicial Branch Contract Law. Staff then identified *SAM* and *SCM* provisions that implement those PCC provisions and drafted provisions for inclusion in the manual that are substantially similar to those *SAM* and *SCM* provisions. For example, if a *SAM* or *SCM* provision implemented a specific PCC requirement (such as a dollar limit or required deadline), that requirement was included in the manual without modification. If the provision did not implement a specific requirement, but rather a concept or process, staff incorporated the provision into the manual as an accounting or business practice that was favored but not mandatory.

### **Proposed revisions to the manual**

Based on the volume and content of feedback that staff received about the manual and the revisions that were circulated for public comment, staff made extensive substantive revisions to

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<sup>4</sup> *Id.*, § 19203.

<sup>5</sup> *Id.*, § 19206.

<sup>6</sup> *Ibid.*

<sup>7</sup> Cal. Rules of Court, rules 10.603(c)(6)(D) and 10.610(c)(3).

the manual. Underlying all the revisions is a more informed and less literal interpretation of what it means to have a judicial branch contracting manual contain provisions that are “substantially similar” to those in manuals that are applicable to the executive branch. Specifically, this interpretation: (1) places more emphasis on the legislative intent expressed in the Judicial Branch Contract Law to promote efficiency while still providing for robust competition in public contracting, but with greater sensitivity to the business operations and organizational structure of the judicial branch; and (2) provides for more discretion to be exercised by JBEs, consistent with the decentralized management system of the trial courts that is reflected in rules of court.

In applying this more informed and less literal interpretation of “substantially similar,” when a *SAM* or *SCM* provision did not implement a specific PCC requirement, but rather a DGS concept or process, the drafters considered, based on feedback from JBEs, whether a *SAM* or *SCM* provision was incompatible for literal adoption in the context of judicial branch operations. If the drafters determined that a *SAM* or *SCM* provision was not appropriate for literal adoption, the provision was distilled to its essential objective and processes and procedures were then developed to achieve the same objective in a manner compatible with judicial branch organization and operations. As a result, the processes and procedures reflected in the proposed revisions are intended to implement the objectives of both the underlying *SAM* or *SCM* provision and, most importantly, the PCC, as expressed in PCC sections 100-102.<sup>8</sup>

Specific revisions to the manual that reflect the more informed and less literal interpretation include:

- Removal of various constraints on negotiations;
- Availability of higher thresholds for use of Requests for Quotes (RFQs);
- Removal of the lower RFQ threshold for IT services;
- Increased flexibility for making advance payments; and
- Removal of provisions previously characterized as mandatory but which were not based on PCC requirements.

The proposed revisions will make the manual more effective and workable for JBEs in their procurement and contracting activities, while furthering the legislative intent that public

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<sup>8</sup> Public Contract Code sections 100–102 contain the Legislature’s findings and intent regarding the code. Section 100 includes the legislative finding that placing all public contract law in one code will make that law clearer and easier to find, and states that the legislative intent in enacting the code is to achieve the following objectives: to clarify the law with respect to competitive bidding requirements; to ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds; to provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices; and to eliminate favoritism, fraud, and corruption in the awarding of public contracts. Section 101 provides that California public contract law should be efficient and the product of the best of modern practice and research. Section 102 provides that California’s public contract law should be uniform to encourage competition for public contracts and to aid public officials in the efficient administration of public contracting, to the maximum extent possible, for similar work performed for similar agencies.

contracting requirements be efficient and stimulate competition in a manner that promotes sound fiscal practices.

### **Future revisions to the manual**

Because of the complexity of chapter 6 of the manual (leverage procurements), staff recommends reporting back to the council at its regular business meeting in August 2012 with substantive revisions to this chapter. Also, because of the substantial difference in the version of the manual that was submitted for public comment and the version that staff is now proposing for the council's consideration today, staff recommends posting the revised manual, as adopted by the council, for public comment following this meeting. This will provide the public and courts other than those represented on the working group the opportunity to comment on the changes adopted by the council today and will also allow for comment on proposed revisions to chapter 6 that are still being developed and not included in this report. When staff returns again to the council in August 2012, staff will include in the proposal to the council any other revisions that are necessary or desirable.

## **Comments and Alternatives Considered**

### **Comments received**

Comprehensive revisions to the manual were submitted for public comment for five weeks, from February 1 through March 6, 2012. The invitation to comment specifically sought input on whether the manual presents information in a clear and understandable way and is user-friendly, whether the content is appropriate and workable for courts of different sizes and staffing capabilities, and whether commentators identified any material omissions in the proposed manual. The working group received the comprehensive revisions one week before the public comment period began and continued to review and revise the manual throughout the public comment process. Twelve formal comments were received in response to the invitation to comment, all from representatives of California superior courts.<sup>9</sup>

Because of the scope of the manual, many comments focused on its technical requirements. The one theme underlying all the comments is the view that the drafters interpreted the requirement that the manual be “substantially similar” to the *SAM* and *SCM* too literally while not sufficiently acknowledging the fundamental differences between the underlying assumptions of the *SAM* and *SCM* and the organization and operations of the judicial branch. In addition to the general inappropriateness for judicial branch operations, the courts noted that the *SAM* and *SCM* contained practices and procedures that are outdated, inefficient, and ultimately, costly. The Superior Courts of Orange and Riverside Counties each also noted that the revised version submitted for public comment contained more restrictions and requirements than the version originally adopted by the council.

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<sup>9</sup> A chart providing the full text of the comments and responses is attached at pages 7-72. For ease of use, the comment chart has been organized by the chapters of the manual. The comment chart first lists the commentators in alphabetical order. The chart then lists the comments received on the overall manual and on each chapter.

A casualty of an overly strict interpretation of “substantially similar,” the courts argued, is the courts’ local control and discretion to determine the processes and procedures best suited to their specific needs. Consequently, courts such as the Superior Courts of Fresno, San Diego, and Tulare Counties have had to expend considerable resources to comply with the requirements of the manual even though they were not necessarily realizing the “best value” in goods and services.

As discussed previously, in response to the volume and content of the comments from courts that had and did not have representation on the working group, staff adopted an interpretation of “substantially similar” that (1) places more emphasis on the legislative intent to promote efficiency while still providing for robust competition in public contracting, but with greater sensitivity to the business operations and organizational structure of the judicial branch; and (2) provides for more discretion to be exercised by JBEs, consistent with the decentralized management system of the trial courts. Staff then undertook substantial revisions to the manual that implemented this refined interpretation.

### **Alternatives considered**

Because of the substantial changes to the version of the manual that was submitted for public comment, staff considered submitting the new revisions for public comment to allow all JBEs the opportunity to comment on the revisions before returning to the council with the recommendation to adopt the revisions. Consultation with the working group indicated, however, that the new revisions address the courts’ main concerns with the manual (and with the previously proposed revisions) and make the manual more effective and workable for the trial courts and other JBEs. To provide relief sooner rather than later to JBEs that are currently struggling to comply with the requirements in the operative version of the manual, staff decided to recommend adoption of the proposed revisions effective April 24, 2012, followed by submission of the adopted revisions for public comment so that all JBEs have the opportunity to provide feedback on the revisions.

### **Implementation Requirements, Costs, and Operational Impacts**

By making the manual more effective and workable, the proposed revisions should mitigate the substantial costs and burdens that trial courts and other JBEs would otherwise incur as a result of the Judicial Branch Contracting Law, while accomplishing the legislative objectives of efficiency and robust competition in public contracting.

### **Attachment**

1. Comment chart at pages 7-72.
2. Attachment A: Revised *Judicial Branch Contracting Manual*

**List of All Commentators and Overall Positions on the Proposal**

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Response</b>
1.	Superior Court of Fresno County Ms. Carmen Lango	NI	“See comments on specific chapters below.”	
2.	Superior Court of Imperial County Ms. Kristi Kussman	NI	“See general comment below.”	
3.	Superior Court of Monterey County Ms. Christine Ace	NI	“See comments on specific chapters below.”	
4.	Superior Court of Orange County Ms. Sherry Clifford	NI	“See comments on specific chapters below.”	
5.	Superior Court of Placer County Mr. Jake Chatters	NI	“See comments on specific chapters below.”	
6.	Superior Court of Riverside County Mr. Luke J. McDannel	NI	“See comments on specific chapters below”	
7.	Superior Court of Sacramento County Mr. William Yee	NI	“See comments on specific chapters below.”	
8.	Superior Court of San Bernardino County Ms. Debra Meyers	NI	“See comments on specific chapters below.”	
9.	Superior Court of San Diego County Mr. Mike Roddy	AM	“See comments on specific chapters below.”	
10.	Superior Court of San Francisco County Ms. Susan Patrick	NI	“See comments on specific chapters below.”	
11.	Superior Court of Santa Clara County Mr. David H. Yamasaki	NI	“See comments on specific chapters below.”	
12.	Superior Court of Tulare County Mr. Alexander J. de Markoff	NI	“See general comment below.”	

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

<b>General Comments</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
<p>Superior Court of Fresno County Ms. Carmen Lango</p>	<p>The Superior Court of California, County of Fresno is opposed to the continued implementation of the Judicial Branch Contracting Law (JBCL) and the JBCM. Despite its stated purpose the JBCL and JBCM do not clarify or simplify competitive procurement practices, facilitate improvement, effectiveness, and efficiency, eliminate favoritism, or promote competition. Instead, they place an unnecessary burden on each individual court. At a time when each court must do more with less, the JBCL and JBCM add additional burdens that provide little or no benefit to the courts but instead make the procurement process more costly, complicated, and time consuming.</p>	<p>The Judicial Branch Contracting Manual (JBCM) has been revised to incorporate a new approach that: 1) places more emphasis on the legislative intent to promote efficiency while still providing for robust competition in public contracting, but with greater sensitivity to the business operations and organizational structure of the judicial branch; and 2) providing for more discretion to be exercised by judicial branch entities, consistent with the decentralized management system of the trial courts.</p>
<p>Superior Court of Imperial County Ms. Kristi Kussman</p>	<p>The JBCM does not provide any information on prevailing wage or use of licensed contractors. It appears that this was left out intentionally as it would be difficult to capture all the requirements related to prevailing wage or licensed contractors. It appears that we are so worried about what we may not capture, that we have lost sight that Courts need some guidelines on purchasing requirements so that we remain compliant with law. There should be code section references in the JBCM that discusses code section requirements. This will help the branch be more efficient as courts will be able to more quickly perform the required research that is necessary to investigate a purchase. One of our concerns is that we issue a RFP and we don't require something that by law should have been required.</p> <p>We also want to share a concern about being efficient. We have seen requests that we purchase using the most "conservative" procurement ideologies. We believe that we need to follow what is required by law. The JBCM and the Courts should not be adopting requirements that are greater than law. Every unnecessary requirement, or every requirement that we make bigger than what it is, unnecessarily uses government</p>	<p>The JBCM was written to implement the Judicial Branch Contract Law (JBCL) by setting forth policies and procedures regarding procurement and contracting that are required by applicable sections of the Public Contract Code (PCC) and that are "substantially similar" to the provisions in the State Administrative Manual (SAM) and the State Contracting Manual (SCM). The JBCM is not meant to provide guidance on employment and labor law.</p> <p>The JBCM was written to implement the JBCL by setting forth policies and procedures regarding procurement and contracting that are required by applicable sections of the PCC and that are "substantially similar" to the provisions in the SAM and the SCM. The JBCM has been revised to incorporate a new approach that: 1) places more emphasis on the</p>

<b>General Comments</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
	resources.	legislative intent to promote efficiency while still providing for robust competition in public contracting, but with greater sensitivity to the business operations and organizational structure of the judicial branch; and 2) providing for more discretion to be exercised by judicial branch entities, consistent with the decentralized management system of the trial courts.
Superior Court of Monterey County Ms. Christine Ace	<ul style="list-style-type: none"> <li>• We would like to see more authorized templates added into the Manuel – to ensure uniformity in process.</li> <li>• We would like to see all code or law reference for each “must.”</li> <li>• It would be an effective time saver if a template for Local Manuel was created that referenced mandated and recommended decision points in the JBCM – rather than all 58 of going through the JBCM and pulling out the relevant issues.</li> <li>• We would like to see uniformity and consistency to the extent possible – For consideration following thresholds if possible by code and law: [Attachment 1]</li> </ul>	<p>Staff will prepare more templates for judicial branch entities (JBEs) use.</p> <p>The comment will be considered in the revision of the JBCM currently scheduled for August 2012.</p> <p>Staff will consider the comment as it prepares tools to assist JBEs to comply with the JBCM.</p> <p>The JBCM has been revised to allow JBEs to adjust the thresholds to meet its local and specific needs.</p>
Superior Court of Orange County Ms. Sherry Clifford	<p><b>Summary</b> On March 24, 2011, Senate Bill 78 was enacted creating a new Part 2.5 of the Public Contract Code (PCC) designated the California Judicial Branch Contract Law (JBCL). With certain exceptions, the JBCL requires that all levels of court and all entities of the judicial branch comply with provisions of the PCC that are applicable to state agencies and departments related to the procurement of goods and services.</p> <p>PCC 19206 of the JBCL requires the Judicial Council to adopt</p>	

<b>General Comments</b>		
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	<p>and publish a Judicial Branch Contracting Manual incorporating procurement and contracting policies and procedures that the judicial branch entities must follow. On August 26, 2011, the Judicial Council adopted the <i>Judicial Branch Contracting Manual</i> (Manual) to comply with PCC 19206. The effective date of this Manual is October 1, 2011. On December 13, 2011, the Judicial Council adopted revisions to the Introduction to the Manual, which revisions became effective immediately. The AOC has now released proposed revisions to Manual for public comment. The Superior Court of California, County of Orange, and (“OCSC”) responds as follows.</p> <p><b>Response:</b> OCSC acknowledges the work and efforts that have been put forth to review and revise the Manual and appreciates that OCSC and other trial courts have had representation in the working group discussions. This has provided the opportunity for discussions on a chapter by chapter (and even word by word) basis. These discussions resulted in requests for modifications by the working group participants – many of which have been incorporated; however, many of which were not. Those requests have been memorialized in the public comment submittals from the County of Riverside and the County of Sacramento as examples and the OCSC fully endorses their comments.</p> <p>Specifically, OCSC has concerns with the following areas.</p> <p>1. The use of “should,” “may” and “must” – Repeatedly, in the working group discussions, concern has been expressed that the use of “should” throughout the Manual places a burden on a court to be compliant with those provisions that are noted as “should”, even though they are not mandatory It has been the</p>	<p>The JBCM has been revised to avoid the use of the terms “should,” “may” and “must” where feasible. Staff will continue to implement this approach in the revision of the JBCM currently scheduled for August 2012.</p>

<b>General Comments</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
	<p>experience of many of the procurement professionals that auditors will interpret the use of the word “should” in a manual as a “best practice”, and write-up courts that do not comply with “should.” In addition, it expands the opportunity for litigation risk if a court made a business decision not to be compliant with a “should” provision. “Should” provisions should not be in the manual for this reason.</p> <p>2. Socioeconomic and Environmental Programs – In this economic climate of continued budget cuts, these programs add financial burdens to the court. For example, complying just with the Manual’s “recycled” products requirements has increased OCSC annual paper costs by \$43,147 per year. This is one product; one program and does not address any of the administrative burdens in tracking some of these programs and their requirements. Administrative time and effort needed to comply with these Programs are an added cost to the courts – a cost which is more difficult to justify during such difficult financial times.</p> <p>3. Audits – OCSC concurs with Riverside’s assessment that audits in July are premature. The impact of the PCC is still being analyzed at all levels of the Judicial Branch and amendments are still being proposed. With the exception of a couple templates, the AOC has, to date, not released the majority of PCC compliant templates. Therefore, the burden is at the local level to either develop PCC compliant contract and solicitation templates or be out of compliance all together.</p>	<p>Staff acknowledges the operational and financial challenges imposed by the requirements of the socioeconomic requirements of chapter 3 of the JBCM; however, the mandatory requirements of chapter three are required by law and may not be ignored or waived due to budget constraints.</p> <p>PCC 19210(a) states that the State Auditor “shall establish a pilot program to audit six trial courts” and also provides a mechanism for selecting the courts to be used for the pilot program based on size. This pilot program, by statute, must be started no earlier than July 1, 2011, and no later than December 15, 2012. PCC 19210(b) provides that “the State Auditor shall, on or before December 15, 2013, commence an audit of the trial courts” and these audits will be based on the results of the pilot program audits. The timeframes for the “pilot program” audits and for the subsequent “regular” audits (that are to occur at least once every four years per trial court) are mandated by statute. The start date of an individual trial court audit within those timeframes is</p>

<b>General Comments</b>		
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	<p>Additionally, protest procedures in this latest Manual revision (See Chapter 4) make the Protest section of the Request for Proposal template that was previously released and in use non-compliant.</p> <p>4. Outdated Procurement Practices – The PCC makes reference to outdated, expensive, labor-intensive procurement practices – many of which in informal surveys, even the state agencies indicate they no longer practice (e.g. DVBE tracking and reporting, advertising in public newspapers, public openings actually at the facility, etc.), phone scripts (people picking up the phone and calling for quotes). As other industries throughout the world have done, procurement practices have moved toward utilizing technology to become more efficient (e.g. electronic bid submittals, electronic bid tabulation reports, etc.). In fact, the DGS is using the same online bidding service utilized by OCSC. The antiquated practices stated in the Manual, if followed exactly, would require OCSC to take a step backward. The philosophies of government procurement should concern advancement, modernization, efficiency, and the preservation of the tax payer dollar. Instead, the JBCM mires the courts in antiquated and inefficient practices.</p> <p>5. Price Negotiations – The current proposal eliminates the Courts ability to negotiate price. The negotiation and best and final offer processes have made significant contributions in reducing costs and enabling OCSC to withstand the ongoing budget cuts over the past fiscal year and towards OCSC financial wellbeing (\$792,386 in Fiscal Year 2009/2010; \$1,901,152 in Fiscal Year 2010/2011 and \$321.765 in Fiscal</p>	<p>generally up to the Bureau of State Audits (BSA) in consultation with the court being audited. Staff will prepare more templates for JBE use.</p> <p>If the proposed revisions to the JBCM are adopted by the council, staff will have to update the solicitation documents and contracts that were previously released to bring them into compliance with the revised manual.</p> <p>The JBCM has been revised to incorporate a new approach that: 1) places more emphasis on the legislative intent to promote efficiency while still providing for robust competition in public contracting, but with greater sensitivity to the business operations and organizational structure of the judicial branch; and 2) providing for more discretion to be exercised by judicial branch entities, consistent with the decentralized management system of the trial courts. The comment will be considered in the revision of the JBCM currently scheduled for August 2012.</p> <p>The JBCM has been revised to remove the constraints on negotiation.</p>

<b>General Comments</b>		
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	<p>Year 2011/2012).</p> <p>6. Scoring of Proposer Exceptions – OCSC has relied upon the flexibility to assess risk vs. the costs offered by its vendor community in their proposals. Each provision of a contract comes at a cost to both parties. By enabling vendors to propose modifications to provisions in a contract, parties can come to an acceptable risk threshold at a cost acceptable to both parties. The scoring of exceptions builds an inherent risk of either overstating or understating the provision by non-procurement professionals. The best practice is for a court to determine if the exceptions are material and thereby non-responsive and not scored or non-material and moved forward for further evaluation.</p> <p>7. On August 4, 2011, OCSC submitted public comments to invitation SP11-12 related to the first draft of the Judicial Branch Contracting Manual. The general comment stated:</p> <p><i>“[PCC] section 19206 says the “policies and procedures in the [judicial branch] manual shall be consistent with this code and substantially similar to the provisions contained in the State Administrative Manual and the State Contracting manual” (emphasis added). It does not say “adopt,” nor does it say “be more restrictive than” the code and manuals referenced. Many provisions in the draft appear to be more restrictive than the Executive Branch practices and also unnecessarily preclude more up-to-date purchasing approaches, for example, various aspects of electronic bidding systems.</i></p> <p><i>The approach here should be to start with the basics and fundamentals, and add detail and broaden coverage as we learn how it works. The attempt to provide a comprehensive manual on day one, particularly when the state manuals</i></p>	<p>Language has been added in numerous locations clarifying that a JBE determines what constitutes a material exception. See chapter 4 section 4.4.D.4, chapter 4A steps 5 and 11, chapter 4B steps 6.C and 6.D, and chapter 4C step 6.B.</p> <p>The JBCM has been revised to incorporate a new approach that: 1) places more emphasis on the legislative intent to promote efficiency while still providing for robust competition in public contracting, but with greater sensitivity to the business operations and organizational structure of the judicial branch; and 2) providing for more discretion to be exercised by judicial branch entities, consistent with the decentralized management system of the trial courts. The comment will be considered in the next revision of the JBCM currently scheduled for August 2012.</p>

<b>General Comments</b>		
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	<p><i>contemplate statewide purchasing model, as opposed to 58 trial courts, seems unwise. It will be very difficult to „undo “ provisions that prove impractical or are not appropriately scaled to the variety of purchasing needs of organizations ranging from LA to Alpine.”</i></p> <p>This comment is still applicable to the proposed revisions of the Manual. Although a very strict and narrow interpretation of the phrase, “<i>policies and procedures in the [judicial branch] manual shall be consistent with this code and substantially similar to the provisions contained in the State Administrative Manual and the State Contracting manual</i>” has been applied, OCSC would propose this phrase be interpreted to mean that the courts address the topics covered within those manuals as it best fits the needs of the judicial branch and as was covered in the Trial Court Financial Policies and Procedures.</p> <p>Inherently the practices that have been developed by the legislative and executive branches have been developed because their very purpose is to serve the needs and desires of the public they serve. Therefore, if the public forum deems that recycled paper is inherently best for the public – no matter the cost, the state and executive branch are established to serve their constituency. The legislative process should be slow and deliberative to ensure that public policy is the voice of that constituency and not the will of the people with the loudest voice or the most money.</p> <p>The judicial branch, however, was established as the third, co-equal branch of government to protect its constituency from the other two branches of government. As is the case with the other branches, the courts must be able to ensure that justice is not delayed and its constituency is assured due process. This expectation applies equally to the purchase of goods and</p>	

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<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
	<p>services that are needed for the basic operations of the court. The current approach of the JBCL and JBCM allows the legislative branch to dictate judicial branch contract and procurement practices; including review and comment on how goods and services are procured (e.g. submittals to the Bureau of State Audits, California Technology Agency). The image this portrays of the nature of the relationship between the judicial branch and the legislative branch is that the judicial branch is subservient. Instead the judicial branch should be developing a procurement process that best serves its clients and constituents at the lowest cost and not passively following antiquated habits and practices of the past.</p>	
<p>Superior Court of Riverside County Mr. Luke J. McDannel</p>	<p><b>1. PROPOSED JBCM REVISIONS SIGNIFICANTLY DECREASE LOCAL COURT DISCRETION</b></p> <p>JBCM REVISION REFERENCE: All Sections.</p> <p>The largest single, recurring, overall theme of the proposed JBCM revisions is taking items that were previously recommended, but still within some local court discretion, and making them mandatory. This often consists of changing what was a “should (do)” into a “must (do).” This decrease in local court discretion is reflected approximately 70 times in the proposed JBCM revisions.</p> <p>There has been no significant change in applicable law since the original JBCM went into effect just five months ago. What has changed during this time period that would call for so many additional limits to be placed on local court discretion?</p> <p><b>2. PROPOSED JBCM REVISIONS ARE NOT WELL-TIMED</b></p>	<p>The JBCM has been revised to incorporate a new approach that: 1) places more emphasis on the legislative intent to promote efficiency while still providing for robust competition in public contracting, but with greater sensitivity to the business operations and organizational structure of the judicial branch; and 2) providing for more discretion to be exercised by judicial branch entities, consistent with the decentralized management system of the trial courts.</p>

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	<p>JBCM REVISION REFERENCE: All Sections.</p> <p>Riverside court (and probably many others courts as well) is getting its feet solidly on the ground in terms of procedures, templates, documents, forms, etc., to meet the (original) JBCM requirements, and now here come these proposed JBCM revisions, which may be so extensive that they call for courts to do yet another re-working (or at least re-adjusting) of procedures, templates, documents, forms, etc.</p> <p><b>3. PROPOSED JBCM REVISIONS WILL ADD MORE UNCERTAINTY TO AN ALREADY MUDDLED AUDIT SITUATION</b></p> <p>JBCM REVISION REFERENCE: All Sections.</p> <p>In BSA audits, courts are expected to be in “full compliance” with the entire JBCM, but is this anywhere near realistic during this implementation period? Then, add in revisions so early in the process and there would now be two floating targets that the court could be expected to be in full compliance with, the original JBCM, and the revised JBCM.</p> <p>A. It’s not just that the revisions are not well-timed, it’s that they call for compliance within a period that’s not workable. Why are the audits being scheduled for July 2012? The statute provides that audits just need to commence before December 15, 2013 – why not give courts additional time to</p>	<p>The JBCM has been revised to incorporate a new approach that: 1) places more emphasis on the legislative intent to promote efficiency while still providing for robust competition in public contracting, but with greater sensitivity to the business operations and organizational structure of the judicial branch; and 2) providing for more discretion to be exercised by judicial branch entities, consistent with the decentralized management system of the trial courts.</p> <p>Based on the content and volume of the comments that staff received about the revisions circulated for public comment, staff has further revised the JBCM to make it more effective and workable for judicial branch entities in their procurement and contracting activities. Staff is submitting for the council’s consideration those revisions that have the support of the JBCM Working Group.</p> <p>PCC 19210(a) states that the State Auditor “shall establish a pilot program to audit six trial courts” and also provides a mechanism for selecting the courts to be used for the pilot program based on size. This pilot</p>

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	<p>allow courts to become compliant -- a good audit is in everyone's interest.</p> <p>B. Could the AOC work with the BSA in granting some type of grace period for full implementation of the JBCM, or at the very least relay to the BSA the need for flexibility/lenience in its audits? Particularly, given that:</p> <p>1. Contrary to what may have been presented, it's not true that most of these JBCM requirements should have already been in place before the new law kicked in, if courts were already in compliance with the TCFPP. Otherwise, there would have been no need for a JBCM manual and all the work everyone has put into the working group meetings.</p> <p>2. The AOC has briefly mentioned that it might be more understanding as to JBCM implementation issues with respect to smaller courts with limited staffing, but this understanding should also apply to medium and larger courts (even larger courts, especially with budget cuts, may have limited staffing, and more importantly limited time). Staff is already inundated with its own day-to-day tasks let alone trying to decipher the</p>	<p>program, by statute, must be started no earlier than July 1, 2011, and no later than December 15, 2012. PCC 19210(b) provides that "the State Auditor shall, on or before December 15, 2013, commence an audit of the trial courts" and these audits will be based on the results of the pilot program audits. The timeframes for the "pilot program" audits and for the subsequent "regular" audits (that are to occur at least once every four years per trial court) are mandated by statute. The start date of an individual trial court audit within those timeframes is generally up to BSA in consultation with the court being audited.</p> <p>Staff will convey the courts' difficulty in implementing the requirements of the JBCM in its on-going discussions with BSA. Given the statutory mandate of PCC 19210, however, whether BSA will be inclined to flexibility/leniency is not a certainty.</p> <p>Staff has removed provisions which were proposed in the version that was circulated for public comment and previously characterized as mandatory but which were not based on PCC requirements. Staff is submitting for the council's consideration only those revisions that have the support of the JBCM Working Group.</p> <p>The JBCM has been revised to incorporate a new approach that: 1) places more emphasis on the legislative intent to promote efficiency while still providing for robust competition in public contracting, but with greater sensitivity to the business operations and organizational structure of the judicial branch; and 2) providing for more discretion to be exercised by</p>

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	<p>JBCM, design and draft new procedures/templates/forms, etc. For all intents and purposes, implementing these changes takes time and careful thought.</p> <p>3. The TCFPP allowed the courts to exercise a much greater degree of discretion than what is permitted in the JBCM. Many of the provisions relating to contract formation were in the form of guidelines. Further, upon application, provisions modifying the guidelines or recommendations could be presented by the individual courts to the AOC for consideration and approval. The contemplated benefits of transparency and accountability have been subsumed by archaic contracting principles that do not reflect the manner in which business is transacted in the fluid world of the private sector and in a growing number of public institutions at both the state and federal level. To the contrary, many states have abandoned the competitive dysfunction associated with contracting procedures and rules that are no longer viable in the present business environment.</p> <p><b>13. GENERAL JBCM QUESTION / ISSUE: WAIVING JBCM PROVISIONS</b></p> <p>With respect to the court's independent ability to waive certain JBCM provisions if it believes such is in the best interest of the court, or would otherwise raise the contract price to a point of unconscionability or simply eliminate the most qualified contractors, the questions are:</p> <ul style="list-style-type: none"> <li>• Whether such an agreement is void <i>ab initio</i> or voidable? and,</li> <li>• What risk does the court incur in the event it waives a mandatory provision or a recommended provision (e.g.,</li> </ul>	<p>judicial branch entities, consistent with the decentralized management system of the trial courts.</p> <p>The JBCM has been revised to incorporate a new approach that: 1) places more emphasis on the legislative intent to promote efficiency while still providing for robust competition in public contracting, but with greater sensitivity to the business operations and organizational structure of the judicial branch; and 2) providing for more discretion to be exercised by judicial branch entities, consistent with the decentralized management system of the trial courts.</p> <p>A discussion of when an agreement is void <i>ab initio</i> or voidable involves providing legal advice, which should be provided on a privileged and confidential basis by a JBE's legal counsel rather than in the JBCM. The AOC/OGC is available to provide legal advice to JBEs. The JBCM has been revised to provide for more discretion to be exercised by judicial branch entities, consistent with the decentralized management system of the trial courts.</p>

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	<p>termination for lack of appropriation; termination for convenience, etc.)?)</p> <p>The discussions to date on these issues have been all but clear. It has been suggested by some at the AOC that risk assessment is the court's responsibility, and whether a court chooses to waive any provisions (mandatory or otherwise) is a court decision that should be based on the court's analysis of the risk. Others have argued that mandatory provisions are non-waiveable and render the contract void and/or illegal.</p> <p>The difference between a void contract and an illegal contract may, at first glance, appear immaterial. However, the governmental immunity of court officers and employees for their conduct is said to be "qualified" and not absolute. This means, to the extent an officer or employee of the court acts outside the scope of his or her authority, personal liability may attach. This is particularly true if the conduct of the officer or employee is classified or determined to be "illegal" and subject to criminal sanctions. In connection with contracts, an "illegal" contract is one which is void from its inception.</p> <p>An "illegal" contract arises in connection with the subject matter of the transaction (murder for hire) or when it is violative of specific statutes that make the contract illegal. An illegal contract, which is also a "void" contract, may subject the offending parties to prosecution by an executive agency. A contract that is "void," for example, while unenforceable, is not necessarily "illegal" as that term is used for purposes of criminal prosecution. Contracts made by incompetent parties or parties that do not have the legal capacity to make decisions are void. Contracts in restraint of trade or commerce may be void. Similarly, contracts that are unconscionable are, in many jurisdictions, "void." In this latter context, the remedies, if any, run between the parties to the contract and do not necessarily</p>	

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	<p>subject the parties to criminal penalties. Indeed, in many circumstances, prosecution against a court employee or officer by an executive agency would not normally be contemplated. Further, one cannot conclude, <i>ipso facto</i>, that the court employee or officer overreached his or her authority or otherwise committed acts that would render the employee or officer personally responsible for the conduct to the point that it destroys the qualified immunity of the employee or officer.</p> <p>Accordingly, in assessing the risk, there is a significant distinction between actions or omissions that are manifestly “illegal” and, thus, criminal, and those which render a contract “void” exposing the court and/or its employees or officers to liability in a civil proceeding. Accordingly, risk assessment <i>vis a vis</i> the AOC or any prosecutorial body adds an additional element for court procurement departments to consider when, in many cases, such departments and their staff lack sufficient expertise to draw the appropriate distinctions in assessing risks. During numerous working group discussions, these questions have not been consistently or completely considered or answered, leaving the court to guess as to what risk assessments will be required to insure the protection of court officers and employees in the contracting process.</p> <p><b>14. GENERAL JBCM QUESTION / ISSUE: CATEGORIES OF PROCUREMENTS THAT ARE EXEMPT FROM THE JBCM</b></p> <p>It would be preferable if the JBCM included a more complete list of certain categories of procurements that are exempt from the JBCM (e.g., healthcare, life insurance, and disability agreements, other agreements contingent on union requirements, etc.). The OGC has informally emailed the court granting an exemption for the healthcare / life / disability</p>	<p>The comment will be considered in the revision of the JBCM currently scheduled for August 2012.</p>

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	category, but it would be desirable to have this specifically stated in the JBCM to avoid audit disputes. Additionally, there might be other types of agreements (e.g., revenue-generating agreements, reimbursement agreements, “zero cost” agreements, <i>etc.</i> ) that are JBCM-exempt, but not so listed in the JBCM.	
Superior Court of San Bernardino County Ms. Debra Meyers	<p><b>GENERAL COMMENTS</b></p> <p>1. A summary of changes would be useful given that some of the sections moved, some were erased entirely, while others were disassembled and integrated into other sections. Taking into account individual correspondence with AOC lawyers and contract specialists, it would be very difficult for someone who was working with the original version to reorient themselves without <i>studying</i> – not just reading – the new version.</p> <p>2. There will always be gray areas or new issues and getting help with these issues can delay the court’s contracting process. It would be helpful to have a ground-level job guide or FAQ when questions come up and probably more efficient than individual courts emailing their respective contacts at the AOC.</p> <p>3. Chapter 6 remains confusing.</p>	<p>Redlines of revisions were provide as part of the invitation to comment for all chapters except chapter 8, whose revisions were so extensive that doing so would not have been helpful.</p> <p>A FAQ on the JBCM is currently available to the superior courts, appellate courts and the supreme court on the Serranus website. Updates to the FAQ will be forthcoming as soon as possible.</p> <p>Because of its complexity, substantial revisions of chapter 6 are expected to be circulated for public comment during summer, 2012.</p>
Superior Court of San Diego County Mr. Mike Roddy	<p>The court makes the following general comments concerning the requirements in the Judicial Branch Contracting Manual:</p> <p>1. Complying with the JBCM has slowed the purchasing process down and the court’s staffing levels are not sufficient to</p>	<p>The JBCM has been revised to incorporate a new approach that: 1) places more emphasis on the</p>

<b>General Comments</b>		
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	<p>timely and effectively comply with the number of requirements imposed by the JBCM.</p> <p>2. The court is experiencing situations where vendors are unwilling to take the time necessary to review all of the new terms and conditions for small contracts, or object to some of those terms and conditions. What can a JBE do if either no entity will agree to all of the mandatory terms and conditions, or the only entity that will agree will do so only at a prohibitive cost?</p>	<p>legislative intent to promote efficiency while still providing for robust competition in public contracting, but with greater sensitivity to the business operations and organizational structure of the judicial branch; and 2) providing for more discretion to be exercised by judicial branch entities, consistent with the decentralized management system of the trial courts.</p> <p>A discussion of how compliance with the JBCM is accomplished in specific situations involves providing legal advice, which should be provided on a privileged and confidential basis by a JBE’s legal counsel rather than in the JBCM. The AOC/OGC is available to provide legal advice to JBEs.</p>
<p>Superior Court of Tulare County Mr. Alexander J. de Markoff</p>	<p>The Judicial Branch Contract Law requires judicial branch entities comply with the provisions of the [PCC] applicable to state agencies and departments related to the procurement of goods and services. However, PCC, §§19201 – 19210 makes the assumption that all judicial branch entities are funded appropriately to execute compliance with the JBCM. The State’s reduction in funding over the past 3 fiscal years has created several obstacles for our Court to overcome. In an effort to offset the reduction in funding, our Court has eliminated and frozen positions that assist in the efficiency of service and justice to the public. Naturally, the decrease in labor increases the amount of work on an already compromised staff. Each court must prioritize the objectives and mission of the judicial system that the Legislature appears to overlook. We are pushed into a corner of compliance with the JBCM or service to the public, as neither can be completely met with current funding. Our Court can certainly appreciate the objectives of the JBCM. However, in light of the State’s</p>	<p>The JBCM has been revised to incorporate a new approach that: 1) places more emphasis on the legislative intent to promote efficiency while still providing for robust competition in public contracting, but with greater sensitivity to the business operations and organizational structure of the judicial branch; and 2) providing for more discretion to be exercised by judicial branch entities, consistent with the decentralized management system of the trial courts.</p>

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	prolonged fiscal crisis, a realistic approach to the Manual must also accompany those objectives.	

Judicial Branch Contracting Manual - Introduction		
Commentator	Comment	Response
Superior Court of Fresno County Ms. Carmen Lango	<b>Introduction:</b> <u>Section 4, Content &amp; Exclusions.</u> The JBCM – in this revision and the first manual – does not specifically address (in terms of what rules DO apply to) procurement and contracting for the planning, design, construction, rehabilitation, renovation, replacement, lease, or acquisition of trial court facilities. It lists what rules do not apply but does not direct what rules do.	This comment will be considered in the revision to the JBCM currently schedule for August, 2012.
Superior Court of Sacramento County Mr. William Yee	<b>Introduction:</b> <u>Section 2</u> COMMENT: In its current form, the JBCM <i>cannot</i> achieve the stated objectives of Section 2, which are drawn from Public Contracting Code, §100.  EXPLANATION: A majority of the members of the Judicial Branch Working Group and AOC’s Business Service’s Unit have agreed during many of its meetings that the Judicial Branch Contracting Law (JBCL) and the JBCM necessarily flowing from it: <ul style="list-style-type: none"> <li>➤ <i>Do not</i> facilitate improvement, effectiveness, and efficiency in the judicial branch;</li> <li>➤ <i>Do not</i> ensure quality products are obtained in the most efficient and cost effective manner;</li> <li>➤ <i>Do not</i> ensure that quality goods and services are timely received;</li> <li>➤ <i>Do not</i> clarify or simplify competitive procurement practices, but unnecessarily complicate them;</li> <li>➤ <i>Do not</i> eliminate favoritism, but instead, will force judicial branch entities to implement procurement</li> </ul>	The JBCM has been revised to incorporate a new approach that: 1) places more emphasis on the legislative intent to promote efficiency while still providing for robust competition in public contracting, but with greater sensitivity to the business operations and organizational structure of the judicial branch; and 2) providing for more discretion to be exercised by judicial branch entities, consistent with the decentralized management system of the trial courts.

**Judicial Branch Contracting Manual - Introduction**

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	<p>“goals” that give preferential treatment to business enterprises that meet various socioeconomic and environmental certification criteria, at <i>greater cost</i> to the taxpayers.</p> <p>➤ <i>Do not</i> promote competition but reduce it, by discouraging otherwise qualified vendors from doing business with the judicial branch due to the many onerous terms and conditions that will be imposed on them.</p> <p>The reason the JBCM cannot achieve the goals stated in Section 2 is because it is based on a law (SB 78) that imposes upon the California Judicial Branch the same provisions of the [PCC] that are applicable to <i>executive branch</i> departments and agencies. Over the years, these rules have created a procurement process that is costly, complicated, time consuming and unable to ensure that quality goods and services are timely received.</p> <p><i>“Developed in piecemeal fashion over the years, California’s complex maze of statutes are inconsistent, conflicting, and require tremendous effort to manage,”</i> states a 2007 California Performance Review Report. <i>“This translates into a costly and lengthy process to acquire even the simplest of goods and services...[T]he labyrinth of codes and statutes no longer facilitates a system that ensures quality products are obtained in the most efficient and cost effective manner...The state’s purchasing system remains fragmented, subject to delays and unable to deliver cost effective purchases.”</i></p>	

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	<p>As further explained in an August 9, 2011 article<sup>1</sup> in the <i>San Francisco</i> and <i>Los Angeles Daily Journals</i>, mandated compliance with SB 78 and the JBCM requires the expenditure of <i>more</i>--not less--public funds for goods and services. Furthermore, judicial branch entities can expect significant delays in the implementation of needed service contracts as they struggle to comply with the same procedural and administrative red tape that has plagued the executive branch for years. This, in turn, threatens to hinder judicial branch entities from effectively performing their core function -- the timely administration of justice.</p> <p>Unless the Legislature first undertakes a major overhaul of the executive branch's procurement process, any attempt by the judicial branch to construct a sound procurement process on that flawed foundation will only be futile.</p> <p>Yet to be addressed before the Judicial Council is the <i>legal</i> question of whether or not it is a violation of public policy or the separation of powers doctrine for a state legislature to impose costly and inefficient executive branch procurement rules on the judicial branch which once operated under custom-tailored procurement rules. This issue was raised on more than one occasion by some members of the Working Group, yet no satisfactory response has been given.</p>	

**Judicial Branch Contracting Manual Chapter 2--Procurement Planning**

Commentator	Comment	Response
Superior Court of Fresno County	<b>Chapter 2, Procurement Planning:</b>	

<sup>1</sup> See, Cabrera, Fred. "New Judicial Branch Procurement Law Will Hamper Courts And Cost Taxpayers a Bundle." *Los Angeles Daily Journal*; *S.F. Daily Journal*, August 9, 2011, page 1.

**Judicial Branch Contracting Manual Chapter 2--Procurement Planning**

Commentator	Comment	Response
Ms. Carmen Lango	<p><u>Section D. Other Considerations...Term Purchases</u>                      SAP (software system) requires Courts/JBEs to set up new blanket purchase orders (BPO or “Term Purchases”) every fiscal year. BPOs cannot carry over into subsequent fiscal years; they must be closed out and new ones set up. Conducting a competitive procurement each and every year before setting up BPOs for routine goods and services (e.g., office supplies) will substantially increase workloads unnecessarily, especially at the busiest time of year for this department. Through purchasing experience most courts know their local and most-used vendors, thus determining our BPO vendors. Accordingly, term purchases like BPOs should not be treated like one-time procurements. In our case, the court issues BPOs with multiple vendors selling like products (e.g., office supplies, printing vendors, etc.) such that single purchases can be competitively bid throughout the year with the awarded vendor’s BPO being charged. This presents the court with a simpler, more efficient practice of paying for purchases while meeting the requirement of competitively bidding purchases, rather than issuing multiple POs throughout the year. In compliance with the TCFPPM or FIN, this court does not simply use the one vendor that has a BPO in place; we use multiple vendors for like products, considering whose deal is the best this month.</p>	<p>Most of the revisions circulated for public comment have been withdrawn. The referenced section currently reads as it did when originally adopted by the council in August, 2011.</p> <p>Regarding the use of blanket purchase orders (BPOs) in the Phoenix system, although BPOs are <i>encumbered</i> on a fiscal-year basis, the term of the BPO itself may extend longer than a fiscal year. Historically, trial courts have often created and maintained BPOs in Phoenix that cross over fiscal years. Accordingly, the BPOs do not need to be re-solicited each fiscal year.</p>
Superior Court of Monterey County Ms. Christine Ace	Chapter 2 page 5 of 20 include “audio” in “The following are examples of IT goods:”	“Audio equipment” has been added to the list of IT goods.
Superior Court of Sacramento County Mr. William Yee	<p><b>Chapter 2--Procurement Planning</b>  <u>Section D (Term Purchases)</u>                      COMMENT: The second draft states “JBEs <i>should</i> establish term purchase contracts through a competitive bid process.... A competitive procurement <i>must</i> be conducted whenever the dollar amount of the term purchase is \$5,000 or greater” As defined in the JCBM’s Introduction, the dual use of the words</p>	<p>The referenced section has been revised to remove the ambiguity.</p> <p>Regarding the use of blanket purchase orders (BPOs) in the Phoenix system, although BPOs are <i>encumbered</i> on a fiscal-year basis, the term of the BPO itself may</p>

**Judicial Branch Contracting Manual Chapter 2--Procurement Planning**

Commentator	Comment	Response
	<p>“should” and “must” in this section creates an ambiguity. Moreover, if the statement is interpreted to mean that all term purchase agreements (<i>e.g.</i>, blanket purchase orders) over \$5,000 require a competitive process, courts can expect to experience needless delays in the acquisition of needed goods via blanket purchase orders.</p> <p>EXPLANATION: Under the JBCM, the word “should” signifies urged use of favored but not mandated business or accounting practices for which documentation is <i>required</i> to show good business reason for variance. The word “may” signifies full JBE discretion and is used in the JBCM to provide guidance only.</p> <p>To avoid ambiguity, the statement should be rewritten to read: “JBEs <i>may</i> establish term purchase contracts through a competitive bid process.... <i>If a JBE chooses to conduct a competitive solicitation for a term purchase, the competitive solicitation would only apply to procurements in which the dollar amount of the term purchase is \$5,000 or more.</i></p> <p>The SAP Phoenix system requires JBEs to set up new blanket purchase orders (BPO) every fiscal year. BPOs cannot carry over into subsequent fiscal years; they must be closed out and new ones set up. Conducting a competitive procurement each and every year before setting up BPOs for routine goods and services (<i>e.g.</i> office supplies) will substantially increase JBE workloads unnecessarily. Through purchasing experience and familiarity with local markets, many JBEs know that certain vendors will consistently bid the lowest price, thus making a competitive procurement pointless. Accordingly, term purchases like BPOs should not be treated like one-time procurements.</p>	<p>extend longer than a fiscal year. Historically, trial courts have often created and maintained BPOs in Phoenix that cross over fiscal years. Accordingly, the BPOs do not need to be re-solicited each fiscal year.</p>

<b>Judicial Branch Contracting Manual Chapter 2--Procurement Planning</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
Superior Court of San Diego County Mr. Mike Roddy	<p>Example: ...the Bid with the highest score includes material exceptions to the JBE’s contract terms and conditions ....</p> <p>The term “material exception” is introduced within an Example in Chapter 2; however, the note below does not appear until Page 7 of Chapter 4A.</p> <p><u>Note that the JBE, in its sole discretion, will determine what constitutes a material exception.</u></p>	<p>The referenced section has been revised to refer to an “exception” rather than a “material exception.”</p>
Superior Court of San Francisco County Ms. Susan Patrick	<p>The activities involved with G. Negotiations leave me uneasy as I see the entire lengthy process as fraught with complications. Using the 1. Example: “A JBE has identified a general need for a new technology; however, market research indicates the technology may have multiple, unanticipated, secondary benefits. The JBE would be able to further define its business needs for the technology by conducting direct negotiations with Prospective Bidders that are subject matter experts in the new technology.” Are these discussions about secondary benefits or the suitability of going out and making a purchase when the identified goal “new technology” is undefined? How can you refine what you don’t know? Why not an RFI? If necessary issue an RFP for a consultant who can do this for you—and make you define what the technology is and how you will use it. Focusing on the secondary without defining the primary does not seem logical.</p>	<p>The referenced section has been revised to allow JBEs the ability to negotiate with Bidders either before or after award of a contract.</p>

<b>Judicial Branch Contracting Manual Chapter 3--Socioeconomic and Environmental Programs</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
Superior Court of Monterey County Ms. Christine Ace	<p>Page 5 of 12 Section D – We will leverage the AOC DVBE Program once it is available – please include the program in the JBCM.</p>	<p>Because the AOC’s DVBE program may change over time, it is not advisable to place the program within the JBCM but to provide it to JBE’s upon their request.</p>

	<p>Page 11 of 12 Section B should be changed to “JBE <b>should</b> require Vendors to use recycled content products...” We question the practicality of this requirement when we know it is not “economically feasible.”</p>	<p>This requirement is mandated by PCC 12203(d).</p>
<p>Superior Court of Sacramento County Mr. William Yee</p>	<p><b>Chapter 3--Socioeconomic and Environmental Programs</b> <b><u>Section 3.1 (A)</u></b></p> <p>COMMENT: As to the DVBE Incentive, this section states: “To implement the DVBE program JBEs <b>must grant Bidders that provide DVBE participation a DVBE incentive</b> (MVC 999.5(a)). A DVBE incentive is a prescribed percentage reduction in the DVBE Bidder’s Bid price where the JBE is selecting a Bidder using the “lowest responsible Bidder” methodology or the addition of a prescribed number of points to the DVBE Bidder’s Bid score where the JBE is using the “highest scoring Bidder” approach. This should not be a mandatory requirement. Instead, it should be optional, as many JBE’s will not have the resources to comply.</p> <p>EXPLANATION: Due to a significant judicial branch budget shortfall and staff reductions, many JBEs in the state lack the available resources to carry out the extensive administrative and record-keeping requirements associated with a formal DVBE procurement program as required by the JBCM. Moreover, the JBCM specifically states that there are no DVBE goals reporting requirements in either the PCC or Military/Veterans Code applicable to judicial branch entities. (<i>i.e.</i>, the statutes that required state agencies to provide annual reports to the Governor and the DGS with respect to meeting DVBE goals were <i>repealed</i> effective January, 1, 2007.) Since there are no reporting requirements, setting up a formal DVBE Program would be pointless for JBEs and unnecessarily costly.</p> <p>In addition, it would not be in the judicial branch’s or the taxpayers’ best interest for JBEs to implement DVBE “incentives.” Such practice would result in a JBE’s expenditure of <i>more</i> tax dollars to vendors who are not the lowest</p>	<p>Staff acknowledges the operational and financial challenges imposed by the requirements of the JBCL; however, the mandatory requirements of chapter three are required by law and may not be ignored or waived due to budget constraints.</p>

	<p>responsible bidder. Such a mandate is contrary to the stated goals in the JBCM’s Introduction. That is, it does not “protect the public from misuse of funds;” it does not provide “all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition;” and it certainly does not “eliminate favoritism” in the award of public contracts.</p> <p>Given the judicial branch’s extensive budget shortfall (requiring staff layoffs), spending more money on goods and services than is necessary is not fiscally prudent. Instead, the JBCM should only encourage JBEs to at least include DVBEs when seeking bids for goods and services, but award based on the lowest responsible bid.</p> <p><u>Section 3.3A (State Agency Buy Recycled Campaign (SABRC))</u>  COMMENT: This section of the JBCM requires JBEs to ensure that at least 50% of reportable purchases are recycled products. This requirement applies to purchases in each of the targeted categories identified in PCC 12207, which includes categories covering paper products, office supplies, office products, and a wide range of other products. The required post-consumer recycled content varies by category (e.g., recycled paper products must consist of at least 30% postconsumer fiber). This should not be a mandatory requirement. Instead, it should be optional, as many JBE’s will not have the resources to comply.</p> <p>EXPLANATION: Due to a significant judicial branch budget shortfall and staff reductions, many JBEs also lack the available resources to implement a State Agency Buy Recycled Campaign program as required by the JBCM.</p> <p>Through its own independent analysis, Sacramento Superior Court determined that recycled office supply products and paper will cost the taxpayers five percent to nearly 500 percent more than those made from virgin material. That analysis concluded that the purchase of recycled office supplies and</p>	<p>Staff acknowledges the operational and financial challenges imposed by the requirements of the JBCL; however, the mandatory requirements of chapter three are required by law and may not be ignored or waived due to budget constraints.</p>
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	<p>paper products would cost Sacramento Superior Court over \$39,000 more per year. (Analysis on file.)</p> <p>The JBCM should merely encourage JBEs to regularly monitor the prices of recycled products and office supplies in light of ever-changing market conditions. If recycled products can be procured for less cost than equivalent products made from virgin material, the procurement staff “should” do so.</p> <p><u>Section 3.3C (Supplier Certification)</u>  COMMENT: This section requires JBEs to require all vendors to certify in writing, under penalty of perjury, the percentage of recycled content in the products, materials, goods, or supplies offered or sold to the JBE (PCC 12205). This provision imposes an unreasonable burden on vendors (especially small family owned businesses) who cannot verify the post-consumer recycled content of their products by written means such as product label, packaging, catalog, manufacturer/Vendor website, product advertisement, etc. This mandatory requirement should be eliminated altogether.</p> <p>EXPLANATION: To avoid risk of “penalty of perjury,” vendors will simply choose not to do business with JBEs. This in turn will reduce the pool of suppliers willing to bid on goods and services needed by JBEs, thus undermining one of the stated goals of the JBCM -- <i>i.e.</i>, to provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices (see JBCM Introduction).</p>	<p>The referenced section provides a waiver of the certification in certain circumstances; otherwise the certification is a statutory requirement.</p>
<p>Superior Court of San Francisco County  Ms. Susan Patrick</p>	<p>Goals are worthy but result in workload increase in documentation and research. Certifications belong in General Provisions exhibit.</p>	<p>Staff acknowledges the operational and financial challenges imposed by the requirements of the JBCL; however, the mandatory requirements of chapter three are required by law and may not be ignored or waived due to budget constraints.</p>

**Judicial Branch Contracting Manual Chapter 4—Competitive Solicitation Overview**

<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
<p>Superior Court of Fresno County Ms. Carmen Lango</p>	<p><b>Chapter 4, Competitive Solicitation Overview:</b> <u>Section B. Common Elements of RFPs and IFBs.</u> The requirement of “Loss Leader” language is removed from this section, page 10, but not from Faxed Bids, page 11, nor from Appendix B, Mandatory Contract Provisions, on page 20 of <b>Chapter 8.</b></p> <p><u>Section 4.4 (C) Ineligible Businesses.</u> The requirements of “Good Standing” and “Plastic Trash Bag” are removed from this section, as well as <b>Chapters 4A and 4B,</b> but NOT from the end of Section B (of <b>Chapter 4B</b>) Format and Required Elements of Bids, section 1 (third bullet) nor from the same section of <b>Chapter 4C,</b> third bullet at the bottom of on page 11.</p>	<p>The “loss leader” language reference on p. 11 is required. The “loss leader” language reference on page 10 has been removed because it is duplicative.</p> <p>The “good standing” language referenced in chapters 4B and 4C has been revised to clarify that requiring proof of good standing is at the JBE’s discretion.</p> <p>References to “plastic trash bags” language in chapters 4B or 4C were not found.</p>
<p>Superior Court of Monterey County Ms. Christine Ace</p>	<ul style="list-style-type: none"> <li>• Page 5 of 24 – Please provide “Confidentiality/Conflict Statement” template.</li> <li>• Page 10 of 24 Bidders signatures – We do not believe this section is necessary as you get the signature on the contract and it appears to be necessary for some types but not all bids.</li> <li>• Page 13 of 24 Section 4.3 Need to add “Submission of bids by email” requirements.</li> <li>• Page 16 of 24 Darfur – requirement needs to be added to solicitation and contract template documents.</li> </ul>	<p>Each JBE has the authority to develop its own confidentiality/conflict statement template. The AOC will develop a sample temple for JBEs to use.</p> <p>The referenced section has been revised as follows: “For any written solicitation, regardless of dollar value, solicitation format, or delivery method (i.e., faxed, mailed, emailed, or delivered in person), Bids <del>must</del> <b>should</b> include the signature of an authorized representative of the Bidder.” Other corresponding changes were also made to this section.</p> <p>There are no specific PCC requirements for acceptance of email bids. A JBE has the discretion to develop its own requirements, and place those requirements in its Local Contracting Manual.</p> <p>The Darfur certification process occurs during the solicitation process. A form Darfur certification is</p>

		available to JBEs on the Courts Online Mentoring, Education and Training (COMET) and Serranus websites. Because the certification process occurs prior to contract execution, no specific language is required in contracts.
Superior Court of Riverside County Mr. Luke McDannel	<p><b>7. Proposed JBCM revisions clarify that the court has discretion in determining the materiality of a bidder’s/proposer’s exceptions taken in a bid/RFP</b></p> <p>JBCM REVISION REFERENCE: Various places throughout Ch. 4, 4A, 4B, 4C</p> <p>The court supports the proposed JBCM revisions which clarify that the court has discretion in determining the materiality of a bidder’s/proposer’s exceptions taken in a Bid/RFP.</p>	No response required.
Superior Court of San Bernardino County Ms. Debra Meyers	<p><b>Chapter 4, page 15, section 4.4.C: Strike out proof of good standing.</b></p> <p>The “good standing requirement” has been stricken; however, it still appears in the “preparing an RFP” sections for non-IT services and IT goods and services. (See, Chapter 4B, page 9, step 6, B and Chapter 4C, page 11 step 6, B.)</p> <p>Previously, the requirement of “good standing” was in Chapter 4 and covered all types of procurements (non-IT goods, non-IT services, and IT goods and services.) Since the requirement has been stricken from Chapter 4 and left in Chapters 4B and 4C, are we to assume that proof of good standing is required for non-IT services and IT goods and services, but not non-IT goods?</p> <p>The Secretary of State cannot verify the “good standing” of sole –proprietorships and general partnerships. Therefore, if the requirement remains for any of the types of procurement, more</p>	<p>The “good standing” language referenced in chapters 4B and 4C has been revised to clarify that requiring proof of good standing is at the JBE’s discretion. Proof of good standing is one example of a qualification that a JBE may include in a non-IT services or IT goods and services Request for Proposals (RFPs). If a JBE wishes to require proof of good standing in non-IT goods procurements, or perhaps for all procurements, it can codify this requirement in its Local Contracting Manual.</p> <p>As stated in chapters 4B and 4C, proof of “good standing” is applicable if the bidder is a corporation. If the bidder is a not a corporation, the concept of good standing is inapplicable.</p>

	<p>detail is needed in the JBCM to help courts determine whether a business is eligible or ineligible.</p>	
<p>Superior Court of San Diego County Mr. Mike Roddy</p>	<p>[page 17 of 24] (Part D.) “Mandatory requirements <i>includes</i> those required by applicable law.”</p> <p>What other types of “mandatory requirements” are there? Are “mandatory requirements” also “minimum terms?” Are the terms and conditions marked “M” in Appendix A and B to the revised Manual “mandatory requirements” under this section? Are they also “minimum terms”? Also, must a JBE identify “mandatory requirements” in the Solicitation Document?</p> <p>(Part D.) States a Bid containing material deviations of mandatory requirements “must be rejected.”</p> <p>What does “rejected” mean? When in the process can this rejection occur? Upon initial review, without further evaluation or scoring of such a Bid? Or must the JBE evaluate and score the Bid and then reject it?</p> <p>This concept of “material deviations of mandatory requirements” is not mentioned anywhere else in the Manual so it is difficult to determine when and how to apply it. Also, must a JBE identify “mandatory requirements” in the Solicitation Document and state that material deviations from these requirements will cause the Bid to be rejected?</p>	<p>Each JBE has discretion to set the mandatory requirements for each solicitation. Mandatory requirements include any “minimum terms” identified by the JBE in the solicitation document. Although not required, a JBE has the discretion to designate the terms and conditions marked “M” in Appendix A or B as “minimum terms.” JBEs may also want to (i) identify any mandatory requirements, including any minimum terms, in the applicable solicitation document, and (ii) state that material deviations from these requirements will cause the bid to be rejected.</p> <p>“Rejected” means that the bid is removed from award consideration. Each JBE has discretion to develop its own processes for evaluation of bids. Rejection could occur upon initial review in some procurements. (Note, however, that if the JBE is using an Invitation for Bids (IFB) and the lowest bid is rejected, the JBE will still need to provide notification to the lowest bidder. So while a JBE may reject a bid in response to IFB prior to evaluating the cost portion of the bid, the JBE will have to examine the cost portion of every bid before awarding the contract.)</p> <p>The referenced section has been revised as suggested.</p>

	Consider adding the sentence below to this section: Note that the JBE, in its sole discretion, will determine what constitutes a material deviation from a mandatory requirement.	
Superior Court of San Francisco County Ms. Susan Patrick	<p>Ch. 4; Is the purpose of a RFI to set up a 2-step procurement process? That is based on evaluation criteria in the RFI the JBE can then narrow down the prospective contractor pool to only those bidders (min. 3) which scored high enough? Is it to provide a mechanism to weed out the under bidder?</p> <p>4.2.C; Isn't the documentation required for a phone bid the same as for an email bid? The difference is that each phone bid requires a separate document and an email bid only one, correct?</p> <p>4.2.D; I used a single solicitation for supportive housing to obtain two contracts but we did not know at the onset how many bidders we would obtain. Can we modify "ii. state the intended number of awards" to allow for more flexibility? In my case there is a larger need than available resources. We were hoping for 3 or more shelters to contract with based on location.</p>	<p>The purpose of the Request for Interest (RFI) is to identify interested bidders. The RFI is not scored. A bidder should not be eliminated at this stage unless the bidder indicates that it is not interested in participating in the solicitation.</p> <p>Section 4.2.C discusses amendments to a solicitation document using addenda. If an addendum is communicated by phone, the addendum information must be summarized in writing, and a single copy of that writing must be included in the procurement file. If an addendum is communicated by email, a single copy of that email must be included in the procurement file.</p> <p>The following footnote has been added to the referenced section to clarify that JBEs have discretion to use a range for the number of awards: "The intended number of awards may be a range; for example 2-4."</p>

<b>Judicial Branch Contracting Manual Chapter 4A—Step by Step Guide for the Procurement of Non-IT Goods</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
Superior Court of Riverside County Mr. Luke McDannel	<p>See comment for chapter 4 above.</p> <p><b>4. Proposed JBCM revisions place limits on courts ability to negotiate pricing</b> JBCM REVISION REFERENCE: Ch. 4A, Sep 13; Ch. 4B,</p>	<p>The referenced section has been revised to allow JBEs the ability to negotiate with Bidders either before or after award of a contract.</p>

	<p>Step 6, Ch. 4C, Step 16, etc.</p> <p>Generally, the JBCM and these proposed JBCM revisions take a negative view towards negotiations, particularly price negotiations. Courts should <i>always</i> be able to attempt to negotiate prices ... period. Any mandated restriction on negotiating pricing should not be included in the JBCM. Facing the harsh economic realities of today for the courts, a good, helpful revision would be to make revisions to the JBCM that encourage negotiations, particularly in pricing, not limit price negotiations.</p> <p>Fundamental precepts of principled and techniques of contract negotiation presume the prospective parties do have the ability to negotiate pricing and other material terms. The concept of principled bargaining has been eviscerated by the JBCM, leaving very little for the parties to negotiate and restricting communications and important discourse to the "four corners" of the solicitation document. The practical problem associated with such limitations is that it requires small and large courts to be spot on with their IFBs or RFPs, thus requiring higher levels of expertise within the procurement units of each court. This increased burden demands that the courts do substantial independent investigation into subject areas that are highly technical and beyond what the courts can reasonably demand from its employees. Finally, such limitations virtually eliminate one of the core principles of contract negotiation <i>i.e.</i>, discussing and creating options and alternatives that can actually improve the results contemplated by the courts in their original solicitations.</p> <p>It is understood that the constraints placed upon the courts by the Legislature mandate, to a degree, that certain processes be followed. However, what appears clear to the court is that neither the AOC nor the Judicial Council has made any attempt to aggressively pursue a course of conduct that would result in</p>	<p>PCC 19204(a) requires that all JBEs comply with the provisions of the PCC “that are applicable to state agencies and departments related to the procurement of goods and services, including information technology goods and services.” This requirement exists</p>
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	<p>more discretion and latitude in the negotiation process. Instead, the JBCM, for the most part, is drafted as the mirror image of essentially every provision set forth in the PCC and, in some cases, even more restrictive than what is required under the PCC. The acknowledgment by the Legislature that the courts have in some way retained some degree of independence as the "third branch of government" is completely illusory. There are a multiplicity of reasons as to why agencies throughout the country have abandoned the traditional model of government procurement as reflected in the PCC and, instead, adopted a business model that is more contemporary and fundamentally sound, permits robust competition, and still retains the required elements of transparency for public review and scrutiny. The JBCM does none of this. Moreover, it does not appear that its authors had the requisite skill level in procurement law and practice to do anything other than mimic the PCC.</p>	<p>independently of any requirement provided in the JBCM. The JBCM provides guidance on the PCC sections with which JBEs must comply.</p> <p>PCC 19206 requires that the JBCM contain policies and procedures that are "substantially similar to the provisions contained in the State Administrative Manual and the State Contracting Manual."</p>
<p>Superior Court of San Bernardino County Ms. Debra Meyers</p>	<p><b>Chapter 4A, page 3, Introduction: \$25,000 threshold for "lowest responsible bidder" vs. "highest scored bid"</b></p> <p>Is the reduction in the threshold from \$50,000 to \$25,000, stated in the Introduction, intended to apply to all procurements of non-IT goods? In some other parts of Chapter 4A, the threshold remains \$50,000.</p> <p>Will the maximum amount for a Request for Quotes been reduced to \$25,000 so that an Invitation for Bids must be used for amounts in excess of \$25,000? (<i>See</i>, Chapter 4A, pages 5-6, step 4.) If RFQs are still allowed to be used for procurements below \$50,000, (rather than \$25,000), then we suggest clarifying the following language:</p> <p style="padding-left: 40px;">“PCC 10301 requires contracts of <del>\$50</del>\$25,000 or more to be awarded to the lowest responsible bidder. Because RFQs are used for procurements under that threshold, JBEs are not statutorily required to award</p>	<p>The \$25,000 threshold applies to only the manner in which the contract may be awarded. If the procurement is under \$25,000, the contract may be awarded to the lowest responsible bidder or to the highest scored bid. If the procurement is \$25,000 or above, the contract must be awarded to the lowest responsible bidder. The other \$50,000 thresholds in chapter 4A (use of Request for Quote (RFQ), advertising, sealed bids) are unaffected.</p> <p>No, the limit for using RFQs will remain at \$50,000. However, additional language has been added to clarify that JBEs have the discretion to increase or lower this limit.</p>

	<p>those contracts to the lowest responsible bidder, but should do so in the absence of a valid business reason.”</p> <p>(Chapter 4A, Page 9, step 11.) We would suggest either lowering the threshold for RFQs or adding language that JBEs <i>are</i> statutorily required to award contracts in amounts between \$25,000 - \$50,000 to the lowest responsible bidder.</p> <p>The threshold for mandatory advertising of solicitations of non-IT goods remains \$50,000. (<i>See</i>, Chapter 4A, page 7, step 6.) Will this be reduced to \$25,000?</p>	<p>The referenced section has been revised to distinguish between RFQs under \$25,000 and RFQs of \$25,000 and above.</p> <p>No, the limit for advertising will remain at \$50,000.</p>
<p>Superior Court of San Francisco County Ms. Susan Patrick</p>	<p>Ch. 4A Step 2; I see the use of the word “should” regarding developing bidder’s lists. Am I correct to interpret this to mean it is optional based on the PCO’s discretion?</p> <p>Ch. 4A Step 5; Phone script? Better use of staff time is email RFQ to multiple bidders as it takes less time, documents competitive solicitation and date stamps the solicitation.</p> <p>Ch. 4A Step 6; Prepare Advertising? Without a solicitation specifications? Advertising provides for solicitation. Or am I misunderstanding and confusing solicitations that will be sent to pre-screened bidders (Ch. 2) versus bids that are competitive such as posting on County/State website?</p> <p>Ch. 4A Step 13; Any changes to substantive terms in the resulting contract that deviate from the solicitation are not allowed. The use of the term “must” is best.</p>	<p>Yes, the “Use of Words Signifying Requirements or Discretion” section in the Introduction of the JBCM explains that the word “should” is used to “urge use of favored but not mandated business or accounting practice.”</p> <p>Use of email is not prohibited under step 5. A JBE is not required to use a phone script.</p> <p>Any solicitation for non-IT goods in excess of \$50,000 must be advertised. As described in chapter 4 section 4.1.D, the requirement for advertising is very flexible and can be met by posting the solicitation on the JBE’s own website.</p> <p>The referenced sentence (“Except in extraordinary circumstances, negotiations should be limited to finalizing the form of agreement and non-substantive terms.”), has been removed. A JBE has discretion to adopt this policy in its Local Contracting Manual, however.</p>

**Judicial Branch Contracting Manual Chapter 4B—Step by Step Guide for the Procurement of Non-IT Services**

Commentator	Comment	Response
<p>Superior Court of Riverside County Mr. Luke McDannel</p>	<p>See comments in chapter 4 and 4A above.</p> <p><b>6. (Original) JBCM procedure of scoring a proposer exceptions taken in response to an RFP is not a procurement best practice</b></p> <p>JBCM REVISION REFERENCE: Ch. 4B &amp; 4C, Step 6</p> <p>The JBCM calls for the court to evaluate the exceptions taken by a proposer in response to an RFP and then give the exceptions substantial weight in scoring/evaluating the proposals. This practice is confusing at best and beyond what the court would consider a “best practice.”</p> <p>Riverside Courts prefers the practice that exceptions should be evaluated and determined to be either material or non-material as follows:</p> <ul style="list-style-type: none"> <li>• If the exceptions are deemed material by the court, the proposal is non-responsive and will not be scored or evaluated any further;</li> <li>• If the exceptions are deemed non-material by the court, the proposal moves forward into further scoring/evaluating, but is not hindered by the presence of the non-material exceptions.</li> </ul> <p>In discussions within the AOC Working Group, an alternative was discussed to modify the JBCM language so that courts “may” score the exceptions. Riverside Court would support this language, as long as scoring the exceptions is not a “should,” or</p>	<p>Chapters 4B and 4C have been revised as suggested.</p>

	any stronger, similar recommendation / requirement language.	
Superior Court of San Bernardino County Ms. Debra Meyers	<p><b>Chapter 4B, page 6, step 5: IFBs as an option for procuring services</b></p> <p>Non-IT services over \$5,000 can be solicited using an IFB or an RFP. Why isn't an IFB an option for IT services? With IT services, it's below \$5,000 or RFP. Given the time it takes to issue an RFP, this seems unnecessarily cumbersome, especially for IT services that are relatively straightforward and can be awarded to the lowest responsible bidder (per IFB requirements) with little risk.</p>	PCC 12102(b) states that "Evaluation criteria for the acquisition of information technology goods and services, including systems integration, shall provide for the selection of a contractor on an objective basis <i>not limited to cost alone.</i> " (emphasis added) So generally, IFBs would not be appropriate in the procurement of IT because IFBs are evaluated on price alone. However, PCC 12102(c) provides an exception, allowing for the acquisition of hardware acquired independently of a system integration project on the basis of lowest cost meeting all other specifications. Accordingly, it would be appropriate to use an IFB in this circumstance. Also, please note that a change has been made allowing RFQs to be used for IT services up to \$100,000. In the next revision of the JBCM currently scheduled for August, 2012, staff will consider including the option to use IFBs for the acquisition of hardware acquired independently of a system integration project.
Superior Court of San Diego County Mr. Mike Roddy	<p><i>(4<sup>th</sup> bullet on page)[page 12 of 19]</i></p> <p>If a material exception <u>(addition, deletion, or other modification)</u> is taken to a minimum term, the Bid <u>is nonresponsive</u><del>will be deemed nonresponsive</del>.</p> <p>Consider adding the sentence below to the bulleted item...</p> <p>Note that the JBE, in its sole discretion, will determine what constitutes a material exception.</p> <p><i>(2nd bullet on page) [page 16 of 19]</i></p> <p><b>“Responsive Bid</b> means a Bid that indicates compliance without <i>material deviation</i> from the requirements of the Solicitation Document and the terms and conditions of the</p>	The referenced section has been revised as suggested.

	<p>proposed contract (see chapter 4, section 4.4.D for guidance on determining whether a deviation is material).”</p> <p>What is the difference between a “material deviation” and a “material exception”? Is a “material exception” one type of “material deviation?”</p> <p>This definition appears to include only one type of non-responsive Bid, when the manual seems to indicate that there are multiple ways in which a bid may be non-responsive. Is a Bid also nonresponsive if:</p> <p>It contains “a material exception to a minimum term” (Chap. 4.C., p.11 of 30);</p> <p>It contains a material deviation from mandatory requirements required by applicable law?” (Chap. 4.D., p. 17 of 24);</p> <p>It contains “an exception to the JBE’s terms and conditions...that constitutes a material deviation”? (Chap. 4A, p. 9 of 13)</p> <p>It contains “any material exception...to the JBE’s terms and conditions?” (Chap. 4B, p. 11 of 19);</p> <p>If it contains numerous, onerous, and/or burdensome</p>	<p>“Material exception” refers to a proposed change to the JBE’s contractual terms and conditions. When an IFB is used, a “material exception” constitutes a “material deviation.” When an RFP is used, a “material exception” to a minimum term constitutes a “material deviation.”</p> <p>Yes, a material exception to a minimum term renders a bid in response to an RFP non-responsive.</p> <p>Yes, a bid that contains a material deviation from mandatory requirements required by applicable law would be deemed non-responsive.</p> <p>Staff is unable to locate the quoted language in chapter 4A. The language currently states: “A Bidder’s exception to the JBE’s terms or conditions (addition, deletion, or other modification) may constitute a material deviation. A Bid with a material deviation is nonresponsive. JBEs have discretion to determine materiality. ”</p> <p>The quoted language applies to IFBs, which are awarded to the lowest bidder. For RFPs, only a material exception to a minimum term renders a bid non-responsive.</p> <p>The JBE has the discretion to determine if the</p>
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	<p>exceptions that taken as a whole make a Bid nonresponsive?</p> <p>These various terms are confusing. Also, the Manual does not state what the effect of a “nonresponsive bid” is...and when in the process the non-responsiveness can be determined.</p> <p><i>[page 18 of 19]</i>  <u>Notification:</u> If the contract will be awarded to a Bidder that did not submit the lowest Bid (because, e.g., the lowest Bid was not a Responsive Bid, or the Bidder that submitted the lowest Bid was not a Responsible Bidder), the JBE must notify the lowest cost Bidder at least five Court Days before awarding the contract.</p> <p>Does this require the JBE to evaluate and score non-responsive Bids and Bids from non-Responsible Bidders, and then open their cost bids even though the JBE has no intention of awarding the contract to these Bidders? It would have to do so in order to know if the cost of such Bids was lower than the winning Bid.</p> <p>Can't a JBE stop evaluating a Bid once it is determined to be non-responsive or from a non-Responsive Bidder?</p>	<p>exceptions taken are so numerous, onerous, or burdensome that a bid is non-responsive.</p> <p>The confusion with regard to these terms arises, at least in part, from the fact that there are two different types of evaluation methodologies allowed by the PCC—commonly referred to as “lowest bidder” and “highest scored bid” methodologies. The defined term “Responsive Bid,” which is drawn from the SCM, is used for the “lowest bidder” methodology. As a result, the definition does not attempt to list all of the ways that a Bid could be non-responsive.</p> <p>The commenter’s analysis is correct. However, this notification requirement is applicable only to solicitations awarded to the lowest responsible bidder, not solicitations awarded to the highest scored bid. Chapter 4B has been revised to remove inconsistent language regarding the opening process for IFBs.</p> <p>Yes, but if the bid is the lowest bid in response to an IFB, the JBE must make the notification mentioned above.</p>
<p>Superior Court of San Francisco County  Ms. Susan Patrick</p>	<p>Ch. 4B Step 15; The use of the term “must” is best.</p>	<p>The referenced sentence (“Except in extraordinary circumstances, negotiations should be limited to finalizing the form of agreement and non-substantive terms.”), has been removed. A JBE has discretion to adopt this policy in its Local Contracting Manual,</p>

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<b>Judicial Branch Contracting Manual Chapter 4C—Step by Step Guide for the Procurement of IT Goods and Services</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
Superior Court of Monterey County Ms. Christine Ace	<ul style="list-style-type: none"> <li>Page 6 of 30 need to increase IT Service dollar value – see chart above. [Endnote 1]</li> <li>Page 8 of 30 Section A delete “<b><u>straightforward.</u></b>”</li> </ul>	<p>The referenced section has been revised as suggested.</p> <p>The referenced section has been revised as suggested.</p>
Superior Court of Placer County Mr. Jake Chatters	<p>1. Add Incidental Services Language to Chapter 4C Chapter 4A, page 11-12, Selected Topics Relevant to Solicitation of Goods, Section A.</p> <p>Incidental Services provides a limited exception to the need for an advertised solicitation where the services portion of a non-IT goods purchase exceeds \$4,999. Specifically, this section allows for:</p> <p>"The Approving Authority may grant an exemption to these requirements if the Approving Authority determines, in his or her sole discretion, that the cost of complying with the requirement will likely exceed the savings generated by complying with the requirement."</p> <p>This same exception is not included in Chapter 4C which relates to the purchase of IT Goods. We would suggest adding this same exception to the purchase of IT goods where incidental services are involved. Specifically add:</p> <p>Chapter 4C: Step by Step Guide for the Procurement of IT Goods and Services; Selected Topics Relevant to Solicitation of Goods, Section E (New)</p>	<p>The JBCM has been revised to unify the limit for IT RFQs (for goods, services, or both) to \$100,000. Accordingly, the concept of “incidental services” is no longer relevant in the context of IT procurements.</p>

	<p>E. Incidental Services Unless an exemption is granted, incidental services included with the purchase of IT goods:</p> <ul style="list-style-type: none"> <li>• Must not exceed \$4,999.99, and</li> <li>• Must be directly related to the purchase of the non-IT goods, such as set up or installation.</li> </ul> <p>Unless an exemption is granted, the solicitation must be advertised if the value of incidental services included in the purchase exceeds \$4,999.99, even if the total estimated value of the solicitation is under \$100,000.</p> <p>The Approving Authority may grant an exemption to these requirements if the Approving Authority determines, in his or her sole discretion, that the cost of complying with the requirement will likely exceed the savings generated by complying with the requirement.</p> <p>2. Add "Maintenance and Support Services" to the definition of "IT goods" on page 6 of Chapter 4C.</p> <p>Manufacturer support and maintenance services are required to ensure effective and efficient IT system operations. These are distinguished from integration or customization services as they relate to the standard operation and troubleshooting of the underlying IT system. Further, these services are often sold through a reseller but the services are only provided by the manufacturer. Requiring a full RFP, as is currently outlined, is unnecessarily burdensome, adds little if anything to competition, and may discourage bidders due to the complexity of a full RFP. Competition would be fostered more effectively with a simpler RFQ. This better competition and more cost effective evaluation could be done by simply including maintenance and support services in the definition of an IT</p>	<p>Staff cautions against characterizing maintenance and support services as "IT goods."</p>
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	good purchase.	
Superior Court of Riverside County Mr. Luke McDannel	See comments in chapters 4, 4A and 4B above.	
Superior Court of San Bernardino County Ms. Debra Meyers	<p><b>Chapter 4C, page 6, step 4: RFQ limits for IT services</b></p> <p>There is a \$5000 cap on RFQs for IT services, but the cost and time requirements of an RFQ often exceeds \$5000; and once the amount of IT services exceeds \$5000, the courts are required to use a potentially even more expensive RFP. Additionally, the more streamlined RFQ process can be used for procurements of IT goods up to \$100,000. While an RFP should remain an option for any IT procurement, it is suggested that required use of an RFP should be reserved for procurements of It goods and IT services in excess of \$100,000.</p> <p>Setting the same RFQ limit for IT goods and IT services is also justified by the very blurry line between the two. The rise of software-as-a-service and cloud-based computing, which have introduced an entire class of commodity “services” offerings, highlights this problem. Examples of these commodity “services” include tools like SurveyMonkey, Cloud-based e-mail, Cloud-based backup and storage, web-based virus scanning, etc. These “services” are a direct replacement for the purchase and installation of a software license or “goods” and in that way, there is no real distinction between IT services and IT goods. As a result, there should be the same procurement limits for IT goods and IT services. Otherwise, the JBCM should be revised to clarify that commodity “services” are to be treated as “goods” for procurement purposes.</p> <p><b>Chapter 4C, page 22, step 14B: Deletion of Suggested Non Cost Evaluation Criteria</b></p> <p>Can it be assumed as a result of this deletion that these criteria</p>	<p>The referenced section has been revised as suggested.</p> <p>No, the commenter’s assumption is incorrect. The criteria have has been moved to Step 6B, which describes the drafting of the RFP in response to another comment that noted that these criteria should be</p>

	need not be considered in evaluating proposals?	considered when the RFP itself is drafted.
<p>Superior Court of San Diego County Mr. Mike Roddy</p>	<p><i>(Under Terms and Conditions) [page 11 of 30]</i></p> <p>“The RFP should identify any ‘minimum terms’ in the JBE’s terms and conditions. ‘Minimum terms’ are the terms so important that a proposed exception (addition, deletion, or other modification) will render a Bid nonresponsive. ”</p> <p>Are all of the terms and conditions marked “M” in Appendix A and B to the Manual “minimum terms” under this section?</p> <p>Does this mean a JBE can consider a Bid non-responsive if it makes any changes (not just material ones) to the terms and conditions that the JBE has identified as “minimum terms?”</p> <p>Does this language just apply to “terms” and not “conditions?”</p> <p><i>(Under Terms and Conditions) [page 11 of 30]</i></p> <p>“The RFP should state that a Bid that takes exception (addition, deletion, or other modification) to a minimum term will be deemed nonresponsive.”</p> <p>Since this language does not refer to a “material” exception, or</p>	<p>A JBE has discretion as to which, if any, terms are designated as “minimum terms” in any given solicitation. A JBE may wish to designate the mandatory terms in Appendix A and B as “minimum terms,” but it is not required to do so.</p> <p>The language regarding “materiality” of proposed changes to minimum terms in chapters 4B and 4C was inconsistent. The language has been clarified as: “The RFP should state that (i) a Bid that takes a material exception (addition, deletion, or other modification) to a minimum term will be deemed nonresponsive, and (ii) the JBE, in its sole discretion, will determine what constitutes a material exception.”</p> <p>No, the language applies to both terms and conditions. The JBE has discretion to designate either as a “minimum term.”</p> <p>The referenced language has been revised to make the</p>

	<p>to a “material deviation,” does this mean that to make a Bid non-responsive, the exception to a “minimum term” need not be “material” or amount to a “material deviation?” <i>But see</i> language on p. 13 of 30 of this section (quoted below), which refers to a “material exception” to a minimum term making a Bid non-responsive.</p> <p>Does this mean that Bids containing <b>either</b> of the following are non-responsive:  An exception of <b>any kind</b> to a “<b>minimum term</b>” AND  A <b>material</b> exception to a <b>non-minimum term</b>?</p> <p>Or is the standard “a material exception to a minimum term” as stated in the AOC’s form RFP?</p> <p><i>(3<sup>rd</sup> bullet on page) [page 13 of 30]</i></p> <p>If a material exception (addition, deletion, or other modification) is taken to a minimum term, the Bid will be <u>deemed</u> nonresponsive.  Seems the words “will be” should also be deleted given the proposed change.</p> <p>This conflicts with language quoted from page 11 of 30 in Chapter 4C, which states that “a Bid that takes exception...to a minimum term will be nonresponsive.” Note materiality is not referenced.</p> <p>Consider adding the sentence below to the bulleted item...</p> <p>Note that the JBE, in its sole discretion, will determine what constitutes a material exception.</p> <p><i>[page 22 of 30]</i></p> <p>3. The JBE must publish the results of the completed non-cost</p>	<p>two sections consistent. A material exception is required to make a bid non-responsive, but the JBE determines materiality.</p> <p>Only Bids containing a material exception to a minimum term are non-responsive.</p> <p>The referenced section has been revised as suggested.</p> <p>The language has been revised to make the referenced sections consistent. A material exception is required to make a bid non-responsive, but the JBE determines materiality.</p> <p>The referenced section has been revised as suggested.</p>
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	<p>evaluation. Unless specified otherwise in the Local Contracting Manual, this publication must occur on the JBE’s website.</p> <p>Does this require JBEs to post the completed non-cost portion of the evaluation prior to opening the cost portion? If so, it seems there are more efficient methods to protect the scoring rather than posting and potentially disrupting the evaluation process before it is completed. Internal processes outlined in the local manual that protect grading should be allowed, rather than having the JBEs go through this process.</p>	<p>Yes, JBEs must post the completed non-cost portion of the evaluation prior to opening the cost portion. This process is required by PCC 12102(b)(2), which states: “Evaluation of all criteria, other than cost, shall be completed prior to the time designated for public opening of cost proposals, and the results of the completed evaluation shall be published immediately before the opening of cost proposals.”</p>
<p>Superior Court of San Francisco County Ms. Susan Patrick</p>	<p>Ch. 4C Step 5; phased approach means for every solicitation you will have 3 or more vendors who will require review of at least 3 documents. This multiplies the amount of effort for every awarded contract exponentially.</p> <p>Ch. 4C Step 14. B.3 RFPs; Posting results of non-cost evaluation on JBE website; any suggestion for where? Or can we put it anywhere?</p> <p>Ch. 4C Step 15; The use of the term “must” is best.</p>	<p>There is no requirement that a JBE use a “phased approach.” A phased approach should be used, if at all, when the benefit gained from using the approach outweighs the additional burden on the JBE.</p> <p>Each JBE has the discretion to determine where to post the results of non-cost evaluations. One option is to post the results in the “Solicitations” or “Procurement” section of the JBE website, if such a section exists.</p> <p>The referenced sentence (“Except in extraordinary circumstances, negotiations should be limited to finalizing the form of agreement and non-substantive terms.”), has been removed. A JBE has discretion to adopt this policy in its Local Contracting Manual, however.</p>
<p>Superior Court of Santa Clara Mr. David H. Yamasaki</p>	<p>On behalf of the Superior Court of California, County of Santa Clara, we respectfully submit our feedback to the Judicial Branch Contracting Manual SP12-02. Our feedback is focused on Chapter 4C, Step-by-Step Guide for the Procurement of IT Goods and Services. We share the objective stated in the chapter's introduction of "a flexible and expeditious approach</p>	

	<p>to IT procurements." We feel that this objective could be better achieved with the following additions and modifications.</p> <p>Proposal 1: On page 6 of Chapter 4C, the manual states that an RFQ can be used to procure IT goods of up to \$100,000 in value. We propose that the term "IT goods" should include maintenance and support services that are provided directly by a manufacturer.</p> <p>Explanation: Manufacturer support and maintenance services are required to ensure proper operation of computer hardware and software (e.g. Symantec Antivirus maintenance, HP server support, etc.). These services are offered directly by the manufacturer but are often sold through value added resellers (VAR). The VAR is not involved in providing the support or maintenance services and only acts as an intermediary to accept the order on behalf of the manufacturer. Since pricing from different VARs can vary we agree that the RFQ process is necessary. However, since the VAR is not involved in providing the actual support or maintenance, a full RFP should not be required unless the cost is over \$100,000.</p> <p>Without this change, the Judicial Branch would experience a significant and unnecessary burden in creating and evaluating RFPs from VARs who, in actuality, would not be delivering any service. At Santa Clara that would mean that we would need to issue RFPs for 16 support and maintenance contracts every year. Given that IT support and maintenance only represents 7% of the overall IT budget and 0.2% of the overall Court budget, we believe the effort would not be justified.</p> <p>Proposal 2: On page 6 of Chapter 4C, the manual states that an RFQ can be used to procure IT services of up to \$5,000 in value. We propose that the limit be increased to \$50,000 in</p>	<p>The JBCM has been revised to unify the limit for IT RFQs (for goods, services, or both) to \$100,000. This change will allow JBEs to use RFQs to procure maintenance and support services up to \$100,000 in value. Staff cautions against characterizing maintenance and support services as "IT goods."</p> <p>The JBCM has been revised to unify the limit for IT RFQs (for goods, services, or both) to \$100,000.</p>
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	<p>value.</p> <p>Explanation: IT consulting rates for high level technical specialists can average \$200 - \$300 per hour. The current threshold of \$5,000 provides for only 2-3 days of consulting without issuing an RFP.</p> <p>Furthermore, almost all support and maintenance contracts which are not provided by a manufacturer (see proposal 1 above) would fall under the IT services category and would exceed the low threshold.</p> <p>Increasing the threshold for use of an RFQ for IT Services to \$50,000 would reduce the burden on courts for small consulting engagements and routine support and maintenance contracts performed by entities other than the manufacturer.</p> <p>Conclusion We appreciate the opportunity to comment on the manual and feel that the two proposals outlined above are critical for achieving the goal of providing "a flexible and expeditious approach to IT procurements."</p>	
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<b>Judicial Branch Contracting Manual Chapter 5--Non-Competitively Bid Procurements</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
Superior Court of Monterey County Ms. Christine Ace	<ul style="list-style-type: none"> <li>Page 3 of 11 add "<b><u>Cost of moving business is prohibitive.</u></b>" Example- offsite storage; "<b><u>Only one Local Authorized Dealer</u></b>" – Examples – furniture or cars; "<b><u>Complex System and Maintenance Agreements</u></b>" Examples phone vendor, storage vendor, AV vendor – once they set up the systems they are in the best position to provide maintenance based on the knowledge they have</li> </ul>	There is no basis in the PCC, SCM, or Trial Court Financial Policies and Procedures Manual (TCFPPM) to exempt procurements from competition where the cost of moving business would be prohibitive. Accordingly, it would be not be appropriate to add this exemption. Although the SCM does include an exemption for maintenance agreements, the exemption requires that the

	<p>acquired during installation.</p> <ul style="list-style-type: none"> <li>• Page 8 of 11 provide authorized template for “Sole Source Request”</li> </ul>	<p>maintenance services not be available from any other source. If the maintenance services are not available from any other source, the JBE has the option of complete the purchase as a sole source under the existing language in chapter 5.</p> <p>Each JBE has discretion to develop its own sole source request template. A sample template will be made available to JBEs on the COMET and Serranus websites</p>
<p>Superior Court of Riverside County Mr. Luke McDannel</p>	<p><b>4. Proposed JBCM revisions create a newly-created non-competitive bid exception related to grants ... but then unduly limits the new exception</b></p> <p>JBCM REVISION REFERENCE: Ch. 5, 5.9</p> <p>The proposed JBCM revisions create a new grant-related Non-Competitive Bid (“NCB”) exception, which the court supports:</p> <p><b>5.9 Sole Source</b> JBEs may purchase non-IT goods, non-IT services, and IT goods and services of any value without conducting a competitive procurement if ... <i>(ii) an AOC non-recurring grant application submittal deadline does not permit the time needed for a competitive procurement of services.</i></p> <p>However, why is the applicability of the new exception limited to only “<i>AOC non-recurring grants</i>”? Is such limitation from the PCC, JBCL, JBCM, SCM, SAM? The court favors a wider application of this NCB exception to any grant situation in which the exception would apply, regardless of the type/category of grant.</p> <p>The underlying operational, business, and program-related issues that give rise to the need for this exception are common to grants of all types, not just AOC grants, and not just non-recurring grants. Opportunities for grants, with associated grant</p>	<p>The referenced section has been revised as suggested.</p>

	<p>submission deadlines, often occur quickly, without much notice. These grants very often call for the court to name its “partners” (service providers, evaluators, other government agencies) in the grant application. So, there is often not enough time to conduct a competitive procurement and award to the partners prior to the grant application date.</p> <p>Additionally, grant announcements often only include a basic description of the grant and possible types of grant-funded programs. At this early point, it is extremely difficult to put together a sufficient, full Scope of Work to conduct a competitive procurement. The court really doesn’t know exactly what the Scope of Work is, or will be, until the grant is awarded.</p> <p>Finally, just by the nature of grants and grant applications, the court is not guaranteed to be awarded any particular grant. So, to do a full competitive procurement prior to award may well turn out to be an exercise in futility. It is not good public policy or good vendor relations to ask service providers, evaluators, and other partners to invest their time, energy and effort into competitive procurements for grant programs that may, or may not, ever come to fruition.</p> <p>The point of the foregoing discussion is that all of these issues related to grants are <i>not</i> specific to AOC grants only, or to non-recurring grants only. That is why this well-founded NCB exception for grants should <i>not</i> be unduly limited to AOC non-recurring grants only.</p>	
<p>Superior Court of Sacramento County Mr. William Yee</p>	<p><b>Chapter 5--Non-competitively Bid Procurements</b> <i>Section 5.2 (Emergency Purchases)</i> COMMENT: This section states: “In the event of an emergency, JBEs may purchase non-IT goods, non-IT services, or IT goods and services of any value without conducting a competitive procurement.</p>	<p>Although PCC 1102 defines “emergency,” the various PCC provisions governing emergency purchases do not use the standard set forth in that definition. Accordingly, the referenced section of the manual has been revised to clarify the applicable statutory requirements for emergency purchases of non-IT goods, non-IT services,</p>

	<p>“Public Contract Code (PCC) 1102 defines an emergency as “a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services.” However, Section 5.2 goes on to state:</p> <p>“An emergency procurement must be approved in writing by the Approving Authority or his or her delegee. The Approving Authority (or delegee) may approve an emergency procurement only <i>if he or she determines that immediate acquisition is necessary for the protection of the public health, welfare, or safety.</i>”</p> <p>The bold/italicized text in the third paragraph is not consistent with the quoted language of PCC section 1102 and should--at minimum--be revised to read, <i>only if he or she determines that the acquisition is necessary to prevent or mitigate the loss or impairment of life, liberty, health, property, or essential public services.</i></p> <p>EXPLANATION: As written, the noted language in the third paragraph of Section 5.2 is written from the perspective of an executive branch agency and not the judicial branch -- <i>i.e.</i>, it is the executive branch that is charged with protecting the public health, welfare, or safety. This language should be tailored to fit the proper role of the judicial branch -- <i>i.e.</i>, administration of justice.</p>	<p>and IT goods and services.</p>
<p>Superior Court of San Bernardino County Ms. Debra Meyers</p>	<p><b>Chapter 5, page 9: Amendments that should be submitted to the NCB process</b></p> <p>This section seems to imply that <i>anything</i> affecting price, quantity, and time should go through the process, but the language isn’t sufficiently clear. Please clarify the language or,</p>	<p>An additional example has been added for clarification. Also, the referenced section has been revised to recognize a JBE’s authority to determine which amendments require a Non-Competitively Bid (NCB) process.</p>

	at least provide examples, so that it can easily be determined when NCB process is required.	
Superior Court of San Francisco County Ms. Susan Patrick	Ch. 5: Regarding who signs the NCB form. Can the CEO delegate this authority to the PCO?	Staff understands the term “NCB form” to refer to the “sole source request.” The sole source request is approved by the “sole source approver.” The sole source approver is any person designated as such in the JBE’s Local Contracting Manual. A JBE has the discretion to designate this role to the Procurement and Contracting Officer.

<b>Judicial Branch Contracting Manual Chapter 6—Leveraged Procurement</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
Superior Court of San Bernardino County Ms. Debra Meyers	<p><b>Chapter 6: Leveraged procurement</b> Overall, chapter 6 is confusing to read and difficult to understand. More specific comments follow.</p> <p><b>Chapter 6, page 7, section 6.2, A, 2 and page 16, section 6.3, B: Ambiguity as to which purchase documents to use</b></p> <p>On page 7, it is provided that, “JBEs <del>may</del> <u>must not</u> procure goods and services under a DGS LPA unless the supplier agrees to extend substantially similar or more favorable terms and conditions to the JBE under a JBE purchase document.”</p> <p>On page 16, that, “DGS user instructions state that a state agency or department <del>must implement</del> <u>may place any order off of a DGS LPA only</u> by executing DGS form STD-65... [list of DGS purchase documents]... or an approved alternative. The specified forms are appropriate, however, for purchase by state departments and agencies rather than JBEs. A JBE procuring off such a DGS LPA <del>should</del> <u>must</u> modify the DGS form so that terms and conditions are consistent with law and policy.”</p>	<p>Because of its complexity, substantial revisions of chapter 6 are expected to be circulated for public comment during summer, 2012</p> <p>The referenced section will be clarified as part of revisions to chapter 6 expected to be circulated for public comment during summer, 2012.</p>

**Judicial Branch Contracting Manual Chapter 6—Leveraged Procurement**

Commentator	Comment	Response
	<p>Please clarify when the courts should use a JBE purchase document rather than modify a DGS document. Is any approval from DGS needed to modify a DGS form or use a modified form?</p> <p><b>Chapter 6, page 11, section 6.3: Non-IT procurements vs. IT procurements</b></p> <p>The heading for section 6.3 includes both non-IT and IT procurements, but the 11-step process that follows is designated for non-IT use, only. Do rules in this section apply to IT procurements?</p> <p>Section 6.3 B does not sufficiently differentiate between competitively bid and non-competitively bid DGS LPAs. It is suggested that competitively bid DGS LPAs should qualify for the same processing as LPAs of other California government agencies; that the additional steps outlined for DGS LPAs (and non-California governmental agencies) should not be required for competitively bid DGS LPAs.</p> <p>Also, this section mentions use of an RFO (Request for Offer.) Why is this term being used instead of RFP? The change in terms is confusing.</p> <p><b>Chapter 6, page 11: LPA depository</b></p> <p>It would be helpful to the courts if the AOC could create a depository or directory of all LPAs/master agreements, including certifications and expiration dates thereof, so that each court does not have to separately certify each agreement. Access to the information in the depository could also expedite the negotiation and drafting a court’s contract and any amendments thereto.</p>	<p>The referenced section will be clarified as part of revisions to chapter 6 expected to be circulated for public comment during summer, 2012.</p> <p>Comment to be considered as part of revisions to chapter 6 expected to be circulated for public comment during summer, 2012.</p> <p>The term RFO (Request for Offer) is used because an RFO (for example, requesting an offer from a vendor under an LPA) is not considered a competitive solicitation and is therefore different from an RFP.</p> <p>The website for the AOC Master Agreements/Leveraged Purchase Agreements is now live at <a href="http://www.courts.ca.gov/procurementservices.htm">http://www.courts.ca.gov/procurementservices.htm</a>.</p>

<b>Judicial Branch Contracting Manual Chapter 6—Leveraged Procurement</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
	It would also be helpful if this depository included all current master agreements to which the AOC is a party.	
Superior Court of San Francisco County Ms. Susan Patrick	Ch. 6.2.2.a; Regarding CMAS, I think the substitution of “may not” to “must not” is not correct because it doesn’t make sense in the context of the subject.	Suggested revision will be made in the revision of chapter 6 expected during summer, 2012.

<b>Judicial Branch Contracting Manual Chapter 7--Protests</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
Superior Court of Riverside County Mr. Luke McDannel	<b>6. Proposed JBCM revisions set protest thresholds</b> JBCM REVISION REFERENCE: Ch. 7, 7.2, Pages 3-4 of 13  The court supports the proposed JBCM revisions which set Protest Thresholds, competitive procurement dollar amounts under which protests do not have to be accepted.	No response required.
Superior Court of San Diego County Mr. Mike Roddy	“Approving Authority” for superior courts is now defined as the Presiding Judge. In most places, reference is to “Presiding Judge or his or her delegee.” However, in the following sections the “or his or her delegee” language is not included: Chapter 4A, Section B. on p. 12 of 13; Chapter 6, Section B. on p. 10 of 17; Chapter 6, top sentence on p. 11 of 17; Chapter 7, Section 7.1 on p. 3 of 13.  Add “delegee” language to each reference to “Approving Authority” unless Presiding Judge is the only one who can legally make the decision.	Except for chapter 6, the referenced sections have been revised as suggested.

**Judicial Branch Contracting Manual Chapter 8--Contracts**

<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
<p>Superior Court of Fresno County Ms. Carmen Lango</p>	<p>A late addition to comments to the revised JBCM. A typographical correction in Chapter 8.</p> <p>Please note the attached is a correction of page 24 of 34, Appendix C of <b>Chapter 8, Contracts</b>. (Page 224 of 291 pages in the Invitation to Comment memo) the list, as posted on page 24, does not coincide with what follows on the next pages.[Attachment 2]</p>	<p>The referenced list has been revised as suggested.</p>
<p>Superior Court of Monterey County Ms. Christine Ace</p>	<p>We would like to see a table correlating “Solicitation Documents” Email Quotes, Phone Quotes, RFQ, IFB and RFP to “Contracting Documents” PO, Blanket PO, Standard Agreements, Short Form Agreements.</p>	<p>The comment will be considered in the revision of the JBCM currently scheduled for August 2012.</p>
<p>Superior Court of Riverside County Mr. Luke McDannel</p>	<p><b>7. Proposed JBCM revisions refer to a “BSA audit provision”</b> JBCM REVISION REFERENCE: Ch. 8, Appendix B, Item 10</p> <p>The “BSA audit provision” is mandatory for most types of contracts over \$10,000. What is this BSA audit provision? It was not contained in any of the templates the AOC has previously provided. Additionally, there is much uncertainty as to the audit standards to be used by BSA and AOC auditors. While AOC financial policies and GAP audits clearly remain within the province of the AOC, audits on contracting practices should be the same for both the BSA and the AOC with all discrepancies in practices being communicated to the courts immediately. As a practical matter, neither entity should have more expansive audit practices than those of the other.</p> <p><b>8. Proposed JBCM revisions would require the court to undertake a burdensome contractor evaluation process</b></p>	<p>GC 8546.7 requires that “every contract involving the expenditure of public funds in excess of ten thousand dollars (\$10,000) entered into by any state agency, board, city, county, city and county, or district, shall be subject to the examination and audit of the State Auditor....Every contract shall contain a provision stating that the contracting parties shall be subject to that examination and audit.”</p> <p>Staff will consider the comment during its on-going review of trial court audit standards.</p> <p>The referenced section has been revised to clarify that a consulting services may, but is not required to, include a</p>

**Judicial Branch Contracting Manual Chapter 8--Contracts**

<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
	<p><b>for consulting services agreements</b>                      JBCM REVISION REFERENCE: Ch. 8 &amp; Ch. 11</p> <p>Reading proposed JBCM revision Chapters 8 &amp; 11 together, the court must evaluate the contractor’s performance under consulting services contracts. Plus, the court must notify and send a copy of any evaluations the court makes to the contractor within 15 days, and the contractor has the right within 30 days, to submit to the court a written response that must be filed in the procurement file.</p> <p>An evaluation may be helpful for future internal reference, but is an evaluation absolutely required for all consulting contracts? Moreover, why must the court send a copy of this evaluation to the contractor? If the contractor is evaluated as poor, why would the court risk jeopardizing its image or potential future relationship with the contractor through this formal evaluation process? What happens if the contractor writes a negative response about the court through this evaluation? Could all of this be subject to a public records request that may further embarrass the contractor and/or the court?</p> <p>The court can certainly, and more delicately and informally, advise the contractor what aspects of its work were good/not as good, etc. However, a formal, documented, evaluation review made available to the contractor has the potential for more damage than it’s worth. The contract provisions provide ample remedies for the court in the event an issue arises in connection with the services of a consultant. Plain and simple, requiring anything more is unproductive busy work.</p> <p><b>12. Contractor certification clauses</b>                      JBCM REVISION REFERENCE: Ch. 8, Appendix A                      Contractor Certification Clauses</p>	<p>statement that the contractor’s performance will be evaluated.</p>

**Judicial Branch Contracting Manual Chapter 8--Contracts**

Commentator	Comment	Response
	<p>In the introductory comments to the Contractor Certification Clauses chart in Ch. 8, Appendix A, the JBCM states, “A <i>JBE should include recommended certification clauses.</i>” The “should” language makes it seem like the court is deciding if the court elects not to include certain Contractor Certification Clauses. Is it proper to require local justification of a decision to not use clauses that for the most part don’t impact the court, or that require the court to police contractor’s compliance with unnecessary clauses that have no impact on the court?</p> <p>The problem related with the word "should" is that an auditor will likely define a "should" as a best practice, when in fact it is not. If "should" equates to a best practice, then the court will be dinged by the auditors in every instance it "should have" followed a "should" recommendation. Prior experience with auditors is that, though they may have experience in the financial aspects of auditing, they may not be as experienced at judging the legal implications of a particular course of conduct elected by the court in connection with the formation and/or discharge of contractual obligations.</p>	<p>The referenced section has been revised to clarify that JBEs have discretion to include in a contract any contractor certification clause (CCC) that is not mandatory.</p>
<p>Superior Court of Sacramento County Mr. William Yee</p>	<p><b>Chapter 8--Contracts</b> <u><i>Appendix A (Contractor Certification Clauses) and Appendix B (Mandatory and Recommended Contract Provisions)</i></u> COMMENT: Meaningful comment concerning Appendix A and Appendix B of Chapter 8 is not possible since sample contract provisions and sample contractor certification clauses do not appear in this second draft of the JBCM, as they did in the earlier draft. Instead, reference is made to an AOC web site where the sample language can be found. However, no URL is provided where that content can be accessed. Since many of the referenced contract provisions and contractor certification clauses are <i>mandatory</i>, it is imperative that they be accessible</p>	<p>The AOC will make the CCCs available to JBEs on the COMET and Serranus websites. Staff does not anticipate that the CCCs will differ substantively from the ones provided in the JBCM originally adopted by the council in August 2011.</p>

**Judicial Branch Contracting Manual Chapter 8--Contracts**

<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
	<p>to the public before the comment period expires on March 6, 2012.</p> <p>EXPLANATION: The appendices in draft one of the JBCM included the actual text of the mandatory and recommended contract provisions and contractor certification clauses, several of which undermine the “Guiding Principles” underlying the JBCM (see Introduction) and are contrary to the best interest of the judicial branch and the public. Below are some of those provisions with comments.</p> <p><b>Union Organizing:</b> Among other requirements, this provisions states that a “contractor shall not... Assist, promote, or deter union organizing by employees performing work under state or judicial branch contracts; use the State of California’s or State’s funds received under this Agreement to assist, promote or deter union organizing...”</p> <p>COMMENT: This provision is problematic. What a contractor, or any private citizen, does with revenue legally earned from a contract with a JBE is their business. If the court is satisfied with the goods/services it received, and the seller has received payment in exchange for those goods/services, the transaction is complete, and the seller should be able to do whatever it deems appropriate with its revenue. Also, what a contractor’s employees do on their own time is their business. Contractor should not be penalized just because employees who are performing services for a JBE are using their off-time to lawfully assemble to support or oppose political issues or union organizing. <i>Legal Question:</i> Doesn’t this provision punish contractors for exercising their First Amendment free speech rights? Does the court have the legal authority to terminate a contract simply because it learned that seller distributed “anti-union” literature on its own private property? This poses a</p>	<p>This certification and contract provision is required in certain circumstances under GC sections 16645-16649.</p>

**Judicial Branch Contracting Manual Chapter 8--Contracts**

<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
	<p>serious First Amendment concern and should not be mandatory under the JBCM.</p> <p><b>Domestic Partners:</b> The JBCM makes the following provision mandatory: “If this Agreement provides for total compensation of more than \$100,000, Contractor is in compliance with [PCC] section 10295.3, which, subject to specified exceptions, generally prohibits discrimination in the provision of benefits between employees with spouses and employees with domestic partners, or discriminates between employees with spouses or domestic partners of a different sex and <i>employees with spouses</i> or domestic partners <i>of the same sex</i>, or discriminates between same-sex and different-sex domestic partners of employees or between <i>same-sex</i> and different-sex <i>spouses of employees....</i>”</p> <p>COMMENT: California does not recognize “same sex” marriages, and the fate of Proposition 8 is still being litigated. Also, the federal Defense of Marriage Act is still valid law. This provision would force JBEs to not purchase goods from businesses who are otherwise law abiding, thus limiting the pool of vendors from which JBEs can choose. Also, if the lowest responsible bidder did not provide employment benefits to “same sex spouses” of its employees for genuine religious reasons, the court’s enforcement of this provision could be actionable as unlawful discrimination on the basis of religion. It also would unfairly deprive an otherwise qualified bidder with a fair opportunity to enter the bidding process -- a violation of one of the Guiding Principles of the JBCM. (See Introduction, Section 2.) This provision should not be mandatory under the JBCM.</p> <p><b>Priority Hiring Considerations:</b> This provision requires a contractor to give priority consideration in filling vacancies in positions funded by the JBE’s contract to qualified recipients of</p>	<p>This certification is required in certain circumstances under PCC 10295.3(f)(1).</p>



**Judicial Branch Contracting Manual Chapter 8--Contracts**

Commentator	Comment	Response
	<p>initiative to reach out to disabled veterans! Ironically, it gives such vendors an incentive to not reach out to disabled veterans business enterprises to avoid the onerous reporting requirements or to not want to do business with JBEs in the first place, thereby reducing competition and choices that would otherwise benefit JBEs and taxpayers. Even if such a vendor were to expend time and resources to generate a mandatory report to JBEs, the JBCM specifically states that there are no DVBE goals reporting requirements in either the PCC or Military/Veterans Code applicable to judicial branch entities. (<i>i.e.</i>, the statutes that required state agencies to provide annual reports to the Governor and the DGS with respect to meeting DVBE goals were <i>repealed</i> effective January, 1, 2007.) Since there are no reporting requirements, requiring vendors to submit a DVBE participation certification would be pointless. This provision serves no public purpose.</p> <p><u>Appendix C (Janitorial Services or Building Maintenance Agreements)</u>: This provision states: “If this Agreement requires Contractor to perform Services at a new site, Contractor shall retain for 60 days all employees currently employed at that site by any previous contractor that performed the same services at the site. Contractor shall provide upon request information sufficient to identify employees providing janitorial or building maintenance services at each site and to make the necessary notifications required under Labor Code section 1060 et seq.”</p> <p>COMMENT: This provision raises many issues that could be problematic for JBEs. Does a successful bidder on a janitorial or building maintenance contract with a court have to employ for 60 days the employees of the current contractor at their current hourly rate? If so,                      -- What if the winning bidder’s cost proposal was based on labor rates that are lower than what the current contractor is</p>	<p>This requirement is contained in Labor Code 1060 et seq.</p>

**Judicial Branch Contracting Manual Chapter 8--Contracts**

Commentator	Comment	Response
	<p>paying his employees? Is the winning bidder required to pay the current contractor's employees their higher rate?                      -- Is the winning bidder required to honor contractual obligations the current contractor made to his employees (e.g. type of medical/dental plan)? If so, wouldn't this impact the winning bidder's original cost proposal if such proposal contemplated different contractual obligations between employer/employee?                      -- This requirement also forces a winning bidder to take on for 60 days employees who may have had performance or disciplinary issues, or who may not meet the winning bidders training requirements. Does the winning bidder at least get an opportunity to interview the current contractor's employees or review employee records to determine if there have been disciplinary issues?                      -- What if the current contractor wants to keep his existing employees to work at one or more other sites?                      -- Does the "must retain for 60-days" requirement possibly force a court to commit an intentional interference with existing contractual relations?</p> <p>This provision should not be included in janitorial contracts.</p>	
<p>Superior Court of San Bernardino County                      Ms. Debra Meyers</p>	<p><b>Chapter 8, page 17, section 8.5.C: Payee Data Record</b>                      This section requires the courts to use the Payee Data Record. Previously, the courts were allowed to use the W-9 in lieu of the Payee Data Record. Can we continue to use a W-9?</p> <p><b>Chapter 8, page 4, section 8.2 A: Defining a PO (Purchase Order)</b></p>	<p>No, JBEs may not use a W-9 in lieu of the Payee Data Record. One of the uses of the Payee Data Record is to identify nonresident vendors for withholding taxes as required by the Revenue and Taxation Code. The W-9 does include an indication that a vendor is nonresident. For that reason, aW-9 is not an alternative to the Payee Data Record.</p> <p>Chapter 8 and its Appendices have been revised to clarify the uses of particular categories of contracts, and the requirements applicable to each category. The</p>

**Judicial Branch Contracting Manual Chapter 8--Contracts**

<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
	<p>On page 4, it is provided that, "... the term "contract" as used in this chapter includes all agreements for goods or services, including purchase orders (POs), intergovernmental contracts (IGCs), and other documents for goods and services, regardless of the document's form or title."</p> <p>Making a PO equivalent to a contract will be problematic. If it is a contract equivalent, must changes to a PO comply with the contract amendment requirements? Are contractor certifications required? If all contracting requirements are imposed on purchase orders, the business of the court will be heavily and negatively impacted both in terms of time delays and costs as purchase orders are used for small purchases, many a few hundred dollars or even less . Please except purchase orders. If purchase orders absolutely cannot be excepted, then please provide specific guidance as to when a PO can be used in lieu of a full contract – i.e. online subscriptions, annual maintenance agreement for software, etc. As the manual currently stands, there is no clear delineation among the appropriate uses of a PO, short form agreement, or standard agreement.</p> <p><b>Chapter 8, page 16, section 8.5 B and Chapter 9, page 4, section 9.1 B: Signing contracts after the effective date and paying contractors without a contract</b></p> <p>On page 16 of Chapter 8, it is provided that, "Contracts should be mutually executed and delivered before work under the contract begins. Any work performed under a contract before it is fully executed and delivered is at the contractor's own risk. If a contract is not mutually executed and delivered before work begins, the contractor may not be paid for that work unless the effective date of the contract is no later than the date work begins."</p>	<p>number of mandatory requirements has been reduced, and the distinction between required, and recommended, provisions, has been clarified.</p> <p>The intent of the provisions is to clarify that payment will be made only for work performed under a contract that is effective at the time the work is performed.</p>

**Judicial Branch Contracting Manual Chapter 8--Contracts**

Commentator	Comment	Response
	<p>Should a contractor start work before a contract is executed, the problem is compounded by language in Chapter 9 that, “Payments should not be processed or released by a JBE to a Vendor for any goods or services unless the JBE possesses all of the following: a properly authorized contract;....”</p> <p>The issue thus becomes not whether the court can sign a contract after a vendor has started work but rather can the vendor start work since the court cannot pay them because a contract has been executed. Please clarify or reconcile these provisions.</p> <p><b>Chapter 8, page 26, section 3: Equipment purchase contracts</b> Please clarify whether this section is only applicable to equipment purchased by a contractor under contract or applicable to all equipment purchased by the JBE.</p>	<p>The requirement applies to all equipment purchased by the JBE directly or indirectly through a contractor.</p>
<p>Superior Court of San Francisco County Ms. Susan Patrick</p>	<p>Ch 8; Appendix A: item 3 for short form contract should be Mandatory; item 7 for short form contract should be Mandatory; item 11 short form contract should be Mandatory;</p> <p>Ch 8; Appendix B, item 11 should be Mandatory or Contractor can destroy records; item 12 Indemnification by Contractor should be Mandatory especially for small consultant contracts; Item 21 Ownership is important in all contracts with a Work Product, including Short Form and it should be Mandatory; Item 24 should be Mandatory, we don’t want to have</p>	<p>Chapter 8 and its Appendices have been revised to clarify the requirements applicable to each category. The number of mandatory requirements has been reduced. Appendices A and B have been revised to indicate that provisions are designated as mandatory if the JBCL requires its inclusion in a contract, or it is required to comply with some other law, rule, or policy. JBEs have discretion to include in a contract any contractor certification clause (CCC) that is not mandatory.</p> <p>Chapter 8 and its Appendices have been revised to clarify the requirements applicable to each category. The number of mandatory requirements has been reduced. Appendices A and B have been revised to indicate that provisions are designated as mandatory if the JBCL requires its inclusion in a contract, or it is required to</p>

**Judicial Branch Contracting Manual Chapter 8--Contracts**

Commentator	Comment	Response
	<p>jurisdiction in Utah, do we?</p> <p>Chapter 8, topic 8, IT Contracts I have prepared a number of contracts large and small that included a Work Product based on contractor and court staff collaboration and the single hardest fact I have to get through to the contractor is the WP prepared with public funds is a public product and we reserve the right to share this WP with other JBEs. I think the language in the paragraph is insufficiently adamant about this and it should clearly state a WP paid w/public funds is public property.</p> <p>Ch 8; Item 13 Equipment Rental contracts good list of issues at least 2 I didn't know about and useful because my Court is now renting equipment to save money.</p>	<p>comply with some other law, rule, or policy. JBEs have discretion to include in a contract any CCC that is not mandatory.</p> <p>The comment will be considered in the revision of the JBCM currently scheduled for August 2012.</p> <p>No response required.</p>

**Judicial Branch Contracting Manual Chapter 9--Disbursements and Payment Programs**

Commentator	Comment	Response
<p>Superior Court of Riverside County Mr. Luke McDannel</p>	<p><b>9. JBCM takes a restrictive, un-favored approach to advance payments</b> JBCM REVISION REFERENCE: Ch. 9, Section 9.1.B</p> <p>Though well-meaning, the JBCM strikes a restrictive, un-favored approach to courts making advance payments. The basic principle behind this approach that courts should not pay for good/services before the goods/services are either delivered or completed is sound. However, day-to-day business realities call for advance payments to be allowed in a wider range of</p>	<p>The referenced section has been revised to provide greater flexibility in making advance payments.</p>

**Judicial Branch Contracting Manual Chapter 9--Disbursements and Payment Programs**

<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
	<p>situations, particularly when the standard within a particular industry is to pay for the goods/services prior to the goods/services being provided, i.e. paying for a software license, an annual subscription, pre-established set of standard maintenance services, etc.</p> <p>The JBCM includes an exception to allow advance payments for insurance contract premiums. The court proposes additional exceptions based on the same premise. For example, licenses and subscriptions. It is standard business practice for the purchaser to pay for a license subscription in advance that covers a certain period of time. Another example, equipment leases. It is standard that users pre-pay for items they lease.</p> <p>Additionally, another situation which may call for an exception to allow advance payments may be where the court receives some significant benefit from pre-paying for goods/services (e.g., price discount). Courts are often offered pricing discounts based on annual pricing, if the amount is paid at the beginning of the service year. In many of those situations, the JBCM restricts the courts from being able to take advantage of this pricing discount. This is an area where courts should be able to utilize some of their business knowledge and acumen, making a decision as to when advance payments are, or are not, in the best interest of the court.</p>	
<p>Superior Court of San Francisco County Ms. Susan Patrick</p>	<p>Ch 9; Advance &amp; Progress Payments: Withholding a portion of the payment is required in Consultant contracts, is the purpose of this chapter to provide guidance for the structuring of withhold in all contracts for services or only those w/progress payments?</p>	<p>The purpose of the referenced section is to explain applicable PCC requirements when JBEs choose to make certain types of progress payments. The referenced section also provides recommendations regarding progress payments (if the JBE decides to make a progress payment).</p>

**Judicial Branch Contracting Manual Chapter 10--Receiving, Inspection, and Acceptance or Rejection of Goods and Services**

<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
<p>Superior Court of San Francisco County Ms. Susan Patrick</p>	<p>Ch 10; Whomever edited this chapter to remove “receiving staff” and replace it w/JBE acknowledges the reality of the vast majority of Courts without decentralized receipt and acceptance. See 11.3 and think that San Francisco alone has 4 facilities scattered all over the City.</p> <p>Ch 10.3 Inspection is a little awkward as earlier in the chapter you acknowledge decentralized receipt and in this section you have a copy of the contract being provided by these staff, if not already in Accounting’s possession. Contract should be provided to Accounting by the contract preparer who may have absolutely nothing to do and be physically remote from staff receiving the goods. I suggest you delete this awkward phrasing as it is also not entirely accurate.</p> <p>Ch 10.5; I include a 30-day acceptance period in all contracts; In Ch 8.3.1 you have “Acceptance Criteria including inspections” but I don’t think this very important point is emphasized enough and no guidance is provided regarding an amount of time (e.g. 30 days).</p>	<p>No response required.</p> <p>The referenced section has been revised as suggested.</p> <p>While many contracts do have a 30-day acceptance period, an acceptance period duration was not designated in Chapter 10 because the actual duration (e.g., 5 vs. 90 days) can vary greatly depending on the type of transaction.</p>

**Judicial Branch Contracting Manual Chapter 11--Contract Administration**

<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
<p>Superior Court of San Bernardino County Ms. Debra Meyers</p>	<p><b>Chapter 11, page 13, section 2: Negotiation for changes</b></p> <p>Given the limitations on amendments, it is difficult to conceive of amendments that require negotiations. Examples of amendments that must be negotiated would therefore be helpful.</p>	<p>The comment will be considered in the revision of the JBCM currently scheduled for August 2012.</p>
<p>Superior Court of San Francisco County</p>	<p>Ch 11.2 regarding the appointment at the JBE of “a senior Contract Administrator ultimately responsible for the</p>	<p>Establishing a contract administration plan is a non-mandatory business practice. Revisions to the</p>

**Judicial Branch Contracting Manual Chapter 11--Contract Administration**

<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
<p>Ms. Susan Patrick</p>	<p>performance of all contract administration functions”; throughout the JBCM it is obvious you are deferring to the individual JBEs regarding contract preparation. I work for a smaller court but have over 40 contracts in effect for both IT and Court operations do you really think IT and UFC will accept a third party administrator? You qualify it by allowing the JBE to delegate management authority but why do it this awkward way? Make it simple as every contract has to have a person to sign off on invoices and this is usually the contract manager. Why not simply require each contract to have an administrator named and make this person responsible? It seems like a lot of work to go through the procedure outlined in this section when it is clearer to all simply to make an administrator responsible in each contract.</p> <p>Ch 11.5 vendor lists are useful only when you make repeated purchases of stock products on a regular basis. I think you put too much emphasis on creating and maintaining these lists when only a few large courts have a business volume that would justify the amount of work that goes into creating such a list. I find it much easier and faster to solicit each purchase individually using electronic media (email, BidSync) and the internet to find suppliers.</p> <p>Ch 11.7. A, addresses performance and inventory control, how can a single person do this for all the contracts in a court to say the least get to all the facilities in a large county? All the duties are critical and should be performed by the person using the services or goods, the contract manager. The items listed in Monitoring Vendor Performance and the Best Practices are also included in some of the standard provisions and/or a Statement of Work which is the basis for the contract manager’s work.</p> <p>Ch 11.7. B, regarding an invoice where part of the charges is in</p>	<p>Introduction of the JBCM clarify that JBEs have the authority to vary their applicable of non-mandatory business or accounting practices. A JBE has the discretion to provide its own system of contract administration so long as it is in compliance with law.</p> <p>Developing and/or maintaining vendor lists is a non-mandatory business practice. Revisions to the Introduction of the JBCM clarify that JBEs have the authority to vary their applicable of non-mandatory business or accounting practices. A JBE has the discretion to provide its own system of contract administration so long as it is in compliance with law.</p> <p>Nothing in the referenced section requires that a single individual undertake the referenced tasks. The referenced section provides for delegation of these tasks where necessary or appropriate.</p> <p>The referenced section is adopted from the Trial Court</p>

**Judicial Branch Contracting Manual Chapter 11--Contract Administration**

<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
	<p>dispute. I noted you state only the disputed portion can be withheld; is this also in FIN because that is where it belongs. The Accounting supervisor at my court routinely refuses to pay an invoice that is not absolutely perfect and he cares nothing about the JBCM so if it isn't in FIN my court will not comply no matter what I say.</p> <p>Ch 11.8. C.2, I struggle to understand the utility of prenegotiation Q&amp;A. A summary of what was negotiated, especially notations in procurement files is useful for remembering and audits. But I am at a loss regarding the utility of prenegotiation objectives when it is common sense if you are negotiating a cost increase you start with the cost basis and any increases are rigorously investigated and justified. I don't start w/any predetermined set, it is developed for each situation.</p> <p>Ch 11.8. C. 2. D; I found this table very difficult to read, and I do not understand it and cannot comment.</p> <p>Ch 11.9. A, B, it cannot be overemphasized that any contract needs to have clear dispute provisions that set up schedules (30 days) and standards for dispute resolution. The contract manager is in the best position to negotiate with the contractor but escalation to the CFO/CEO should also be provided.</p> <p>Ch 11.9.C, I think involving the AOC at the cure notice is a little premature but if it is in CRC there must be some justification. I would think it better to wait until the dispute cannot be resolved w/CEO to involve AOC.</p> <p>Ch 11.10, it appears to me that terminating for convenience is easier than issuing a cure notice and involving the AOC. I don't</p>	<p>Financial Policies and Procedures Manual: 7.03, Contract Administration, which has been specifically superseded by the JBCM.</p> <p>Establishing pre-negotiation objectives is a non-mandatory business practice. Revisions to the Introduction of the JBCM clarify that JBEs have the authority to vary their applicable of non-mandatory business or accounting practices. A JBE has the discretion to provide its own system of contract administration so long as it is in compliance with law.</p> <p>The referenced table has been revised to clarify its contents.</p> <p>JBEs have the discretion to provided escalation of disputes to the CFO/CEO their Local Contracting Manual.</p> <p>The reference section restates the requirements of California Rules of Court, rule 10.202, which states that trial and appellate courts must “notify the AOC Office of the General Counsel promptly on receipt of notice of a dispute that is likely to result in a claim or lawsuit...against a court.”</p> <p>Seeking legal counsel upon termination for convenience is a non-mandatory business practice. Revisions to the</p>

**Judicial Branch Contracting Manual Chapter 11--Contract Administration**

<b>Commentator</b>	<b>Comment</b>	<b>Response</b>
	think seeking legal counsel if you issue a cure notice is practical; if the contractor does not comply there are remedies already in place in the contract. Having used AOC legal counsel for a contractor that was non compliant we found it not terribly useful as there was no resolution in the court's favor in spite of legal counsel. Counsel was excellent, but was without leverage.	Introduction of the JBCM clarify that JBEs have the authority to vary their applicable of non-mandatory business or accounting practices.

Type of Procurement	NON-IT Goods	NON-IT Services	IT Goods	IT Services
<b>UP to \$25K</b>				
Solicitation Document Requirements	(Should) 3 Quotes, email, phone, internet RFQ, IFB, or RFP Determined by Local Procurement Manual - based on Best Practices Recommended by JBCM			
Advertising	NOT REQUIRED			
Selection Methodology	Lowest Price Or Best Value Selection Criteria			
<b>Over \$25K</b>				
Solicitation Document Requirements	RFQ, IFB or RFP Determined by Local Procurement Manual - based on Best Practices Recommended by JBCM			
Advertising	REQUIRED			
Selection Methodology	Best Value Selection Criteria			

## APPENDIX C

### **ADDITIONAL INFORMATION FOR CERTAIN TYPES OF CONTRACTS**

This appendix contains additional information for the following types of contracts:

1. Consulting Services Contracts
2. Credit Card Issuer Contracts
- ~~3. Elevator Maintenance Contracts~~
3. Equipment Purchase Contracts
4. Federally Funded Contracts
5. IGCs (MOUs) with Counties for County Services
6. IGCs with California Government Entities
7. IGCs with Local Government Entities
8. Information Technology Contracts
9. Janitorial/Building Maintenance Contracts
10. Legal Services Contracts
11. Parts Cleaning Contracts
12. Printing Contracts
13. Equipment Rental Contracts
14. Subvention and Local Assistance Contracts



# Judicial Branch Contracting Manual

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EFFECTIVE OCTOBER 1, 2011

REVISED APRIL 24, 2012



JUDICIAL COUNCIL  
OF CALIFORNIA

Judicial Council of California  
Administrative Office of the Courts  
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Revised by the Judicial Council on April 24, 2012

Judicial Council of California

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# Judicial Council of California

Judicial Branch Contracting Manual

Introduction

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## INTRODUCTION

Original Release Date:  
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## 1. STATUTORY BASIS FOR THIS JUDICIAL BRANCH CONTRACTING MANUAL

On March 24, 2011, Senate Bill 78 was enacted, creating a new Part 2.5 of the Public Contract Code (PCC) designated the California Judicial Branch Contract Law (JBCL).<sup>1</sup> With certain exceptions,<sup>2</sup> the JBCL requires that superior and appellate courts, the Judicial Council, of California (Judicial Council), the Administrative Office of the Courts (AOC), and the Habeas Corpus Resource Center (HCRC) (referred to collectively as judicial branch entities or JBEs) comply with provisions of the PCC that are applicable to state agencies and departments related to the procurement of goods and services.

### Judicial Branch Contracting Manual

PCC 19206 of the JBCL requires the Judicial Council to adopt and publish a Judicial Branch Contracting Manual incorporating procurement and contracting policies and procedures that JBEs must follow. The policies and procedures in the Judicial Branch Contracting Manual must be “consistent with” the PCC and “substantially similar” to the provisions contained in the *State Administrative Manual* (SAM) and the *State Contracting Manual* (SCM).

### Applicable Dates of JBCL Requirements

The JBCL became effective March 24, 2011, and applies to all contracts initially entered into or amended on or after October 1, 2011. PCC 19206 requires the council to adopt and publish a Judicial Branch Contracting Manual no later than January 1, 2012, but PCC 19204(d) provides that until the council adopts and publishes the required manual, JBEs “shall instead be governed by applicable policies and procedures in the State Administrative Manual and the State Contracting Manual, or policies and procedures as otherwise required by law to be adopted by the Department of General Services applicable to state agencies.”

On August 26, 2011, the Judicial Council adopted this *Judicial Branch Contracting Manual* (Manual) in compliance with PCC 19206. ~~This~~The original effective date of this Manual is October 1, 2011, and later effective dates of revisions to the Manual are reflected on the first page of each chapter.

<sup>1</sup> SB 78 (Comm. on Budget and Fiscal Review, Stats. 2011, ch. 10). The California Judicial Branch Contract Law is at PCC 19201–19210. The law was amended by SB 92 (Comm. on Budget and Fiscal Review, Stats. 2011, ch. 36), effective June 30, 2011.

<sup>2</sup> See PCC 19204(c), 19207, and 19208.

## 2. GUIDING PRINCIPLES IN THE DEVELOPMENT OF THIS MANUAL

Development of this Manual was guided by the principles reflected in the findings and declarations of the Legislature in enacting the PCC, which express the legislative intent to achieve the following objectives as set forth in PCC 100:

- To clarify the law with respect to competitive bidding requirements;
- To ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds;
- To provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices; and
- To eliminate favoritism, fraud, and corruption in the awarding of public contracts.

In addition, the Legislature has declared that California public contract law “should be efficient and the product of the best of modern practice and research” (PCC 101) and that, “to encourage competition and to aid in the efficient administration of public contracting, to the maximum extent possible, for similar work performed for similar agencies, California’s public contract law should be uniform.” (PCC 102)

Development of this Manual was complicated by the inapplicability of the SAM and SCM to the organization and operations of JBEs. The SAM and SCM were written for use by executive branch agencies, with the Department of General Services (DGS) as the entity charged with administering those agencies’ procurement and contracting activities. In contrast, management in the judicial branch is decentralized; for the superior courts, by way of example, the presiding judge of each court is responsible for approving procurements and contracts and the court executive officer is responsible for contract negotiations.<sup>3</sup> In addition, PCC 19207 acknowledges that neither DGS nor any other state entity is involved in approval or review of judicial branch procurement, except as specifically required by law. As a result, much of the material in the SAM and SCM either does not apply to JBEs or is incompatible with judicial branch organization and operations. Additionally, even when applied to the executive branch, SAM and SCM procurement and contracting policies and procedures have been found by government studies to be out-dated, ineffective, and ultimately costly.<sup>4</sup>

<sup>3</sup>CRC 10.603(c)(6)(D) and 10.610(c)(3).

<sup>4</sup>See California Performance Review, *The Report of the California Performance Review*, Vol. 4, Chapter 7, Statewide Operations-Procurement (2007), [www.cpr.ca.gov/CPR\\_Report/Issues\\_and\\_Recommendations/Chapter\\_7\\_Statewide\\_Operations/Procurement/Chapter\\_7D\\_Summary.html](http://www.cpr.ca.gov/CPR_Report/Issues_and_Recommendations/Chapter_7_Statewide_Operations/Procurement/Chapter_7D_Summary.html) (as of April 16, 2012).

Because of the fundamental differences between the underlying and often out-dated assumptions of the SAM and SCM and the organization and operations of JBEs, the drafters of this Manual balanced the conflicting requirements of incorporating “substantially similar” policies and procedures from SAM and SCM and accomplishing the legislative objectives of PCC 100–102. As a result, when the SAM or SCM did not implement a specific PCC requirement, but rather a DGS concept or process, the drafters interpreted the provision in light of PCC 100–102 and the business operations and organizational structure of the judicial branch. If a SAM or SCM provision was not compatible for literal adoption in the context of judicial branch operations, the drafters distilled that provision to its essential objective and then developed processes and procedures that achieve the same objective in a manner compatible with judicial branch organization and operations. Thus, the processes and procedures reflected in this Manual are intended to implement the objectives of both the underlying SAM or SCM provision and, most importantly, PCC 100–102.

### **3. INTERPRETATION AND APPLICATION OF THIS MANUAL**

In interpreting the requirements of this Manual and applying those requirements in the context of their own local operations and specific procurements, JBEs should seek to achieve the objectives of PCC 100, including ensuring full compliance with competitive bidding statutes; providing all qualified bidders with a fair opportunity to enter the bidding process; and eliminating favoritism, fraud, and corruption in the awarding of public contracts. Under the decentralized management system of the judicial branch, each Judicial Branch Entity is vested with individual purchasing authority.<sup>5</sup> In the case of a superior court, the purchasing authority is vested in the presiding judge.<sup>6</sup> To meet the unique needs of the court and ultimately achieve the goals set forth in PCC 100–102, each presiding judge has the authority to vary the court’s application of any nonmandatory business or accounting practice set forth in this Manual. Any variances should be documented in the court’s Local Contracting Manual.

The AOC/OGC is available to assist JBEs in answering questions or providing clarification regarding this Manual.

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<sup>5</sup>See section 1.1.A of chapter 1 of this Manual for the source and designation for each JBE’s purchasing authority.

<sup>6</sup>CRC 10.603(c)(6)(D).

### **3.4. LOCAL CONTRACTING MANUAL**

PCC 19206 requires the Judicial Council to include in this Manual a requirement that each JBE shall adopt a Local Contracting Manual for procurement and contracting for goods and services by that JBE. The content of each Local Contracting Manual must be “consistent with” the PCC and “substantially similar” to the provisions contained in the SAM and the SCM.

- Each JBE must adopt a manual consistent with the requirements of PCC 19206.
- Each JBE must identify individual(s) with responsibility and authority for procurement and contracting activities as required by this Manual.
- Each JBE may include in its Local Contracting Manual policies and procedures governing its procurement and contracting activities, and those policies and procedures must not be inconsistent with this Manual or with applicable law.

### **4.5. CONTENT AND EXCLUSIONS**

The Manual addresses Judicial Branch Entities’ procurement of goods and services, including information technology goods and services, contracting, and contract management. The Manual does *not* address:

- Procurement and contracting for planning, design, construction, rehabilitation, renovation, replacement, lease, or acquisition of trial court facilities, as those activities are expressly excluded from coverage under Part 2.5 by PCC 19204(c);
- Procurement and contracting specific to planning, design, construction, rehabilitation, renovation, replacement, lease, or acquisition, of facilities *other than* trial court facilities and maintenance of facilities, as those activities are the responsibility of the AOC and will be addressed in the AOC’s Local Contracting Manual; and
- Any provision of the PCC that does not apply to contracting or procurement by state agencies and departments as such provision is inapplicable to Judicial Branch Entities. (PCC 19208)

The Manual does *not* address procurement and contracting for the following contracts that are unique to the judicial branch and are not subject to the JBCL or this Manual:

- Contracts (often referred to as MOUs) between a superior court and the sheriff for court security services;
- Contracts between a court and a court reporter when the court reporter provides services as an independent contractor; and

- Contracts between a court and a court interpreter when the court interpreter provides services as an independent contractor.

The Manual is drafted also to comply with PCC 19207, which states:

Except as provided in subdivision (a) of Section 19204 or as otherwise specifically required by law applicable to any judicial branch entity, nothing in this part is intended, nor shall it be construed, to require the approval, review, or involvement of any other state entity, including, but not limited to, the Department of General Services or the Secretary of California Technology, in the procurement of any judicial branch goods or services, including information technology goods and services.

The above-referenced exception provided in subdivision (a) of PCC 19204 applies to all contracts with total cost estimated at more than \$1 million and to contracts for administrative or infrastructure information technology (IT) projects of the council or the courts with total costs estimated at more than \$5 million. (GC 68511.9) These types of contracts are subject to the following requirements:

- Contracts estimated to cost more than \$1 million, *except* contracts for administrative or infrastructure IT projects estimated to cost more than \$5 million, are subject to “review and recommendations” by the Bureau of State Audits to ensure compliance with PCC Part 2.5. JBEs that enter into any such contract must notify the State Auditor, in writing, within 10 ~~business days~~Court Days of entering the contract.
- Contracts for administrative or infrastructure IT projects of the council or the courts with total costs estimated at more than \$5 million are subject to “review and recommendations” of the California Technology Agency. That agency must consult with and provide recommendations to the council or the court, and must submit a copy of its review and recommendations to the Joint Legislative Budget Committee. (GC 68511.9)

## **5.6. EFFECT OF THE MANUAL ON PREEXISTING JUDICIAL BRANCH POLICIES AND PROCEDURES**

This Manual supersedes the following chapters of the *Trial Court Financial Policies and Procedures Manual* (TCFPPM) that would otherwise apply to the superior courts:

- FIN 6.01, Procurement;

- FIN 7.01, Contracts;<sup>7</sup>
- FIN 7.02, Memorandums of Understanding (MOUs), Interagency Agreements (IAs) and Intra-branch Agreements (IBAs); and
- FIN 7.03, Contract Administration.

The other requirements of the TCFPPM, however, including, but not limited to, those relating to invoice processing and expense reimbursement, are not superseded by this Manual. JBEs will continue to be responsible for maintaining fiscal and operational accountability by following established procedures and policies, including, for trial courts, those set out in the TCFPPM.

In addition, this Manual supersedes (a) the AOC “Policy Regarding Legal Review of Procurement Matters,” and (b) the AOC policy “7.2.1, Procurement of Goods and Services,” for all procurement and contracting purposes *except* as those policies apply to planning, design, construction, rehabilitation, renovation, replacement, lease, or acquisition of trial court facilities.

Finally, this Manual supersedes the *Court Facilities Contracting Policies and Procedures*, adopted by the Judicial Council on December 7, 2007, for all facilities-related procurement and contracting purposes *except* for planning, design, construction, rehabilitation, renovation, replacement, lease, or acquisition of trial court facilities.

## County and other Local Agency Procurement Policies

PCC 19204 requires JBEs to comply with the provisions of the JBCL. This requirement supersedes any county or other local agency policies and procedures that a JBE may have followed prior to October 1, 2011.

### ~~6.7.~~ **ACCESS TO THE JUDICIAL BRANCH CONTRACTING MANUAL**

This Manual is available on the Internet at [www.courts.ca.gov/7465.htm](http://www.courts.ca.gov/7465.htm).

### ~~7.8.~~ **USE OF WORDS SIGNIFYING REQUIREMENTS OR DISCRETION**

Words used in this Manual to signify requirements or discretion have the meaning and intent specified in the table below.

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<sup>7</sup>Chapters FIN 6.01 and FIN 7.01 of the TCFPPM are not superseded for the planning, design, construction, rehabilitation, renovation, replacement, lease, or acquisition of trial court facilities.

Use of Words Signifying Requirements or Discretion			
Words→	Words signifying a mandatory duty or prohibition are:  “must,” “shall,” “mandatory,” “required,” “must not,” and “may not”	Words signifying reasonable discretion: “should” and “should not”	Words signifying full discretion: “may” and “encouraged”
When used→	To reflect obligations or prohibitions under state or federal law (e.g., statutes, rules, regulations, case law) or under mandatory policies, standards, or other authority	To urge use of favored but not mandated business or accounting practices	To provide guidance
Compliance→	Mandatory unless there is an applicable exemption	Not mandatory, but favored unless there is a good business reason for variance	Optional
<u>Documentation</u> Documenting Noncompliance→	Documentation of <u>noncompliance</u> required	<del>Include justification for</del> <u>Documentation of variance</u> in <u>recommended for the appropriate file</u> <sup>8</sup>	None required

<sup>8</sup> If specific to a particular procurement, the procurement file is the appropriate file. If the variation affects many procurements, the JBE may note the variation and include reasons in its Local Contracting Manual.

## 9. UPDATES TO THIS MANUAL

This Manual is not meant to be static and should change as processes and procedures better tailored for judicial branch operations are developed or recognized. It is anticipated that this Manual will be reviewed periodically and updated as necessary to ensure effective and efficient contracting and procurement policies across the judicial branch.

~~IF AND TO THE EXTENT A PROVISION OF THIS MANUAL EXPRESSLY AUTHORIZES A JBE TO WAIVE A MANDATORY DUTY, THE ACTUAL WAIVER MUST BE NECESSARY OR APPROPRIATE, IN THE BEST INTERESTS OF THE JBE AND THE PUBLIC, AND, IN THE OPINION OF THE JBE'S LEGAL COUNSEL, CONSISTENT WITH APPLICABLE LAW.<sup>9</sup> ANY OTHER WAIVER IS VOID. DOCUMENTATION OF WAIVERS MUST BE KEPT ON FILE IN ACCORDANCE WITH THE RECORDS RETENTION REQUIREMENTS SET FORTH IN CHAPTER 11, SECTION 11.5 OF THIS MANUAL.<sup>10</sup>~~

### ~~INTERPRETATION OF THE MANUAL~~

~~THE AOC/OGC IS AVAILABLE TO ASSIST JBES IN ANSWERING QUESTIONS OR PROVIDING CLARIFICATION REGARDING THIS MANUAL.~~

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<sup>9</sup> Trial courts may arrange for legal review by their in-house legal staff or retained counsel, or through AOC/OGC. Other JBES should arrange for legal review through AOC/OGC.

<sup>10</sup> FIN 12.01, *Record Retention*, of the *Trial Court Financial Policies and Procedures Manual* addresses the period of time that trial court contract records are retained.



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 1  
Page 1 of 12

## **PURCHASING AUTHORITY**

### CHAPTER 1

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## INTRODUCTION

This chapter identifies the sources of purchasing authority of Judicial Branch Entities (JBEs). This chapter also describes the roles of JBE personnel involved in the purchasing process, discusses ethical considerations, and provides guidance for developing a Local Contracting Manual.

## DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

## 1.1 PURCHASING AUTHORITY OF JUDICIAL BRANCH ENTITIES

### A. Purchasing Authority Basics

Each JBE possesses its own authority to purchase goods and services (both IT and non-IT). The source of that purchasing authority is specified in the table below:

JBE	Source of Purchasing Authority
Supreme Court	Article VI, section 2 of the California Constitution. See also Government Code (GC) 68803 and 68807.
Courts of Appeal	Article VI, section 3 of the California Constitution. See also GC 69141. Pursuant to CRC <del>rule</del> -10.1004(c)(6), this authority is vested in the Administrative Presiding Justice, who may in turn delegate this authority to the clerk/administrator pursuant to CRC <del>rule</del> -10.1020(c).
Superior Courts	Article VI, section 4 of the California Constitution. Pursuant to CRC <del>rule</del> -10.603(c)(6)(D), this authority is vested in the Presiding Judge, who may in turn delegate this authority to the Court Executive Officer.

JBE	Source of Purchasing Authority
Habeas Corpus Resource Center (HCRC)	Pursuant to GC 68664(a), responsibility for the HCRC’s “day-to-day operations” is assigned to the Executive Director.
Judicial Council	Article VI, section 6 of the California Constitution. See also GC 68506.
AOC	Article VI, section 6 of the California Constitution, as delegated by the Judicial Council. See also GC 68506. Pursuant to CRC rule 10.80(d), the Administrative Director of the Courts is responsible for allocating the financial and other resources of the AOC.

JBEs must ensure that any delegation of purchasing authority is properly documented.

## B. Scope of Authority

### 1. Limitations on Purchasing Authority

Most facilities-related expenditures are outside the scope of purchasing authority for appellate and ~~trial~~-superior courts.

~~Under GC 69204 and GC 70391, T~~he Judicial Council is responsible for the construction, acquisition, and operation of appellate court facilities (GC 69204(b)) and trial-superior court facilities (GC 70391(b)). In addition to any responsibilities delegated by the Judicial Council, GC 69206 and 70392 assign certain court facilities-related responsibilities to the AOC.

Under GC 70392(~~de~~), however, the AOC is authorized to delegate its responsibilities for ongoing operation and management to a court for some or all of the existing court facilities used by that court.

### 2. Authority to Enter into Intergovernmental Contracts (IGCs)

JBEs may enter into intra-branch agreements (IBAs) with other JBEs for goods or services, including IT goods and services. JBEs may enter into interagency

~~agreements (IAs) or~~ memoranda of understanding (MOUs) with ~~executive branch entities or~~ other governmental entities for goods or services, including IT goods and services.

**Note:** The terms “IBA” ~~“IA,”~~ and “MOU” are used to refer to types of Intergovernmental Contracts (IGCs), not to limit a JBE’s ability to enter into IGCs. JBEs may enter into IGCs even if the agreements are labeled or named something other than IBA, ~~IA,~~ or MOU (see chapter 8 [of this Manual](#) for additional information regarding IGCs).

IGCs do not need to be competitively bid (~~but the JBE may opt to do so in its sole discretion~~). Other types of procurements are also exempt from certain competitive bidding requirements. These include emergency purchases, ~~most~~ purchases under \$5,000, and purchases made under certain Leveraged Procurement Agreements (for additional information regarding non-competitively bid procurements, see chapter 5 [of this Manual](#)).

## C. Purchasing Roles and Responsibilities

### 1. Roles and Responsibilities

The following table defines the roles and responsibilities of individuals involved in a JBE’s procurement activities. ~~There must be segregation of duties among the employees involved in the procurement process.~~ In some JBEs, especially smaller ~~trial superior~~ courts, one individual may perform several of these roles. ~~The same employee may initiate the requisition and receive the goods or services, although receipt by a second person strengthens internal controls. Different employees must be responsible for procurement activities and payment approval. However, JBEs should maintain sufficient separation of duties to reduce the risk of error or fraud in the JBE’s purchasing program.~~<sup>4</sup>

~~No one person should perform more than one of the four categories of procurement duties:~~

- ~~• Requisition request and contract/PO approval;~~
- ~~• Acknowledging and receiving goods and services;~~

<sup>4</sup> ~~The term “should” is used here in recognition of the fact that smaller JBEs may not have enough procurement (or other) personnel to separate the specified duties completely. JBEs should separate duties as much as possible, however, given their staffing constraints.~~

- ~~Authorizing or approving invoices; and~~
- ~~Preparing payments.~~

~~At a minimum, the person approving invoices and the person preparing payments must be different people~~

Assignment	Roles and Responsibilities
Procurement and Contracting Officer (PCO)	<ul style="list-style-type: none"> <li>• Is responsible for all procurement and contracting within the JBE</li> <li>• Ensures that all procurement and contracting activities within the JBE comply with applicable procurement laws</li> <li>• Provides the necessary resources to ensure that all staff are properly qualified and trained in all aspects of the procurement process</li> <li>• Oversees development of the Local Contracting Manual</li> </ul>
Buyer  <b>Note:</b> A JBE may elect not to designate a Buyer. If the JBE does not do so, then the Buyer role reverts to the PCO.	<ul style="list-style-type: none"> <li>• Performs day-to-day purchasing and contracting activities</li> <li>• Is knowledgeable about applicable procurement laws and best practices</li> <li>• Ensures that the needs of the JBE are met within applicable procurement laws</li> <li>• Maintains the procurement file and related documentation</li> </ul>
ADA Coordinator  <b>Note:</b> A JBE may elect not to designate an ADA Coordinator. If the JBE does not do so, then the ADA	<ul style="list-style-type: none"> <li>• Assists and responds to questions or concerns regarding procurement-related reasonable accommodation needs</li> </ul>

Assignment	Roles and Responsibilities
Coordinator role reverts to the PCO.	
DVBE Advocate  <b>Note:</b> A JBE may elect not to designate a DVBE Advocate. If the JBE does not do so, then the DVBE Advocate role reverts to the PCO.	<ul style="list-style-type: none"> <li>• Identifies potential DVBE prime contractors or subcontractors and potential contracting opportunities</li> <li>• Makes information regarding pending solicitations available to certified DVBE firms capable of meeting the JBE's business needs (MVC 999.12)</li> </ul>
Procurement-Card Coordinator  <b>Note:</b> A JBE may elect not to designate a Procurement-Card Coordinator. If the JBE does not do so, then the Procurement-Card Coordinator role reverts to the PCO.	<ul style="list-style-type: none"> <li>• Ensures compliance with relevant procurement card procedures and contract terms</li> <li>• Adds, deletes, and alters card restrictions/limits</li> <li>• Reviews billing reports to monitor payments and disputes</li> </ul>
Receiving Staff	<ul style="list-style-type: none"> <li>• Receives or acknowledges deliveries</li> <li>• Inspects goods</li> <li>• Completes required reports, as required by the Local Contracting Manual or another JBE policy</li> </ul>
Protest Hearing Officer  <b>Note:</b> If a protest hearing officer is not designated by a JBE, the Buyer's supervisor will act as the protest	<ul style="list-style-type: none"> <li>• Evaluates protests</li> <li>• Issues written determinations regarding protests</li> </ul>

Assignment	Roles and Responsibilities
hearing officer.	
Protest Appeals Officer <b>Note:</b> If a protest appeals officer is not designated by a JBE, the protest hearing officer’s supervisor will act as the protest appeals officer.	<ul style="list-style-type: none"> <li>Evaluates protest-related appeals</li> <li>Issues written determinations regarding appeals of protests</li> </ul>
Payment Officer	<ul style="list-style-type: none"> <li>Ensures timely payment of invoices</li> <li>Ensures that proper internal approvals have been secured before processing payment</li> </ul>

**2. Ethics**

*a. Ethics training*

JBEs should ensure that personnel involved in procurement activities receive ethics training, and they should regularly remind personnel of the importance of maintaining professional and ethical standards when conducting procurements.

~~All personnel involved in the procurement process should have the appropriate training, experience, level of responsibility, and accountability as necessary to ensure compliance with Applicable Procurement Laws.~~

*b. Ethics and Conflicts*

All personnel involved in the procurement process must adhere to and conduct business by maintaining high ethical standards.

All personnel involved in the procurement process must:

- Conduct themselves in a professional manner, refraining from mixing outside relationships with business, and not engaging in incompatible activities, conflicts of interest, or unethical behavior;
- Avoid wasteful and impractical purchasing practices;
- Not make any commitment or promise regarding the selection of a Bidder or award of a contract;
- Be aware that perceptions can override reality; and
- Involve the JBE's procurement and legal staff or, alternatively, the AOC Office of the General Counsel (OGC), when questions arise regarding acceptable or unacceptable behavior when dealing with Bidders or Vendors.

Other ethical issues include the following:

- Personnel involved in the procurement process must not make purchases of materials or services from any business entity in which they have a financial interest (see GC 1090 et seq.);
- Personnel involved in the procurement process are prohibited from using their position in state government to bestow any preferential benefit on anyone connected to them by family, business, or social relationship; and
- Even the appearance of questionable or unethical practices is detrimental to both the personnel involved and the judicial branch.

**Note:** -For restrictions on contracting with current and former JBE employees, see CRC ~~rules~~ 10.103 and 10.104.

### *c. Gifts and Gratuities*

This section discusses certain restrictions regarding the acceptance of gifts and gratuities. These restrictions are minimum requirements. JBEs may adopt more stringent restrictions in their Local Contracting Manuals.

Accepting gifts and gratuities: No person involved in the procurement process of a JBE may accept, directly or indirectly, any gift, loan of money or equipment, meal, lodging, transportation, entertainment, service, or any other favor of value from any person who is doing or seeking to do business of any kind with that JBE. Doing so could be construed as intent to influence JBE personnel in their official duties or as a reward for an official action performed by the JBE personnel. Favors must be declined.

Financial Interest in Contract: GC 1090 is applicable to members of Evaluation Teams, as they are responsible for evaluating Bids. GC 1090 requires that state officers and others not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Any person who is found to have willfully violated GC 1090 may be punished by a fine of not more than \$1,000 or by imprisonment in state prison, and will be forever disqualified from holding any office in this state.

Avoid making a gift of public funds: Article 16, section 6 of the California Constitution strictly prohibits any gift of public funds. To not be considered a gift of public funds, an expenditure must support the JBE's mission (function and purpose) and benefit the judicial branch.

Accepting free or loaner equipment from suppliers: JBEs should not accept an offer of goods or services without cost or obligation to the JBE that is made by a Prospective Bidder, Bidder, or Vendor. If a Buyer's decision is contrary to this best practice, the JBE should execute a contract to memorialize the agreement.

Before accepting any goods and services offered at no cost or obligation to the JBE, the JBE should consider the perception of the acceptance to other suppliers. How does the JBE remain fair and impartial if a decision is eventually made to solicit the goods or services?

~~**Note:** If a JBE elects to accept free goods or services, the contract should state that by accepting the goods or services at no cost, the JBE has no further obligations or hidden costs associated with acceptance.~~

## 1.2 LOCAL CONTRACTING MANUAL

This section provides broad guidance to JBE staff involved in developing their Local Contracting Manuals. This section is not intended to dictate the techniques that should be used, because the details of the process should suit the individual JBE, the stakeholders affected, and the JBE's business needs.

Statutory requirement: Please see the Introduction to this Manual for a discussion of the statutory requirement for Local Contracting Manuals.

Purpose: The purpose of a Local Contracting Manual is to familiarize JBE employees with the JBE’s specific purchasing and contracting practices. The Local Contracting Manual expands on and supplements this Manual.

Contents: The Local Contracting Manual must include:

- The JBE’s organizational structure; for example, who fills the roles identified in section 1.1.C.1; and
- Signature authorization listing (who can sign what ~~and when~~).

The signature authorization listing may take the form of a chart, such as the one below:

<u>Value of Purchase Order or Contract</u>	<u>Person(s) or Position(s) Authorized to Sign</u>
<u>Purchase orders and contracts up to \$5,000</u>	<u>[name or position]</u>
<u>Purchase orders and contracts up to \$100,000</u>	<u>[name or position]</u>
<u>Purchase orders and contracts above \$100,000</u>	<u>[name or position]</u>

The remaining contents of the Local Contracting Manual are determined by the individual JBE as necessary to describe its particular processes and personnel. The Local Contracting Manual must be consistent with all applicable law, as well as with this Manual. Each JBE may address topics such as:

- Normal lead times for different types of purchases;
- Required approvals, both internal and external;
- Certification of availability of funds; ~~and~~
- ~~Approval and payment of invoices;~~
- ~~Receiving; and~~
- Setting up and maintaining official procurement files.

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Other topics that may be addressed in the Local Contracting Manual are highlighted in the following chapters of this Manual.



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 2  
Page 1 of 21

## PROCUREMENT PLANNING

### CHAPTER 2

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## INTRODUCTION

This chapter describes the preliminary considerations and activities that help ensure the success of any procurement effort. These include determining the type of procurement (non-IT goods, non-IT services, or IT goods and services) and considering numerous other issues that arise in procurement planning.

## DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

## 2.1 FORMULATING THE PROCUREMENT APPROACH

There are several preliminary steps required to determine the approach to be taken in a particular procurement.

### A. Competitive or Non-Competitive Procurement

Most Judicial Branch Entity (JBE) procurements are competitive, and require the use of Solicitation Documents, advertising, and Bids. In certain circumstances, however, JBEs can procure non-IT goods, non-IT services, and IT goods and services without a competitive process. These types of procurements are:

- Purchases under \$5,000;
- Emergency purchases;
- Purchases from ~~a~~ governmental entities;
- Legal services;
- Certain Leveraged Procurement Agreements (LPAs);
- Purchases from a business entity operating a Community Rehabilitation Program (CRP); ~~and~~
- Licensing or proficiency testing examinations;
- Subvention and local assistance contracts; and
- Sole source.

For more information on these types of procurements, see chapter 5 [of this Manual](#). [For more information about determining the value of the procurement, see step 1 of chapter 4A, 4B, or 4C of this Manual](#). For more information on determining whether a purchase qualifies as an emergency purchase, see section F below.

## B. Classifying the Purchase

1. Benefits: Properly classifying a purchase enables the Buyer to conduct the procurement by correctly:

- Applying the appropriate laws, regulations, policies, and procedures to the specific purchase; and
- Completing external notices and reviews as applicable.

Improperly classifying a purchase may result in:

- Delaying a JBE's program or project;
- Waste of time and effort, ultimately wasting taxpayer money;
- Loss of funding; and
- Disputes, protests, or lawsuits.

2. Purchase classification: The first step in classifying a purchase is determining whether:

- The purchase involves goods or services; and
- The purchase is for IT or non-IT goods or services.

In most cases, a Buyer will be able to classify a purchase quite simply. If the purchase involves only the purchase of ~~food~~ladders, furniture, or office supplies, the purchase is a non-IT goods purchase. If the purchase involves only the purchase of legal services, the purchase is a non-IT services purchase. If the purchase involves only computer equipment and software, the purchase is an IT goods purchase. In other cases, a single purchase may involve the purchase of both goods and services, or both IT and non-IT goods and services. The sections below provide guidance to Buyers in classifying mixed purchases.

3. Classifying mixed purchases: Classifying a mixed purchase begins by determining the main value or the major objective of the entire purchase. The dollar value associated with the services provided and the dollar value of the goods being supplied are factors that should be considered.

What is the main value of the contract—the goods or the services?

- If the main value is the **goods**, the transaction should be treated as a goods purchase. In procurements of non-IT goods, however, if the value of

incidental non-IT services is \$5,000 or higher, the non-IT services must be procured separately unless an exemption is obtained. For more information on this topic, see chapter 4A [of this Manual](#).

- If the main value is the **services**, the transaction should be treated as a services purchase.

**Example:** A manager requests new furniture for an office. The Buyer needs to purchase the new furniture and acquire services necessary to position that furniture in the office. The main value is the furniture. The request should be treated as a goods purchase.

4. Non-IT vs. IT: Section 4819.2 of the *State Administrative Manual* (SAM) defines IT as “all computerized and auxiliary automated information handling, including systems design and analysis, conversion of data, computer programming, information storage and retrieval, voice, video, data communications, requisite systems controls, and simulation.”

**IT goods.** The following are examples of IT goods:

~~The following are examples of IT goods:~~

- Computers (desktop, notebook, tablet, workstation).
- Data storage (interfaces/controllers, drive arrays, hard drives [desktop, internal, portable, removable], tape backup, tape cartridges, CD/DVD, ~~s~~Storage area network [SAN], ~~N~~network ~~a~~Attached ~~s~~Storage [NAS], media ~~and~~ accessories).
- Memory products (RAM, ~~F~~flash, USB).
- Monitors ~~&~~ projectors (displays, touchscreens).
- Networking products
  - Cables;
  - Adapters;
  - Switches;
  - Routers;

- Hubs;
- Modems;
- Gateways;
- VoIP; and
- Standalone appliances.
- Power, cooling and racks
  - Batteries;
  - Uninterruptable pPower sSupplies;
  - Surge protectors; and
  - HVAC equipment (when related to IT equipment spaces).
- Printing dDevices
  - Laser;
  - Ink iJet;
  - All-in-one multi-function devices; and
  - Plotters.
  - Scanners
- Scanners
  - Barcode;
  - Document; and
  - Graphics.
- Servers
  - Standalone;

- Rack-mount;
- Blades; and
- Associated controllers and interfaces.
- Software (including antivirus, security, backup, business, productivity tools, database, development, education, reference, operating system and management, networking, virtual computing, and web-publishing).
- Special electronics (including automation and control systems, cellular/smartphone and accessories, eReaders, handheld devices and accessories).
- Computer Accessories (including video cards, imaging, keyboards and keypads, mice and trackballs).
- Audio equipment.
- ~~Central processing units (mainframes) and all related features and peripheral units, including processor storage, console devices, channel devices, etc.~~
- ~~Minicomputers, midrange computers, microcomputers and personal computers and all peripheral units associated with such computers~~
- ~~Special purpose systems:
 
  - ~~Magnetic ink character recognition~~
  - ~~Optical character recognition (OCR)~~
  - ~~Photo composition~~
  - ~~Typesetting and electronic bookkeeping~~~~
- ~~Communication devices used for transmission of data such as:
 
  - ~~Modems~~
  - ~~Data sets~~
  - ~~Multiplexors~~
  - ~~Concentrators~~
  - ~~Routers~~
  - ~~Switches~~
  - ~~Local area networks (LANs)~~
  - ~~Private branch exchanges~~~~
- ~~Network control equipment, or microwave or satellite communications systems~~
- ~~Input-output (peripheral) units (off-line or on-line) including:
 
  - ~~Terminal~~~~

- ~~\_\_\_\_\_ Card readers~~
- ~~\_\_\_\_\_ Optical character readers~~
- ~~\_\_\_\_\_ Magnetic tape units~~
- ~~\_\_\_\_\_ Mass storage devices~~
- ~~\_\_\_\_\_ Card punches~~
- ~~\_\_\_\_\_ Printers~~
- ~~\_\_\_\_\_ Computer output to microform (COM) converters~~
- ~~\_\_\_\_\_ Video display units~~
- ~~\_\_\_\_\_ Data entry devices~~
- ~~\_\_\_\_\_ Teletypes~~
- ~~\_\_\_\_\_ Teleprinters~~
- ~~\_\_\_\_\_ Plotters~~
- ~~\_\_\_\_\_ Scanners~~
- Any device used as a terminal to a computer and control units for these devices

The following consumable items are considered IT goods, but may also be acquired as non-IT goods:

- Documents (e.g., standards and procedures manuals, Vendor-supplied systems documentation and educational or training manuals);
- Equipment supplies (e.g., printer forms, disk packs, ~~floppy disks~~, magnetic tape and printer ribbons or cartridges);
- Furniture (IT-related, such as desktop station tables and printer stands);

The following consumable items are IT goods:

- PC keyboards;
- Mice;
- Zip drives;
- Memory cards;
- Personal digital assistants (PDA);
- Software;
- Scanners.

**IT services.** IT services are those services where information technology knowledge or skills are of primary importance, such as:

- Hardware, software, or system maintenance services; and

- IT consulting services (services of an advisory nature that provide a recommended course of action or personal expertise).

**Example:**—Independent verification and validation (IVV) consulting services or independent project oversight (IPO) consulting services are considered IT services because they provide oversight and validation on large IT integration projects, and are acquired as IT services.

**Example:** A JBE buys 10 personal computer keyboards for replacement stock to issue when existing keyboards fail. A personal computer processes data electronically and the keyboard is a critical component to the operation of the computer. The keyboards are considered IT goods and the purchase is an IT-goods procurement.

**Example:** A JBE purchases a vehicle for business use. The vehicle has been fitted with an electronic mapping system, which is an IT good. The features of the mapping system are secondary to the purpose of the vehicle, which is a means of transportation and a non-IT good. Consequently, the purchase is a non-IT goods procurement.

5. Need help in classifying purchases? Courts needing assistance in determining the classification of a purchase after reviewing the available resources (i.e., this Manual, the Local Contracting Manual) should contact the AOC Business Services Unit or the AOC Trial Court Administrative Services Division.

### C. Initial Review

Start planning early:—Planning the purchase should begin at the earliest practicable time. The amount of time necessary for the planning process is dependent on the dollar value, risk, complexity, and criticality of the proposed purchase.

Initial Buyer review:—The Buyer's first step in the planning and scheduling of a procurement effort is the initial review of a purchase request. Reviewing the request in terms of the following information will assist the Buyer in determining any impact to the procurement planning and scheduling activities.

1. Internal review and approvals: Consider the following:

- Have the proper approval signatures been obtained to conduct the procurement in conformance with the JBE's Local Contracting Manual?
- Is the request in compliance with applicable equipment standards?

- Is there documentation in sufficient detail to support and justify conducting the procurement?
- Are there any program schedule requirements, special delivery instructions, time constraints, etc.?

2. Funding authority: Is the procurement scheduling and planning effort limited by:

- Federal funding limitations and/or restrictions?
- Availability of current and future year funding?
- Timing constraints impacted by availability of fiscal year funding?

3. External notices and reviews: Are any external notices or reviews required (refer to section 2.2 of this chapter for additional details)?

4. ~~Seeking legal participation: Buyers should seek JBE legal participation as necessary to manage risk. ~~JBEs should consider adopting a policy stating when legal participation is required in procurement efforts. This policy, if adopted, should be included in the Local Contracting Manual.~~~~

~~Purchasing activities that benefit from legal participation may include but are not limited to the following:~~

~~Purchases of a type that has a history of litigation;  
IT warranty issues; and  
Conflict of interest issues.~~

~~See chapter 8, section 8.43.B of this Manual for more information on legal approval and review.~~

5. Narrowing procurement alternatives: To assist in determining the procurement approach that best meets the JBE's needs, Buyers should ask the following questions:

- Can other requests for similar goods or services be consolidated into a single purchase to maximize purchasing power?
- What available purchasing approach can effectively meet the JBE's needs at the least cost in terms of time and resources?

- Can the functional requirements of the request be met through an LPA ~~(e.g., CMAS)?~~
- Is there a known supplier market and can the acquisition best be met through open competition?
- What risk factors are inherent to the purchase and what steps can be taken in advance to mitigate them?

#### D. Other Considerations Affecting the Planning Process

1. Requests for reasonable accommodation purchases: A purchase made in response to a request for reasonable accommodation of a disability is not exempt from applicable procurement laws. However, when conducting a procurement to fulfill a reasonable accommodation request, Buyers should be mindful of the need to expedite the purchase. All reasonable accommodation requests should be coordinated with the JBE's human resources department or other department with responsibility for addressing disability accommodation requests.

2. Leasing equipment: ~~Leasing may be used, for example, when a JBE lacks sufficient funds for a purchase, when the JBE has insufficient data to project future needs, or when the relevant technology is evolving rapidly and the JBE does not want to purchase equipment that may soon be obsolete or outdated.~~

Prior to initiating an equipment lease, a JBE ~~must~~ should consider whether leasing or purchasing equipment is the more economical option. JBEs may consult SAM section 3700 et seq. for more information on comparison methods and other issues to be considered. ~~complete a "lease versus purchase analysis" as described in appendix A. Lease versus purchase analysis documentation should be retained within the procurement file.~~

3. Shipping charges: JBEs conducting competitive solicitations should determine shipping terms during the procurement-planning phase. Shipping costs must ~~should~~ be addressed in the Solicitation Document. The preferred shipping method is "Free on Board" (FOB) Destination Freight Prepaid (FRT.-PPD) where the Vendor is responsible for freight charges and costs and owns the goods while in transit.<sup>1</sup>

4. Term purchases: ~~JBEs may establish term purchase contracts through a competitive bid process.~~

<sup>1</sup> An important reason for the preferred shipping method is to avoid the risk of loss in transit.

A term purchase establishes a purchasing mechanism for:

- A specified period of time;
- A specified list of products and quantities; and
- Items a JBE acquires on a routine basis, such as office supplies.

When conducting a competitive solicitation for a term purchase:

- A competitive bid procurement should be conducted whenever the dollar amount of the term purchase is \$5,000 or greater;
- The solicitation should identify contract start and end dates;
- The solicitation should state the aggregate amount of the contract; and
- The solicitation should state a maximum number of units that may be purchased.

**Example:** 10 units will be purchased on award, and the JBE reserves the right to purchase up to 10 more units during the contract term.

**Note:** Evaluation and award are based on the total quantities per line item to be purchased during the contract term. Using the above example, the Bid would be evaluated and the contract awarded on the assumption that all 20 units will be purchased.

- ~~The solicitation should clearly state the delivery terms over the course of the contract term;~~
- The solicitation should clearly define whether pricing is firm over the course of the contract or if allowances will be made for price increases or decreases; and
- The JBE should keep a running total of orders placed against each term purchase contract in the procurement file.

5. Purchases from Community Rehabilitation Programs (CRPs): JBEs may consider purchasing products and services from rehabilitative or sheltered workshops pursuant to Welfare and Institutions Code section 19403. JBEs may purchase non-IT goods, non-IT services, and IT goods and services of any value from a business entity operating a CRP without conducting a competitive procurement, provided that the goods or services meet the specifications and needs of the JBE and are purchased at a fair market price as determined by the JBE.

**Note:** ~~The JBE should document in its procurement file that the price offered by a CRP is fair and reasonable. The JBE should document its procurement file to support that the price offered by a CRP is fair and reasonable.~~

The California Alliance of Rehabilitation Industries (CARI) provides a statewide network of community rehabilitation programs to assist state entities in meeting their needs. Contact CARI at ~~(916)-~~441-5844 for additional information.

6. Socioeconomic Programs: JBEs should consider the socioeconomic and environmental program requirements set forth in chapter 3 of this Manual when planning procurements.

## E. Statement of Work (SOW)

1. Determining the need for an SOW: A JBE should include an SOW for all services transactions and all goods transactions that involve a services component. An SOW protects the JBE and the Vendor by identifying and documenting the details of the work to be performed.

2. What to include in an SOW: ~~A SOW is unique to each transaction, but usually consists of some or all of the following:~~

~~**For services** (including consulting services):~~

~~A clear, precise description of the work to be performed, services to be provided, problem to be solved, questions to be answered, issues to be addressed, or the goals and objectives to be met;~~

~~An explanation of the desired approach to the problem, if any;~~

~~A description of any specific functions, tasks, or activities to be performed, in their order of importance and probable sequence, if applicable;~~

~~Performance timelines or completion dates;~~

~~Required quality control standards to be met, if applicable;~~

~~A description of any required deliverable (such as progress reports or a final report summarizing a consultant's findings);~~

~~A description of the assistance or materials to be provided by the JBE, if applicable;~~

~~Practical and policy information, technological requirements or specifications, and legal limitations, if applicable;~~

~~The job classification or approximate skill level of the personnel to be made available by the Vendor;~~

~~The name or identification of the Vendor personnel to be assigned; and~~

~~The Vendor's work hours required to accomplish the purpose, objective, or goals.~~

**For goods:**

~~Specifications for goods; and~~

~~Description of when, where, and how goods are to be delivered.~~

~~For information on what to include in an SOW, see chapter 8.3.BA.1 of this Manual.~~

## F. Emergency Purchases

Emergency purchases are exempt from certain competitive bidding requirements. This section will help Buyers identify valid emergency purchases. If the Buyer determines that a purchase should be an emergency purchase, refer to chapter 5 of this Manual.

~~An emergency purchase is appropriate when immediate acquisition is necessary for the protection of the public health, welfare, or safety, as defined by PGC 1102 as "a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services."~~

**Example of emergency:** A courthouse is flooded and staff must make an immediate purchase of supplies to clean up the water.

**Example of a nonemergency:** A JBE wants to purchase used copy machines for office use at a total cost of \$12,000. The purchase saves the JBE an estimated \$6,000 when prices are compared to new copy machine prices. Although it may be in the JBE's best interest to purchase the used equipment, ~~it does not meet the definition of an "emergency."~~ The opportunity to get a good deal does not constitute an emergency.

## G. ~~Negotiations~~ Process

~~A JBE may negotiate with Bidders either before or after award of a contract to ensure that the JBE receives the most favorable terms possible. Generally, a JBE will have more negotiating leverage prior to the award of a contract.~~

~~**Example:** A JBE wishes to avoid awarding a contract to a Bidder that transfers substantial risk to the JBE through the contract. Therefore, the JBE wishes to finalize the contract with the Bidder before award while the JBE has both (i) negotiating leverage with the leading Bidder and (ii) an opportunity to negotiate exceptions taken by~~

lower-ranked bidders before the final score and ranking are determined. The JBE states in the RFP that the JBE may clarify or negotiate contract terms and conditions with one or more of the Bidders based on the Bidders' preliminary rankings following initial scoring of their Bids. When Bids are scored, the Evaluation Team notes that the Bid with the highest score includes exceptions to the JBE's contract terms and conditions. The Evaluation Team wishes, therefore, (i) to seek clarification from or negotiate with the leading Bidder on contract terms and conditions before making the award, or (ii) if scores are close enough that changes to exceptions to contract terms and conditions may affect ranking, to seek clarification from or negotiate with the leading Bidder and one or more of the other Bidders with the highest preliminary scores. Final scores and ranking will reflect the negotiated terms and conditions, and, if the final rankings change which Bidder is highest-ranked, the formerly leading Bidder will not be awarded the contract.

~~During the procurement planning phase for goods and services of any type, a JBE should consider whether a negotiation process is appropriate. If so, the JBE must add language to its Solicitation Document indicating the JBE's intent to utilize a negotiation process.~~

~~When to use a negotiation process: The JBE may initiate negotiations if it determines one or more of the following conditions exist:~~

- ~~1. The business need or purpose of a procurement can be further defined as a result of a negotiation process.~~

~~**Example:** A JBE has identified a general need for a new technology; however, market research indicates the technology may have multiple, unanticipated, secondary benefits. The JBE would be able to further define its business needs for the technology by conducting direct negotiations with Prospective Bidders that are subject matter experts in the new technology.~~

- ~~2. The business need or purpose of a procurement is known, but a negotiation process may identify different types of solutions to fulfill the business need or purpose.~~

~~**Example:** A JBE has identified specific business problems and technical requirements, but a negotiation process with Prospective Bidders may produce multiple potential solutions using goods, services, or a combination of both.~~

- ~~3. The complexity of the purpose or need suggests a Prospective Bidder's costs to prepare and develop a Bid are likely to be extremely high.~~

~~**Example:** A JBE has a need for a complex procurement and has ascertained through market research that the cost for Prospective Bidders to develop a Bid is extremely high and may limit the number of bidders willing to participate.~~

- ~~4. The business need or purpose of a procurement is known, but negotiation is necessary to ensure the JBE is receiving the best value or the most cost-effective goods, services, information technology, or telecommunications.~~

~~**Example:** A JBE needs to conduct a procurement for a telecommunications system; however, market research has shown the technology within the industry is changing so rapidly that a traditional procurement method will not yield the best value to the JBE.~~

~~Considerations, guidelines, and procedures for negotiation: When a JBE uses a negotiation process, the following considerations, guidelines, and procedures are applicable:~~

- ~~1. Each Solicitation Document must set forth in detail the evaluation methodology and criteria to be applied to that particular solicitation. The evaluation methodology will be specific to the type of procurement being conducted (i.e., goods, services, information technology).~~
- ~~2. An Evaluation Team will evaluate all Bids according to the methodology specified in the Solicitation Document and consider all award evaluation criteria, which may include administrative and technical requirements, as well as price.~~
- ~~3. The JBE may elect to proceed with negotiations if one or more conditions identified above (in “When to use a negotiation process”) exists. In some instances, the condition supporting negotiations may be known to the JBE prior to issuing a solicitation. In some instances, the condition supporting negotiations may not be known to the JBE until after a solicitation commences.~~
- ~~4. If the JBE elects to proceed with negotiations, a negotiation team must be convened. The negotiation team may be the same team as the Evaluation Team on any individual procurement or may be limited to legal counsel, the PCO, the Buyer, or another authorized person or persons.~~

~~5. Once convened, the negotiation team must confirm the purpose and scope of the negotiations and the identity of the Bidders to be invited to participate in the negotiation process.~~

~~6. The JBE must identify the Bidders that will participate in the negotiations in one of the following ways:~~

- ~~• The JBE may identify in the Solicitation Document the methodology that will be used to identify Bidders to participate in negotiations. This may include, but is not necessarily limited to, a methodology that establishes a competitive range based on Bidders' preliminary rankings following initial Bid evaluations;~~
- ~~• The JBE may identify in an addendum to the Solicitation Document the methodology that will be used to identify Bidders to participate in negotiations;~~
- ~~• The JBE may negotiate with all responsive responsible Bidders following Bid evaluations.~~

~~— **Example:** A JBE wishes to avoid awarding a contract to a bidder that transfers substantial risk to the JBE through the contract. Therefore, the JBE wishes to finalize the contract with the Bidder before award while the JBE has both negotiating leverage with the leading Bidder and still has an opportunity to negotiate exceptions taken by lower-ranked bidders before the final score and ranking are determined. The JBE states in the Solicitation Document that the JBE may clarify or negotiate contract terms and conditions with one or more of the Bidders based on the Bidders' preliminary rankings following initial scoring of their Bids. When Bids do come in and are scored, the evaluation team notes that the Bid with the highest score includes material exceptions to the JBE's contract terms and conditions. The evaluation team wishes, therefore, (i) to seek clarification from or negotiate with the leading Bidder on contract terms and conditions before making the award, or (ii) if scores are close enough that changes to exceptions to contract terms and conditions may affect ranking, to seek clarification from or negotiate with the leading Bidder and one or more of the other Bidders with the highest preliminary scores. Final scores and ranking will reflect the negotiated terms and conditions, and, if the final rankings change which Bidder is highest-ranked, the formerly leading Bidder will not be awarded the contract.~~

~~7. JBEs must notify Bidders in writing:~~

- ~~• That the JBE is initiating a negotiation process;~~

- ~~• Of the general purpose and scope of the negotiations;~~
- ~~• Of the anticipated schedule for the negotiations; and~~
- ~~• Of the procedures to be followed for those negotiations.~~

~~This information may be provided in a single document or separate documents.~~

- ~~8. If needed, the JBE may issue additional information and/or instructions to Bidders participating in negotiations.~~
- ~~9. As part of the negotiation process, participating Bidders may be asked to submit supplemental Bids. Any request for supplemental Bids must be directed in writing to all Bidders participating in the negotiations, and must provide details concerning the format and due date for the supplemental Bids.~~
- ~~10. The negotiation team must decide how the negotiations will be completed:~~
  - ~~• In a single round, or in several rounds; and~~
  - ~~• Orally or in writing.~~

~~Oral negotiations may be held in person, by conference call, or by use of video or web conferencing.~~
- ~~11. The Buyer must maintain a written record describing the procedural steps taken in the negotiation process and the basis for final contract award.~~
- ~~12. The JBE may terminate negotiations and/or the solicitation at any time.~~

## 2.2 EXTERNAL NOTICES AND REVIEWS

Depending on the type and size of a procurement, the JBE may be required to provide notice or allow review of a transaction. Details of the different notices and reviews are set forth below.

### A. CRC 10.620

CRC 10.620 requires a trial court to provide public notice of:

- Any solicitation of non-IT goods, non-IT services, or IT goods and services that exceeds the greater of \$400,000 or 10 percent of the total trial court budget; and

- The execution of a contract that exceeds the greater of \$400,000 or 10 percent of the total trial court budget.

For detailed requirements regarding this notice, see CRC 10.620.

## B. Information Technology (IT) Procurements over \$5 Million

### California Technology Agency (CTA) Review

All administrative and infrastructure information technology projects of the Judicial Council or the courts with total costs estimated at more than \$5 million are subject to the review and recommendations of the California Technology AgencyCTA, as specified in GC 68511.9.<sup>2</sup>

## C. Other Procurements over \$1 Million

Bureau of State Audits (BSA) ReviewIf the total cost of ~~the a~~ purchase is estimated at more than \$1 million, the Buyer must notify the Bureau of State Audits (BSA) in writing of the existence of such contract, as specified in PCC 19204(a). The JBE must make this notification within 10 days of execution of the contract. BSA may review the contract to ensure compliance with the California Judicial Branch Contract Law.

**Note:** This requirement does not apply to contracts covered by GC 68511.9 (i.e., Judicial Council or court contracts for administrative and infrastructure IT projects over \$5 million) discussed in section 2.2.B above.

## 2.3 CREATING THE PROCUREMENT FILE

The Buyer should create a procurement file for each transaction. This section provides guidance on what should be included in the procurement file. Please note that the following list is not exhaustive. A JBE may adopt policies respecting the creation and contents of procurement files in its Local Contracting Manual.

Documenting the decisions: Buyers should develop a strategy of how the procurement activity will be accomplished, and document the rationale for developing that strategy. In simple terms, Buyers should maintain a diary of the events and decisions that lead up to and complete the purchase transaction, providing a timeline and history of the actions and decisions made throughout the procurement process.

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<sup>2</sup> Note that GC 68511.9 refers to the Office of the Chief Information Officer (OCIO). However, the OCIO has been renamed the California Technology Agency in accordance with Chapter 404, Statutes of 2010 (AB 2408).

Provide the basis of the decisions: Buyers should also describe how competition will be sought, promoted, and sustained throughout the course of the purchasing activity. If open competition is not the method of choice, document the basis of the decision.

Degree of detail: The degree of documentation detail is determined by the cost, risk, complexity, and criticality of the purchasing activity.

Take notes: Buyers should make notations of meetings held and decisions made, and create a phone log to record phone conversations impacting the procurement effort. Consistent, high quality file documentation helps the transaction be easily understood by a reader who is unfamiliar with it and makes documents easy to locate. It will also assist the JBE during audits by the BSA.

Public record: Buyers should create and maintain their procurement records-files keeping in mind that most procurement records are subject to disclosure under CRC 10.500. ~~Consequently, avoid typos, scratch-outs, and personal notations not relevant to the procurement.~~

**~~APPENDIX A~~**  
**~~LEASE VERSUS PURCHASE ANALYSIS~~**

~~[To be developed, based on SAM 3700 et seq.]~~



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 3  
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## **SOCIOECONOMIC AND ENVIRONMENTAL PROGRAMS**

### **CHAPTER 3**

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## INTRODUCTION

This chapter describes socioeconomic and environmental programs and considerations that affect procurement activities of Judicial Branch Entities (JBEs). The first and most extensively discussed is the California Disabled Veterans Business Enterprise (DVBE) program that is intended to increase business opportunities for disabled veteran businesses. Next, is a brief discussion of pertinent requirements of the Americans with Disabilities Act ([ADA](#)) to familiarize JBEs with the importance of making all procurement activities available to all persons, including persons with disabilities. Finally, this chapter discusses the requirements of California's State Agency Buy Recycled Campaign (SABRC) program that promote the purchase of products that are energy efficient and have other preferable environmental attributes.

## DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

### 3.1 CALIFORNIA DISABLED VETERANS BUSINESS ENTERPRISE (DVBE) PROGRAM

#### A. Purpose

The Legislature established the DVBE program to address the special needs of disabled veterans seeking rehabilitation and training through entrepreneurship and to recognize the sacrifices of Californians disabled during military service. In doing so, the Legislature stated its intent "that every state procurement authority honor California's disabled veterans by taking all practical actions necessary to meet or exceed the Disabled Veterans Business Enterprise participation goals of a minimum of 3 percent of total contract value" (MVC 999(a)).

These goals apply to the total contract value expended each year by each JBE.<sup>1</sup>

**Example:** A JBE annually expends \$10 million in contracts to purchase goods and services. Its DVBE participation goal would be not less than \$300,000—3 percent of \$10 million—that would go to certified DVBEs that are contractors, subcontractors, or

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<sup>1</sup> Total contract value should not include the value of contracts with state entities (such as counties) that are mandated by law.

suppliers to perform a “commercially useful function” (see section 3.1.G.2) in specific procurements.

DVBE incentive: To implement the DVBE program JBEs must grant Bidders that provide DVBE participation a DVBE incentive (MVC 999.5(a)). A DVBE incentive is a prescribed percentage reduction in the DVBE Bidder’s Bid price where the JBE is selecting a Bidder using the “lowest responsible Bidder” methodology or the addition of a prescribed number of points to the DVBE Bidder’s Bid score where the JBE is using the “highest scoring Bidder” approach.

## **B. Administration**

The MVC and PCC establish DGS as the administering agency for this program. In that role, DGS manages certification and decertification of companies as DVBEs. JBEs must use DGS certified entities or entities that have DGS-approved business utilization plans to meet their DVBE goals.

## **C. Outline of Principal Requirements for JBE Implementation of the DVBE Program**

The PCC and MVC have procedural and management requirements JBEs must fulfill. These include:

1. Adopting rules and procedures to implement the requirements of MVC 999 and the following and PCC 10115 et seq.;
2. Appointing a DVBE advocate;
3. Determining which contracts are subject to a DVBE incentive;
4. Utilizing available resources for implementation of the program; and
5. For those procurements that provide for a DVBE incentive:
  - Verifying Bidder status as a DVBE;
  - Verifying whether the certified DVBE is providing a “commercially useful function” as that term is defined below;
  - Not awarding any contract to a Bidder suspended for violating PCC 10115.10 for the period of the applicable suspension;
  - Not permitting a Vendor to utilize a subcontractor suspended for violating PCC 10115.10 for the period of the applicable suspension;
  - Notifying the Office of Small Business and Disabled Business Enterprise Services (OSDS) of alleged Vendor violations of PCC 10115.10; and

- Upon completion of the contract term, requiring each prime contractor with DVBE subcontractors to submit to the JBE certain certifications under MVC 999.5(d).

#### **D. Adoption of Rules and Procedures for a DVBE Program**

Each JBE must develop or adopt a set of rules and procedures for the implementation of a DVBE program. ~~Alternatively, the~~ DGS has established a system of rules and regulations for managing the DVBE program that includes forms that may be adopted and modified by JBEs that wish to establish their own program. The AOC Finance Division's Business Services Unit (BSU), with the assistance of the AOC Office of the General Counsel (AOC/OGC), will develop a program for use by the AOC that will be available for JBEs to adopt or use in developing their own rules and procedures. Additionally, the BSU and the AOC/OGC will be available to assist courts in establishing a program.

Rules and procedures for the following must be established:

- A method for monitoring adherence to DVBE goals;
- Use of existing state government resources to assist in implementing the DVBE program; and
- Incentive amounts and a formula for incentive calculation for procurements that are subject to DVBE incentives.

Solicitation Documents should be drafted to include reference to DVBE procedures and contracts must include appropriate DVBE provisions.

#### **E. Appointing a DVBE Advocate**

Each JBE must designate a DVBE advocate whose duties include, but are not limited to:

- Identifying potential DVBE prime contractors or subcontractors and potential contracting opportunities; and
- Making information regarding pending solicitations available to and considering offers from certified DVBE firms capable of meeting the JBE's business needs. (MVC 999.12)

#### **F. Waiver of a DVBE Incentive**

Although all competitive procurements are subject to the DVBE incentive, a JBE, through its Procurement and Contracting Officer (PCO) or designee (see chapter 1 of this Manual), has the discretion to waive inclusion of DVBE participation in an individual solicitation. Note, however, that the overall DVBE participation goal of 3 percent of annual total contract value still applies. The JBE's PCO or designee must document the procurement file whenever the DVBE requirement has been waived.

## G. General Requirements for DVBE Procurements

### 1. *Verifying Bidder Status as a DVBE*

Verifying certification status: For competitive solicitations that include the DVBE incentive, JBEs must verify California DVBE certification status before a contract award regardless of the procurement approach. Status can be verified by accessing the DVBE services certified firm inquiry database, search on California DGS or ([www.bidsync.com/DPXBisCASB](http://www.bidsync.com/DPXBisCASB)). If this database is used in support of DVBE certification, a printout can simply be placed in the procurement file.

Business utilization plan alternative: There is an additional method for a Bidder to qualify as a DVBE for contracts for non-IT goods and for IT goods and services. For those procurements, a JBE must accept from a Bidder a DVBE business utilization plan (plan) in lieu of DGS certification (PCC 10115.15(a)). The use of a plan does not extend to non-IT service contracts.

A plan is a Bidder's written commitment to contract with certified DVBEs for at least 3 percent of its business's total contract dollars expended in California during the next year (i.e., the year after the year in which the contract is awarded). This 3-percent commitment applies to all business done by the Bidder in California, not just contracts with the State of California. The DGS procurement division provides plan approval. A plan is considered approved by the DGS on the date of submission provided the plan meets requirements set forth in PCC 10115.15. However, the DGS may audit the plan and later disapprove it. To qualify as a DVBE by use of a plan, a Bidder must provide a written certification that it has submitted its plan to DGS when it submits its Bid to the JBE.

Broker/agent status: The benefits of DVBE status are intended to apply to DVBEs that are not "brokers" or "agents." MVC 999.2(b) defines those terms as follows:

- "Broker" or "agent" means any individual or entity, or combination thereof, that does not have title, possession, control, and risk of loss of materials, supplies,

services, or equipment provided to an awarding JBE, unless one or more certified disabled veterans has 50 percent ownership of the quantity and value of the materials, supplies, services, and of each piece of equipment provided under the contract.

- “Equipment broker” means any broker or agent who rents equipment, directly or indirectly, to an awarding JBE.

A DVBE that is a “broker” or “agent” must inform the JBE of its status at the time of submission of its Bid.

If a JBE contracts with a DVBE that is determined to be a broker or agent,<sup>2</sup> then:

- The DVBE broker or agent will not receive the benefit of its DVBE certification for the transaction, which means no DVBE incentive may be applied; and
- The JBE may not count the DVBE broker’s or agent’s participation in the contract towards the JBE’s annual DVBE participation goal.

## **2. Determining if a DVBE Performs a Commercially Useful Function**

Certified DVBE contractors, subcontractors, and suppliers that Bid on or seek to participate in a JBE contract must perform a commercially useful function to be eligible to participate as a DVBE in a specific procurement. The JBE is responsible for determining whether the contractor, subcontractor, or supplier will perform a commercially useful function before making a contract award to the DVBE.

A certified DVBE is deemed to perform a commercially useful function if the business does all of the following:

- Is responsible for the execution of a distinct element of the work of the contract;
- Carries out its obligation by actually performing, managing, or supervising the work involved;
- Performs work that is normal for its business services and functions; and
- Is not subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practices.

A contractor, subcontractor, or supplier will not be considered to perform a commercially useful function if its role is limited to that of an extra participant in a

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<sup>2</sup> The determination is made from the Bidder information supplied with its Bid (see preceding paragraph).

contract through which funds are passed to obtain the appearance of a DVBE participation.

### **3. Other Requirements**

Utilizing available resources in managing the DVBE program: JBEs must utilize existing resources such as the Department of Veterans Affairs and the DGS Office of Small Business and DVBE Services (OSDS) in implementing the DVBE program. (PCC 10115.4 and MVC 999.6)

Suspended Bidders and subcontractors: A JBE may not award any contract to a Bidder suspended for violating PCC 10115.10 for the period of the applicable suspension. (See PCC 10115.10(6)(c).) A JBE may not permit a Vendor to utilize a subcontractor suspended for violating PCC 10115.10 for the period of the applicable suspension. To access a DGS list of suspended Bidders, search on [www.dgs.ca.gov/pd/Programs/OSDS/firmviolations.aspx](http://www.dgs.ca.gov/pd/Programs/OSDS/firmviolations.aspx).

Contractor violations of PCC 10115.10: If a JBE suspects that a Vendor is in violation of PCC 10115.10, the JBE must notify OSDS. Violations include:

- Fraudulently obtaining or retaining certification as a DVBE, or aiding another to do so;
- Making a false statement to defraud a state official or employee to influence certification as a DVBE;
- Obstructing or impeding the investigation of qualifications of a business entity as a DVBE;
- Fraudulently obtaining, attempting to obtain, or helping another to obtain public monies to which there is no entitlement under the laws establishing the DVBE program; and
- Establishing or exercising control over a firm that has engaged in such activities. (See PCC 10115.10 for a complete list of violations and associated penalties.)

Contractor postcontract certification: Upon completion of an awarded contract that contains a commitment to achieve a DVBE goal, the JBE must require the prime contractor that entered into a subcontract with a DVBE to certify to the JBE:

- The total amount of money the prime contractor received under the contract;
- The name and address of the DVBE subcontractor that participated in the performance of the contract;

- The amount of money each DVBE subcontractor received from the prime contractor; and
- That all payments under the contract have been made to the DVBE subcontractor.

The JBE must keep this certification on file.

#### **4. Other Considerations**

Effect on Contracts of Failure to Meet DVBE Goals: Failure of a JBE to meet the goals established under MVC 999 et seq. and PCC 10115 et seq. does not affect the validity or enforceability of any contract (PCC 10115.6, MVC 999.8).

No Goals Reporting Requirement: There are no DVBE goals reporting requirements in either the PCC or MVC applicable to JBEs.<sup>3</sup>

### **3.2 AMERICANS WITH DISABILITIES ACT CONSIDERATIONS**

In compliance with the Americans with Disabilities Act (ADA) and similar California statutes, JBEs must make reasonable efforts to ensure that their programs, activities, and services are accessible to persons with disabilities. Contracting and procurement are activities covered by these laws.

JBEs must provide reasonable accommodation to persons with disabilities that enable them to participate in the procurement process. JBEs must also be prepared to respond to questions about reasonable accommodation by persons with disabilities. The term “reasonable accommodation” does not include actions that would fundamentally alter the nature of the procurement process or that would impose an undue financial or administrative burden upon a JBE.

JBEs should designate an individual (ADA Coordinator) who is available to respond to questions or concerns regarding reasonable accommodation of disabilities in the procurement process. Solicitation Documents should advise Prospective Bidders that the JBE complies with the ADA and similar California statutes and that requests for accommodation of disabilities should be directed to the ADA Coordinator.

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<sup>3</sup> MVC 999.7 and PCC 10115.5, which required state agencies to provide annual reports to the Governor and DGS with respect to meeting DVBE goals, were repealed effective January 1, 2007.

### 3.3 STATE AGENCY BUY RECYCLED CAMPAIGN (SABRC) PROGRAM

The SABRC is a joint effort between the California Department of Resources Recycling and Recovery (CalRecycle) and DGS to implement state law requiring state agencies and the Legislature to purchase recycled-content products (RCPs). It complements the efforts of the Integrated Waste Management Act (Public Resources Code, ~~section §~~ 4000 et seq.), which was enacted to reduce the amount of waste going to California's landfills.

#### A. Utilizing Recycled Content Products

PCC 12203 requires JBEs to ensure that at least 50 percent of reportable purchases are recycled products. This requirement applies to purchases in each of the targeted categories identified in PCC 12207, which includes categories covering paper products, office supplies, office products, and a wide range of other products. The required postconsumer recycled content varies by category (e.g., recycled paper products must consist of at least 30 percent postconsumer fiber).

**Example:** A JBE is purchasing \$20,000 worth of paper for its copy machines. At least \$10,000 of the paper must have 30 percent recycled content by weight. The other \$10,000 may be any mix of recycled or nonrecycled products. For additional information, search on CalRecycle or [www.calrecycle.ca.gov](http://www.calrecycle.ca.gov).

**Note:** CRC 10.503, adopted by the Judicial Council effective January 1, 1994, states: "All courts must use recycled paper for all purposes except for uses for which recycled paper is not practically available."

#### B. Recycled Preference and Competitive Solicitations

To the maximum extent economically feasible in performance of the contract work, each JBE must require Vendors to use recycled content products (PCC 12203(d)). Contact Resources Recycling and Recovery (CalRecycle) at 916-341-6199 or 916-341-6524 or [SABRC@CalRecycle.ca.gov](mailto:SABRC@CalRecycle.ca.gov) for information on qualifying SABRC reusable and recycled content products.

#### C. Supplier Certification

Unless otherwise waived as noted below, JBEs must require all Vendors to certify in writing, under penalty of perjury, the percentage of recycled content in the products, materials, goods, or supplies offered or sold to the JBE (PCC 12205). This requirement applies even if the product contains no recycled material. To access the Postconsumer-

Content Certification form (CIWMB 74), search on CalRecycle or [www.calrecycle.ca.gov/buyrecycled/stateagency/Forms/CIWMB74.doc](http://www.calrecycle.ca.gov/buyrecycled/stateagency/Forms/CIWMB74.doc).

This certification can be waived if the postconsumer recycled content can be verified by other written means such as product label, packaging, catalog, manufacturer/Vendor website, product advertisement. For additional information regarding the SABRC program, search on CalRecycle or [www.calrecycle.ca.gov/BuyRecycled/StateAgency/](http://www.calrecycle.ca.gov/BuyRecycled/StateAgency/).

#### **D. Printer Cartridges**

No JBE may purchase any printer or duplication cartridge for which the manufacturer, wholesaler, distributor, retailer, or remanufacturer places restrictions on the recycling or remanufacturing of that cartridge by any other person (PCC 12156). Each JBE must print a statement on the cover of its printer or duplicator cartridge ~~Solicitation Documents~~, or in some other noticeable place in the Solicitation Document, notifying Prospective Bidders that it is unlawful to prohibit a printer or duplication cartridge that is sold to the state from being recycled or remanufactured, except as specified in PCC 12156(b).



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 4  
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## COMPETITIVE SOLICITATION OVERVIEW

### CHAPTER 4

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## INTRODUCTION

This chapter discusses topics that arise in multiple types of competitive solicitations. Chapters 4A, 4B, and 4C [of this Manual](#) provide specific guidance for procurements of non-IT goods, non-IT services, and IT goods and services, respectively. To reduce repetition of similar information, each of those chapters refers to sections contained in this chapter.

## DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

## 4.1 THE BASICS OF COMPETITION

Competition is one of the basic tenets of procurement under the California Judicial Branch Contract Law. The type of competition will vary depending on the type of goods or services to be procured, as well as the value of the procurement.

### A. General Requirements

Judicial Branch Entities (JBEs) must conduct competitive procurements in a manner that promotes open, fair, and equal competition among Prospective Bidders. Generally speaking, a procurement must be competitive unless it falls into one of the categories covered in chapter 5 [of this Manual](#).

1. Supplier treatment: Buyers conducting competitive procurements must provide qualified Prospective Bidders with a fair opportunity to participate in the competitive solicitation process, stimulating competition in a manner conducive to sound fiscal practices without favoritism, fraud, or corruption.

### B. Developing Prospective Bidder Resources

1. Contact lists: JBEs should establish contact lists using a variety of means to identify Prospective Bidders. Resources available to JBEs to identify and/or establish contact lists include:

- Recommendations from customers;
- Local trade unions;
- Chambers of commerce;
- Industry listings;

- Leveraged Procurement Agreement (LPA) databases;
- Certified Disabled Veteran Business Enterprise (DVBE) databases;
- Internet searches; and
- Telephone directories.

2. Request for interest: JBEs may use a request for interest (RFI) to separate those Prospective Bidders that intend to participate in an upcoming solicitation from those that have no interest in participating. RFIs are typically used when there is an excessively large pool of Prospective Bidders.

The RFI establishes or supplements the contact list for Buyers to use when distributing a Solicitation Document. ~~Buyers should must provide a~~ copy of the Solicitation Document will be provided to all responding Prospective Bidders. The Buyer should retain the RFI and the contact list in the procurement file.

RFI components:—An RFI should:

- Be short, concise, and to the point;
- Include the solicitation number and title;
- Include a general description of the goods or services to be solicited;
- Include estimated quantities, features, general time frames, any pertinent geographic information, Buyer's name and telephone number, etc.;
- Not provide or ask for any cost information, as such information could create an unfair bidding environment;
- Provide space for Prospective Bidders to provide supply contact name, address, telephone number, and submittal date; and
- Include where and how to submit the response to the RFI.

Note: Nothing in this section limits a JBE's ability to use a "request for information." A request for information is used to gather information about goods or services available in the marketplace, what goods or services generally cost, or similar topics. A request for information is not used to separate those Prospective Bidders that intend to participate in an upcoming solicitation from those that have no interest in participating.

### C. Confidentiality

1. Period of confidentiality: During the solicitation development, information regarding the solicitation is confidential. This is to prevent any Prospective Bidder from obtaining an unfair advantage. See Chapter 4A, 4B, or 4C (as applicable) of this Manual regarding the confidentiality of Bids. Before the public opening of written Bids, any Bids

~~received must remain confidential. If a solicitation is conducted using an RFQ, Bids remain confidential until execution of a contract. Before the award of a contract using a RFQ, the Bids received must remain confidential.~~

Although a Bid may have pages marked “confidential” or “proprietary,” the Bid ~~may be is a record~~ subject to release in response to a CRC 10.500 request. See chapter 11 of this Manual for further discussion.

2. Confidentiality/conflict statements: In addition to the Buyer, other personnel may be involved in the solicitation development, evaluation, and selection process. The JBE may adopt a requirement in its Local Contracting Manual that these personnel sign confidentiality/conflict statements.

A confidentiality/conflict statement typically requires that the person signing:

- Certify that all information concerning the procurement will be kept confidential and secure;
- Certify that no information will be disclosed to any party who has not signed a confidentiality/conflict statement;
- Acknowledge that the information to be kept confidential includes, but is not limited to, specifications, administrative requirements, terms and conditions, and includes concepts and discussions as well as written or electronic materials;
- Acknowledge that if the person leaves the procurement project before it ends, all procurement information must still be kept confidential;
- Agree that any instructions relating to the confidentiality of procurement information will be followed;
- Acknowledge that any unauthorized disclosure may be a basis for civil or criminal penalties and/or disciplinary action;
- Agree to advise the Buyer immediately in the event the person either learns or has reason to believe that someone who has access to confidential procurement information has disclosed or intends to disclose that information in violation of a confidentiality/conflict statement;
- Certify that the person has no personal or financial interest and no present or past employment or activity that would be incompatible with participation in the procurement; and
- Agree that no gift, benefit, gratuity, or consideration will be accepted from any Prospective Bidder.

## D. Advertising

1. When advertising is required: JBEs are sometimes required to advertise solicitations. Even when a JBE is not required to advertise a solicitation the JBE may wish to do so to increase competition.

**Note:** A JBE does not need to advertise any non-competitively bid procurement. See chapter 5 [of this Manual](#) for more information [regarding non-competitively bid procurements](#).

The requirements for advertising depend on the type of procurement: non-IT goods, non-IT services, or IT goods and services. See the applicable section in chapters 4A, 4B, and 4C [of this Manual](#).

2. Types of advertising: A JBE may advertise a solicitation by:

- posting a notice on its own website;
- placing an advertisement in print media;
- submitting the procurement to the California State Contracts Register (CSCR), which may be accessed via DGS's [eProcurement system BidSync system](#);<sup>1</sup>
- posting a notice to another electronic bidding system; or
- other methods the Buyer determines are reasonably likely to reach Prospective Bidders.

3. Timing of advertising: Solicitation Documents should be released after or simultaneously with any required advertisement to ensure that Prospective Bidders learn about solicitations in a timely manner.

Solicitations should be advertised for at least 10 working days before the Bid Closing Time to ensure Prospective Bidders have enough time to generate Bids. For small value solicitations, however, the JBE may wish to consider a shorter advertising period. If a JBE adopts a shorter advertising period for small value solicitations, it should include details in its Local Contracting Manual.

**Note:** DGS's [BidSync eProcurement system](#), ~~or other electronic bidding systems~~, may require that an advertisement remain in the CSCR longer than 10 days. [Other electronic](#)

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<sup>1</sup> [DGS's eProcurement system currently uses BidSync technology. JBEs may be required to register with BidSync to use certain features of DGS's eProcurement system.](#)

bidding systems may have similar requirements. Buyers should confirm the advertisement end date if using these systems.

4. Record of advertisement: A copy of the published advertisement should be included in the procurement file.

5. Resolicitations: A JBE conducting a resolicitation does not need to readvertise the solicitation if:

- The resolicitation occurs within three months of the publication of the original advertisement;
- Notice of resolicitation is provided to Prospective Bidders that requested and/or were sent the original Solicitation Document; and
- There is no material change to the solicitation.

6. Contract advertising exemption: JBEs can be granted an exemption from advertising by the Approving Authority or delegee when there is a compelling reason to do so. An exemption may be warranted if, for example, only one Prospective Bidder can supply the required goods or services and advertising would not produce more Prospective Bidders.

7. Advertising in the ~~California State Contracts Register (CSCR)~~: The CSCR is a centralized listing of state procurements that DGS is required to publish by Government Code (GC) 14825. The CSCR currently takes the form of an online database, accessed through DGS's eProcurement ~~or BidSync~~ systems. Prospective Bidders are likely to see advertisements in the CSCR.

A JBE may submit an advertisement to the CSCR by using DGS Procurement Division's Internet web page ([www.pd.dgs.ca.gov](http://www.pd.dgs.ca.gov)), or by submitting Form STD 815 to DGS/Business Development Unit (~~contact Marc Anderson at (916) 375-4582 or [marc.anderson@dgs.ca.gov](mailto:marc.anderson@dgs.ca.gov)~~). DGS charges a fee for each advertisement that appears in the CSCR. There is an additional fee for advertisements that are not submitted electronically.

## E. Samples

The practice of obtaining samples from Prospective Bidders before contract award is not recommended. If sample goods are needed for review before award for demonstration or prepurchase testing, the Solicitation Document should:

- Explain that sample goods are required for demonstration or prepurchase testing;
- State that the JBE is not obligated for the cost of the sample goods or for their return; and
- Specify the quantities of the sample goods required.

Caution should be taken to ensure that a Bid does not contain terms or conditions that would result in the automatic purchase of the goods being tested.

## 4.2 SOLICITATION DOCUMENTS GENERALLY

The Solicitation Document sets forth the procurement process and includes the solicitation and contract requirements. It is the guiding document that ensures that Bidders are able to submit Responsive Bids and that the procurement is successful.

### A. Developing the Solicitation Document

Each Solicitation Document, regardless of format (Request for Quote (RFQ), Invitation for Bid (IFB), Request for Proposal (RFP)), should clearly state the needs or business requirements of the JBE in order for a Prospective Bidder to weigh associated risks and price the purchase.

1. Avoid writing restrictive requirements: JBEs should not include requirements in competitive-Solicitation Documents that restrict the bidding to a single Prospective Bidder. Buyers can avoid restrictive requirements by:

- Including only essential requirements;
- Avoiding restrictive, impractical, or nonessential requirements;
- Carefully checking delivery requirements to ensure that the turnaround time from a Bidder's receipt of order to delivery is not too restrictive or limiting;
- Defining requirements to promote and encourage Bidders to bid standard items or standard services where possible;
- Not specifying a particular brand name, product, or product feature that is peculiar to one manufacturer, except for reference purposes;
- Not dictating detailed design solutions prematurely; and
- Allowing sufficient time from the posting of the solicitation to the Bid Closing Time or first key action date to provide Prospective Bidders time to review and consider the requirements, prepare a Bid, and submit the Bid.

### B. Required Provisions

1. Bidder instructions: Each Solicitation Document should include instructions to Prospective Bidders detailing how to submit a Responsive Bid. A JBE may adopt a standard set of bidder instructions for use in its solicitations. If adopted, the standard set of bidder instructions should be included in the JBE's Local Contracting Manual.

2. General provisions: Each Solicitation Document should include the JBE's standard terms and conditions for the applicable type of purchase (non-IT goods, non-IT services, or IT goods and services). To the extent practicable, the JBE should include terms and conditions specific to that procurement, or simply attach the entire proposed contract including available appendices.

3. Protest information: Each Solicitation Document must include information regarding protest procedures, including relevant protest deadlines and the name and address of the Protest Hearing Officer. If the JBE estimates that the procurement will be below the applicable protest threshold adopted by the JBE, the Solicitation Document must state that protests will not be accepted. For more information regarding protest thresholds, see chapter 7, section 7.2 of this Manual.

4. Common elements of RFPs and IFBs: All RFPs and IFBs must contain the following elements:

- A schedule of key dates, including the Bid Closing Time;
- ~~Requirement of a signature of an authorized Bidder representative who can bind the Bidder contractually;~~
- Information on how Bids are to be submitted (e.g., sealed envelope with the solicitation number on the outside of the sealed package);
- Where Bids must be sent or delivered;
- Any attachments that are required to be returned by Bidders, such as administrative or technical requirements; and
- Evaluation information; ~~and~~
- ~~Information regarding protest procedures (including relevant protest deadlines and the name and address of the Protest Hearing Officer).~~

All RFPs and IFBs must also contain provisions addressing the following:

- Bidder conflict of interest (see PCC 10410–10411); and
- Antitrust claims (see GC 4552–4554); ~~and~~
- ~~Loss leader prohibition.~~

5. **Bidder signatures:** For any written solicitation, regardless of dollar value, solicitation format, or delivery method (i.e., faxed, mailed, ~~emailed~~, or delivered in person), Bids ~~should~~ **must** include the signature of an authorized representative of the Bidder. Faxed or electronic signatures are acceptable if allowed by the Solicitation Document. Of course, a faxed or electronic signature could not be used in any solicitation requiring a sealed bid as such bids must be delivered to the JBE in a sealed envelope.

**Note:** Bidder signatures are not required if the solicitation is conducted via e-mail or telephone using an RFQ, although the Buyer should document the name of the Bidder representative who provides the Bid.

6. **Faxed bid responses:** The following paragraph (or equivalent) must be included in all written ~~competitive~~ solicitations when a JBE accepts faxed Bids:

Bids submitted by facsimile machine (fax) will be considered only if they are sent to [office fax number]. Bids sent to any other fax number will not be considered. To be considered, all pages of the faxed bid that are received before the bid opening time specified in the solicitation document will be considered “the complete bid.” Please be advised that there is a heavy demand placed on the fax machine receiving bids and the JBE assumes no responsibility if a bidder cannot transmit its bid via fax, or if the entire bid is not received before the bid opening time.

**Note:** JBEs should consider adopting a solicitation value (e.g., \$100,000) above which faxed bids will not be accepted. JBEs ~~should~~ **may** also consider limiting the acceptance of faxed Bids to solicitations using an RFQ conducted via telephone or e-mail. Any limit on faxed bids should be included in the JBE’s Local Contracting Manual.

7. **Loss leader prohibition:** Except as noted below, every Solicitation Document must contain the following statement:

It is unlawful for any person engaged in business within this state to sell or use any article or product as a “loss leader” as defined in section 17030 of the Business and Professions Code.

**Exceptions:** The following acquisitions do not require loss leader language:

- Request for Offers (RFOs) for acquisitions from LPAs; and
- Procurements under \$5,000.

8. Socioeconomic and environmental program language~~Other Considerations and Requirements~~: JBEs are reminded to include socioeconomic and environmental program language in their solicitations, as applicable. Refer to chapter 3 of this Manual for further information.

With proper approval, JBEs may waive the DVBE requirement from any individual competitive solicitation. When this occurs, the Solicitation Document should state that the DVBE requirement is being waived. The waiver may be approved by the Approving Authority or delegee.

**Note:** Whenever the DVBE participation requirement is not included in a solicitation, the Buyer should document the procurement file to support the approval of the waiver.

9. Tie bids: It is possible that two Bids will have the same cost (when an IFB is used) or receive the same score (when an RFP is used). ~~the Evaluation Team, after considering all stated evaluation criteria, may assign the same score to two or more Bids.~~ JBEs should include a tiebreaker provision in the Solicitation Document to address how the contract award will be made in the event of a tie. Examples of permissible tiebreakers are a coin toss or other similar objective method. The event must be observed by witnesses, and the affected Bidders should be invited to observe.

10. Warranty requirements: The Solicitation Document should specify any warranty requirements.

11. Shipping costs: For any procurement including goods (non-IT or IT), shipping costs must be addressed in the Solicitation Document.

## C. Amending a Solicitation Document

1. Clarifications or changes to a Solicitation Document: Clarifications or changes to a Solicitation Document are made by an addendum. An addendum should include at a minimum the following information:

- Addendum number;
- Solicitation title and ~~solicitation~~-number;

- Indication of where the clarification or change is made in the Solicitation Document (e.g., deleting and inserting pages); and
- Revised Bid Closing Time, or statement that the Bid Closing Time is unchanged.

A Solicitation Document may be modified before the Bid Closing Time. In the case of a modification resulting from a solicitation specifications protest, a Solicitation Document may be modified after the Bid Closing Time. ~~The addendum must be communicated to Prospective Bidders in the same manner in which the original solicitation was communicated to the Prospective Bidders, except when the solicitation was conducted by phone, as noted below.~~

**Example:** ~~If the original solicitation was in written format, any addendum to the solicitation must be in writing.~~ If ~~at the original~~ solicitation ~~was~~ conducted by telephone, then the addendum may be communicated by telephone or in writing, at the Buyer's discretion. If the addendum is communicated by telephone, the addendum ~~information~~ must be documented as part of the RFQ. ~~All addenda become~~ ~~and must become~~ part of the procurement file.

**Example:** ~~An addendum to an IFB or RFP cannot be communicated by phone. If the solicitation was released in written format, any addendum to the solicitation must be in writing.~~

**Note:** An addendum should be issued a reasonable time before the Bid Closing Time to allow Prospective Bidders sufficient time to prepare their Bids. If, in the Buyer's judgment, ~~the addendum is significant and~~ Prospective Bidders will need more time to submit a responsive Bid, then the Bid Closing Time should be extended in the addendum.

2. Evaluation criteria revisions: Evaluation criteria may not be changed after the Bid Closing Time ~~due date and time~~ once Bids have been submitted.

#### D. Multiple Awards for Services

JBEs may award multiple contracts for services through a single solicitation. This is useful, for example, when there are a variety of services or locations involved.

The single solicitation must (i) have clear, concise descriptions of the work to be performed or goals and objectives to be achieved, (ii) state the intended number of

awards,<sup>2</sup> and (iii) provide a clear objective standard on how awards will be made. The single solicitation should give Bidders sufficient information to be able to understand what is to be accomplished and to be able to budget accordingly.

### 4.3 BID HANDLING

1. Bid submissions: Generally, Bids are handled as follows:
  - When sealed Bids are required, each Bid must be separately sealed inside an envelope, signed (if required by the Solicitation Document), and received by the Bid Closing Time to be considered for award.
  - Bids must be kept in a secured area and remain confidential until bid opening.
  - Bids received after the Bid Closing Time are considered nonresponsive and must not be considered for award.<sup>3</sup>
2. Submission of bids by fax: Faxed bids should only be accepted when:
  - The Solicitation Document specifically states they will be allowed; and
  - They are received on the fax machine at the telephone number specified in the Solicitation Document.

The internal clock of the receiving fax machine is the clock by which the official time of receipt will be determined.

Any solicitation that requires a sealed cost-submission Bid cannot be faxed.

### 4.4 VENDOR SELECTION

#### A. Vendor Selection Basics

The Evaluation Team should be composed of personnel familiar with the subject matter of the procurement, as well as applicable legal requirements. Each Evaluation Team member must:

- Be unbiased and able to evaluate all Bids fairly; and

<sup>2</sup> The intended number of awards may be a range; for example, 2–4.

<sup>3</sup> A JBE may adopt, in its Local Contracting Manual, a requirement that late Bids be returned unopened to the applicable Bidder.

- Withdraw from participating in an evaluation if he or she has or acquires a disqualifying interest.

An example of a disqualifying interest is where the Evaluation Team member's spouse is an employee of a Bidder.

Private consultants may not be voting members of the Evaluation Team. Private consultants may be used only to provide clarification or subject matter expertise to the Evaluation Team.

## B. No Bids

If no Responsive Bid is received from a Responsible Bidder, the Buyer has two options:

**Option 1:** The Buyer may cancel and reissue the solicitation, modifying any possible restrictive requirements. The Buyer should also consider methods to broaden the number of Bidders.

**Option 2:** If, in the opinion of the Buyer, a second solicitation would not result in a different outcome, the Buyer may cancel the solicitation and proceed with a sole source purchase following the requirements in chapter 5, section [5.97.A of this Manual](#). If possible, the JBE should select as the sole source a responsible Bidder whose Bid was substantially technically compliant/responsive with the specifications.

**Note:** A JBE's ability to cancel a solicitation is not limited to situations where too few Bids were received. Before the Bid Closing Time, a JBE may cancel a solicitation for any or no reason. After the Bid Closing Time, all Bids may be rejected if the JBE determines that:

- The Bids received do not reflect effective competition;
- The cost is not reasonable;
- The cost exceeds the amount expected; or
- The JBE determines otherwise that awarding the contract is not in the best interest of the JBE.

## C. Ineligible Businesses

Various provisions of California law prohibit JBEs from contracting with certain entities. The Buyer must ensure that a contract is not executed with an ineligible entity.

~~Good Standing: Both domestic and foreign corporations (those incorporated outside of California) must be in good standing in order to be qualified to do business in California. JBEs can determine whether a corporation is in good standing by accessing the Office of the Secretary of State's web site at [www.ss.ca.gov](http://www.ss.ca.gov).~~

~~Plastic Trash Bag Law: JBEs cannot contract with any plastic trash bag supplier, manufacturer or wholesaler, or any of its divisions, subsidiaries, or successors, that is not compliant with the Recycled Content Plastic Trash Bag Law,<sup>4</sup> regardless of the goods or services being provided. The prohibition extends beyond trash bags to all goods and services.~~

~~The Recycled Content Plastic Trash Bag Law requires that plastic trash bag manufacturers and wholesalers certify their compliance with the law. Those businesses (and any of their divisions, subsidiaries, or successors) found to be not in compliance are deemed to be ineligible for:~~

- ~~• Award of any JBE contract or subcontract; and~~
- ~~• Renewal, extension, or modification of an existing contract or subcontract.~~

~~Because a Bidder may have divisions, subsidiaries, or successors, unknown to the JBE, that supply or manufacture plastic trash bags, the JBE should include appropriate certifications even in contracts unrelated to plastic trash bags.~~

~~A listing of compliant and noncompliant trash bag manufacturers and wholesalers is available on the CalRecycle website at [www.calrecycle.ca.gov/BuyRecycled/TrashBags/ComplyList/](http://www.calrecycle.ca.gov/BuyRecycled/TrashBags/ComplyList/).~~

1. Darfur Contracting Act: Procurements for **non-IT goods or services** must address the requirements of the Darfur Contracting Act. The act is intended to preclude JBEs generally from contracting with "scrutinized companies" that do business in the African nation of Sudan (of which the Darfur region is a part), for the reasons stated in PCC 10475.

For acquisitions of non-IT goods or services, JBEs must require certain vendors to certify whether they are a "scrutinized company." This applies regardless of the procurement approach used including, but not limited to: RFQs, RFPs, IFBs, and non-

<sup>4</sup> ~~Public Resources Code section 42290 and following.~~

competitively bid procurements (except as specified below). The JBE may use the certification form contained in appendix A [of this chapter](#), or develop its own form.

The only exception to JBEs obtaining this information is for contracts awarded using LPAs, or for Intergovernmental Contracts (IGCs).

A scrutinized company is ineligible to submit a Bid for a contract with a JBE for non-IT goods or services. PCC 10478-(a) requires a company that currently has (or within the previous three years has had) business activities or other operations outside of the United States to certify that it is not a scrutinized company in order to submit a Bid to a JBE. A scrutinized company may, however, submit a Bid to a JBE if the company first obtains permission from the JBE.

~~Timing of checks: JBEs may check for ineligible businesses when creating contact lists, before soliciting Bids, during the evaluation of Bids, or before the creation of a contract or amendment. In any event, the JBE must ensure that it does not enter into a contract with an ineligible business.~~

2. Document the file: If a Bidder or Bid is rejected due to ineligibility, the procurement file should be documented identifying the reason, with a printout of the supporting documentation.

#### D. Deviations

The JBE may reject any or all Bids [or parts thereof](#), and may waive any immaterial deviation or defect in a Bid. The JBE's waiver of any immaterial deviation or defect in no way modifies the Solicitation Documents or excuses the Bidder from full compliance with the solicitation specifications if awarded the contract.

1. Waiving mandatory requirements is prohibited: Mandatory requirements include those required by applicable law. Material deviations of mandatory requirements cannot be waived, and any Bid containing [such deviations](#) ~~them~~ must be rejected. All such deviations must be documented in the procurement file to support the rejection.

2. Determining whether a deviation is material: JBEs should evaluate Bids by first determining that each Bid is responsive to the solicitation requirements. A deviation from a requirement or a defect is material if, in the opinion of the JBE, the affected Bid:

- Is not in substantial accord with the solicitation requirements;

- Provides an advantage to one Bidder over other Bidders in any way (such as reducing the cost of providing the goods or services); or
- Has a potentially significant effect on the delivery, quantity, or quality of items bid, amount paid to the Vendor, or the cost to the JBE.

3. Immaterial deviation: A Bid that substantially conforms to the requirements set forth in a Solicitation Document, but is not strictly responsive, may be accepted if the variance cannot have affected the amount of the Bid or given the Bidder an advantage or benefit not allowed other Bidders. In other words, if the variance is inconsequential, the Bid may still be accepted.

**Example:** A Bidder referenced the wrong page in its supporting technical literature. The Bidder directed the Evaluation Team to page 4 and the correct page was page 5.

4. Material deviation: A material deviation ~~in the Bid that~~ affects the amount of the Bid, or provides an advantage or benefit not allowed other Bidders. A material deviation ~~that typically~~ affects the cost, quantity, or quality of the product or services to be provided to the JBE.

**Example:** The solicitation required a telephone system that would serve 500 users and the Bidder offered a system that would serve 250 users.

5. JBE discretion: The JBE, in its sole discretion, will determine what constitutes a material deviation from a mandatory requirement.

#### 4.5 REVERSE AUCTIONS

JBEs may use a “reverse auction” for the acquisition of non-IT goods, non-IT services, or IT goods and services. A reverse auction is a competitive online solicitation process for fungible goods or services in which Bidders compete against each other online in real time in an open and interactive environment.

Any reverse auction process used by a JBE must comply with the following:

- The reverse auction documentation must specify (i) the date and time when the JBE will start accepting online Bids, and (ii) the date and time when the JBE will stop accepting online Bids;

- Prospective Bidders must register before the reverse auction opening date and time;
- Prospective Bidders must agree to any terms and conditions and other requirements of the solicitation;
- All Bids must be posted online and be updated on a real-time basis;
- Bidders must be allowed to lower their Bids below the lowest currently-posted bid; and
- Bids must be accepted until the specified closing date and time.

A JBE may require Prospective Bidders to be prequalified prior to placing Bids in a reverse auction. A JBE may adopt other policies respecting reverse auctions in its Local Contracting Manual.

#### 4.6 FOLLOW-ON CONTRACTING

A Vendor may, as part of the consulting services provided to a JBE, recommend or suggest the purchase of certain goods or services. This is common when, for example, the JBE contracts with a Vendor to create a feasibility study. No Vendor (or subsidiary thereof) that makes such a recommendation may submit a Bid or be awarded a contract to provide those goods or services to the JBE. In addition, no Vendor may be paid out of JBE funds for developing recommendations on the acquisition of IT goods or services or assisting in the preparation of a feasibility study, if that Vendor is to be a source of such acquisition or would otherwise directly and/or materially benefit from the JBE's adoption of such recommendations or the course of action recommended in the feasibility study.

This “follow-on” prohibition does not extend to Vendors that were awarded a subcontract of the original consulting services contract that amounted to no more than 10 percent of the total monetary value of the consulting services contract. To determine whether a follow-on situation exists, the JBE should examine the initial and subsequent contracts.

Analysis of the initial contract: The first step is determining whether the initial contract is for consulting services. If it is not, the prohibitions above do not apply. The essential issue is what the Vendor delivers, not how it is labeled. The following questions may prove helpful:

- Are consulting services present?
- Does the contract call for services that are advisory in nature, providing a recommended course of action or personal expertise and having an end

product that transmits information or analysis related to the governmental functions of a JBE?

Determining whether certain IT-related contracts constitute consulting services contracts can be difficult. For reference, the following are examples of what are typically or not typically considered consulting services in the IT area:

1. IT contracts typically considered as consulting services contracts:
  - Feasibility study;
  - Strategic planning and business process reengineering/improvement (not included in the lifecycle of an IT project); and
  - Maintenance and operations.
2. IT contracts typically not considered as consulting services contracts:
  - Design development and implementation;
  - Project management;
  - Independent validation and verification; and
  - Independent project oversight consultant.
3. IT contracts that require analysis of the specific details of the contract to determine whether or not it is a consulting services contract:
  - Acquisition specialist.

Analysis of the subsequent contract: If the initial contract is determined to be a consulting services contract, determine the causal relationship, if any, between the initial contract and the subsequent contract. The purpose of the causal inquiry is to determine whether there is a sufficient link between the end product(s) of the first contract and the deliverable(s) to be procured by the second contract to warrant preclusion of the Vendor that performed the first contract. In general, if there is a causal relationship, the JBE must reject the Prospective Bidder or withhold the award of a contract. Consultation with legal counsel is recommended before the JBE decides either to reject a Prospective Bidder or to withhold an award of a contract.

#### **4.7 SUMMARY DOCUMENT**

Procurement summary document: The evaluation and selection process for every procurement effort should be documented and referenced in a procurement summary. The purpose of the procurement summary is to create a single document that provides the history of a particular procurement transaction and explains the significant facts,

events, and decisions leading up to the contract award execution. The procurement summary should be included in the procurement file.

Procurement summaries should be written clearly and concisely to support the soundness of the purchasing decision.

Procurement summary information includes but is not limited to:

- Documenting the prices offered by the Bidders;
- Documenting that the selection process occurred in accordance with the Solicitation Document;
- Determining that the selected Bidder is responsible and the Bid is responsive; and
- Attaching the scoring sheets, if applicable.

## APPENDIX A

**DARFUR CONTRACTING ACT CERTIFICATION**

Pursuant to Public Contract Code (PCC) section 10478, if a bidder or proposer currently or within the previous three years has had business activities or other operations outside of the United States, it must either (i) certify that it is not a “scrutinized company” as defined in PCC 10476, or (ii) receive written permission from the [Court/HCRC/AOC] to submit a bid or proposal.

To submit a bid or proposal to the [Court/HCRC/AOC], you must complete **ONLY ONE** of the following three paragraphs. To complete paragraph 1 or 2, simply check the corresponding box. To complete paragraph 3, check the corresponding box **and** complete the certification for paragraph 3.

1. We do not currently have, and we have not had within the previous three years, business activities or other operations outside of the United States.

**OR**

2. We are a “scrutinized company” as defined in PCC 10476, but we have received written permission from the [Court/HCRC/AOC] to submit a bid or proposal pursuant to PCC 10477(b). *A copy of the written permission from the [Court/HCRC/AOC] is included with our bid or proposal.*

**OR**

3. We currently have, or we have had within the previous three years, business activities or other operations outside of the United States, but we **certify below** that we are not a “scrutinized company” as defined in PCC 10476.

**CERTIFICATION FOR PARAGRAPH 3:**

I, the official named below, CERTIFY UNDER PENALTY OF PERJURY, that I am duly authorized to legally bind the proposer/bidder to the clause in paragraph 3. This certification is made under the laws of the State of California.

<u>Company Name (Printed)</u>		<u>Federal ID Number</u>
<u>By (Authorized Signature)</u>		
<u>Printed Name and Title of Person Signing</u>		
<u>Date Executed</u>	<u>Executed in the County of _____ in the State of _____</u>	

~~Public Contract Code sections 10475 - 10481 apply to any company that currently or within the previous three years has had business activities or other operations outside of the United States. For such a company to submit a bid to a [Court/HCRC/AOC], the company must certify that it is either (a) not a scrutinized company; or (b) a scrutinized company that has been granted permission by the [Court/HCRC/AOC] to submit a bid. If your company, within the previous three years, has not had any business activities or other operations outside of the United States, you do **not** need to complete this form.~~

**OPTION #1 - CERTIFICATION**

~~If your company, within the previous three years, has had business activities or other operations outside of the United States, in order to be eligible to submit a bid, please insert your company name and Federal ID Number and complete the certification below.~~

~~I, the official named below, CERTIFY UNDER PENALTY OF PERJURY that (a) the company named below is **not** a scrutinized company per Public Contract Code section 10476; and (b) I am duly authorized to legally bind the company named below. This certification is made under the laws of the State of California.~~

<u>Company/Vendor Name (Printed)</u>		<u>Federal ID Number</u>
<u>By (Authorized Signature)</u>		
<u>Printed Name and Title of Person Signing</u>		
<u>Date Executed</u>	<u>Executed in the County of _____ in the</u>	

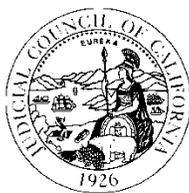
	<i>State of _____</i>
--	-----------------------

**OPTION #2 – WRITTEN PERMISSION FROM THE [COURT/HCRC/AOC]**

~~The [Court/HCRC/AOC] may permit a scrutinized company, on a case-by-case basis, to bid on a contract with the [Court/HCRC/AOC] for goods or services, if it is in the best interests of the [Court/HCRC/AOC]. If you are a scrutinized company that has obtained written permission from the [Court/HCRC/AOC] to submit a bid or proposal, complete the information below.~~

~~The company identified below is a scrutinized company as defined in Public Contract Code section 10476, and it has received written permission from the [Court/HCRC/AOC] to submit a bid or proposal. A copy of the written permission from the [Court/HCRC/AOC] is included with our bid or proposal.~~

<del><i>Company/Vendor Name (Printed)</i></del>		<del><i>Federal ID Number</i></del>
<del><i>By (Authorized Signature)</i></del>		
<del><i>Printed Name and Title of Person Signing</i></del>		
<del><i>Date Executed</i></del>	<del><i>Executed in the County of _____ in the</i></del> <del><i>State of _____</i></del>	



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 4A  
Page 1 of 13

## **STEP-BY-STEP GUIDE FOR THE PROCUREMENT OF NON-IT GOODS**

CHAPTER 4A

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## INTRODUCTION

The most significant change to Judicial Branch Entity (JBE) procurement required by the California Judicial Branch Contract Law is that JBEs must procure non-IT goods valued at \$5025,000 or above using a “lowest responsible bidder” methodology rather than a “best value” or “highest scoring bidder” approach. JBEs can no longer use these other approaches to procure non-IT goods valued at \$5025,000 or above (PCC 10301).

This chapter sets forth a step-by-step guide that Buyers can use when competitively soliciting non-IT goods. For noncompetitive solicitation of non-IT goods, see chapter 5 [of this Manual](#).

## DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary. ~~The definitions of capitalized terms used in this chapter are set forth in the glossary.~~

## STEP 1—DETERMINE THE PROCUREMENT VALUE

The value of the procurement directly affects the processes to be used in the procurement. The JBE employee requesting the procurement should estimate the total value of the procurement, including:

- Value of the non-IT goods to be procured;
- Value of any associated incidental services (such as installation);
- Delivery costs;
- Taxes (if applicable); and
- Other associated costs, as applicable.

JBEs may not split a single transaction into a series of transactions for the purpose of evading procurement requirements.

See section A in the “Selected Topics Relevant to Solicitations of Goods” section below for additional information on incidental services acquired in connection with the procurement of non-IT goods.

**STEP 2—DEVELOP LIST OF PROSPECTIVE BIDDERS**

The JBE employee requesting the procurement should develop a list of Prospective Bidders, see chapter 4, section 4.1.B [of this Manual](#) for additional information on developing a list of Prospective Bidders.

~~The Buyer should consider verifying whether any of the Prospective Bidders identified is ineligible for contract award. By doing so, the Buyer will avoid soliciting Bids from entities to which the JBE cannot award the contract. The verification must be completed in any event before contract award. See chapter 4, section 4.4.C for additional information on ineligible entities.~~

**STEP 3—ASSEMBLE PROCUREMENT TEAM**

The Buyer, with assistance from the JBE employee requesting the procurement, should identify additional JBE personnel who will be involved in the procurement. This may include:

- Personnel to help develop the Solicitation Document;
- Evaluation Team members; and
- Legal counsel, if applicable. (See [chapter 8, section 8.4.B of this Manual](#) [chapter 2, section 2.1.C](#) for more information on seeking legal participation.)

If required by the Local Contracting Manual, the Buyer should have these personnel sign confidentiality/conflict statements. See chapter 4, section 4.1.C [of this Manual](#) for additional information on confidentiality/conflict statements.

**STEP 4—SELECT SOLICITATION DOCUMENT TYPE**

Two types of Solicitation Documents are used in the procurement of non-IT goods:

- Requests for Quote (RFQs); and
- Invitations for Bid (IFBs).

~~For procurements valued less than \$50,000, the Buyer may use an RFQ or IFB. For procurements valued at or above \$50,000, a Buyer must use an IFB. See the table below for **additional** information about when each type of Solicitation Document should be used.~~

Solicitation Document	Procurement Size	Description
-----------------------	------------------	-------------

Solicitation Document	Procurement Size	Description
RFQ	Up to \$50,000 <sup>1</sup>	Used for straightforward, uncomplicated, and low-risk procurements.  <i>Note: Cannot be used if incidental services included in the purchase (e.g., set-up, installation) exceed \$4,999.99, unless an exemption is granted. See section A in the “Selected Topics Relevant to Solicitations of Goods” section below for additional information.</i>
IFB	Any size	Used for more complicated, higher risk, and higher value procurements.

~~\* A JBE may adopt a lower threshold on the use of RFQs. Any lower threshold should be included in the JBE’s Local Contracting Manual.~~

**Note:** The JBE may use other names for these Solicitation Documents; it does not need to refer to or title them as “RFQs” or “IFBs.”

## STEP 5—DRAFT SOLICITATION DOCUMENT

The Buyer should draft the final Solicitation Document. For requirements applicable to Solicitation Documents, see The Solicitation Document should comply with the applicable requirements set forth in chapter 4, section 4.2 of this Manual. ~~In particular, it must include all provisions identified as required. In addition, the Solicitation Document should specify any warranty requirements.~~

In addition to the required provisions identified in chapter 4 of this Manual, a Solicitation Document for non-IT goods must comply with the following requirements:

<sup>1</sup> ~~A JBE may adopt a higher or lower threshold on for the use of RFQs in its. Any lower threshold should be included in the JBE’s Local Contracting Manual. If the JBE adopts a higher threshold, the JBE must ensure that (i) the higher threshold is reasonable and appropriate, and (ii) the JBE provides adequate oversight for the use of larger-value RFQs. Also, note that procurements under \$5,000 may be conducted without a competitive solicitation; see chapter 5 section 5.1 of this Manual.~~

- The Bidder must submit a California seller's permit certification (see section B in the "Selected Topics Relevant to Solicitations of Goods" section below for additional information); and
- Product specifications must not be written with the intent of excluding goods manufactured, produced, grown, or otherwise originating in California (see PCC 10302.6).

The following subsections provide additional information useful in drafting the two types of Solicitation Documents.

### A. RFQs

An RFQ is used for straightforward procurements where Bids are may be solicited by telephone or another method of electronic communication. If the Buyer solicits Bids by telephone, the Buyer must prepare and use a script (a narrative of the Bid requirements) so that each Prospective Bidder receives the same information and Bids may be evaluated fairly. Similarly, if the Buyer solicits Bids by e-mail or another written manner, the Buyer must send the same information to each Prospective Bidder so that Bids may be evaluated fairly.

The RFQ should:

- Be short, concise, and to the point;
- Include a general description of the non-IT goods to be solicited;
- Include quantities of the non-IT goods to be solicited;
- Include any required features of the non-IT goods to be solicited;
- Specify when the non-IT goods must be delivered;
- Specify how the Prospective Bidder must deliver its Bid (e.g., by telephone, e-mail, fax, etc.); and
- Include a reference to the web page containing the current bidder instructions and applicable general provisions associated with the purchase, if applicable.

### B. IFBs

The IFB must include the JBE's standard terms and conditions for the acquisition of non-IT goods. The JBE should also distribute with the IFB the terms and conditions specific to the procurement, or simply attach the entire proposed contract, including available appendices. The IFB should state that any proposed material exception (addition, deletion, or other modification) to the JBE's terms and conditions will render a

Bid nonresponsive. Note that the JBE, in its sole discretion, will determine what constitutes a material exception.

The IFB must state the time and place Bids will be publicly opened. This place must be accessible to Bidders and other members of the public, and may be at the JBE's facilities.

~~When using an IFB, the Buyer should consider whether to use a negotiation process. If so, appropriate language must be included in the IFB. See chapter 2, section 2.1.G for additional information on using a negotiation process.~~

## STEP 6—PREPARE ADVERTISING

A JBE ~~should~~must advertise any solicitation of non-IT goods **in excess of \$50,000.**<sup>2</sup> See chapter 4, section 4.1.D of this Manual for advertising methods.

Because the advertisement should be released before or simultaneously with the Solicitation Document, the Buyer should prepare any necessary advertisement in conjunction with the Solicitation Document.

**Note:** If incidental services included in the purchase (e.g., set-up, installation) exceed \$4,999.99, the solicitation must be advertised even if the total estimated value of the solicitation is under \$50,000. See section A in the "Selected Topics Relevant to Solicitations of Goods" section below for information regarding exemptions to this requirement.

## STEP 7—RECEIVE BIDS

Bids are received and handled as described in chapter 4, section 4.3 of this Manual. Some aspects of receiving Bids depend on the type of Solicitation Document used.

### A. RFQs

Bids must be submitted as specified in the RFQ. The Buyer should document all Bids received and retain the documentation in the procurement file. In addition, the RFQ (script, e-mail, or other writing) should be retained in the procurement file.

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<sup>2</sup> All solicitations of non-IT goods in excess of \$50,000 must be advertised, even if the JBE adopts a threshold for use of RFQs that is higher than \$50,000.

Bids received pursuant to an RFQ solicitation remain confidential until a contract is executed.

## B. IFBs

~~If the estimated value of the purchase is \$50,000 or higher,~~ Bids must be submitted in sealed envelopes. A JBE ~~may wish to~~should time/date stamp Bids as they are received.

Bids received pursuant to an IFB solicitation remain confidential until the Bids are publicly opened.

## STEP 8—OPEN BIDS

All Bids in response to IFBs must be publicly opened at the time and place specified in the IFB Solicitation Document. If any person present at the opening requests that the Bids be read, the Buyer (or designee) must read the Bids aloud. Once opened, the Bids must be made available for public inspection.

**Note:** Because RFQs do not involve sealed Bids, this step is inapplicable to solicitations using RFQs.

## STEP 9—DETERMINE IF COMPETITION HAS BEEN ACHIEVED

Two methods are used to determine whether competition has been achieved: one for RFQs and another for IFBs.

### A. RFQs

If a Buyer obtains a single Bid, and the Buyer determines that the Bid is fair and reasonable, the Buyer does not need to obtain additional Bids. If a Buyer obtains a single Bid, and the Buyer determines that the Bid is not fair and reasonable, the Buyer should obtain at least one additional Bid.

### B. IFBs

The Buyer should make reasonable efforts to obtain at least two Responsive Bids from Responsible Bidders. Advertising the solicitation constitutes a reasonable effort.

## STEP 10—BID CLARIFICATION

If the JBE requires clarification regarding a Bid, the JBE ~~may~~ should contact the Bidder that submitted the affected Bid.

## STEP 11—EVALUATE THE BID

The Evaluation Team must evaluate the Bids using the criteria specified in the Solicitation Document. The requirements in this step are in addition to the general requirements set forth in chapter 4, section 4.4 of this Manual.

~~A Bidder's exception to the JBE's terms or conditions (addition, deletion, or other modification) may constitute a material deviation. A Bid with a material deviation is nonresponsive. If the Bidder has taken a material exception to any of the JBE's terms and conditions, the JBE should deem the Bid to be non-responsive.~~ JBEs have discretion to determine materiality.

~~Before awarding the contract, the Buyer should verify whether any of the Bidders are ineligible for contract award. See chapter 4, section 4.4.C for additional information on ineligible entities.~~ For ease of reference, the following definitions are excerpted from the glossary:

- **Responsible Bidder** means a Bidder that possesses the required experience, facilities, and financial resources and is fully capable of performing the relevant contract.
- **Responsive Bid** means a Bid that ~~complies with~~ indicates compliance without material deviation from the requirements of the Solicitation Document and the terms and conditions of the proposed contract without material deviation. See chapter 4, section 4.4.D of this Manual for guidance on determining whether a deviation is material.

**Note:** For purposes of determining the lowest Bid, the amount of sales tax must be excluded from the total amount of the Bid (PCC 10301).

## A. RFQs

RFQs less than \$25,000: The JBE should award the contract, -if at all, to the **Responsible Bidder** that submitted the lowest **Responsive Bid** after application of any preference, incentives, or discounts, if applicable.<sup>3</sup>

~~(PCC 10301 requires contracts of \$5025,000 or more to be awarded to the lowest responsible bidder. Because RFQs are used for procurements under that threshold, JBEs are not statutorily required to award those contracts to the lowest responsible bidder, but should do so in the absence of a valid business reason.)~~

RFQs of \$25,000 or more: The JBE must award the contract, if at all, to the **Responsible Bidder** that submitted the lowest **Responsive Bid** after application of any preference, incentives, or discounts, if applicable.

**Note:** See chapter 3 of this Manual for more information regarding preferences, incentives, and discounts.

## B. IFBs

The JBE must award the contract, if at all, to the **Responsible Bidder** that submitted the lowest **Responsive Bid** after application of any preference, incentives, or discounts, if applicable.

**Note:** See chapter 3 of this Manual for more information regarding preferences, incentives, and discounts.

## STEP 12—NOTICE OF INTENT TO AWARD

### A. RFQs

When using an RFQ, the JBE is not required to post a notice of intent to award.

### B. IFBs

There are both posting and notification requirements when using an IFB.

<sup>3</sup> PCC 10301 requires contracts of \$25,000 or more to be awarded to the lowest responsible bidder. JBEs are not statutorily required to award contracts less than \$25,000 to the lowest responsible bidder, but should do so in the absence of a valid business reason.

## C. Posting

The JBE must post a “notice of intent to award” on its website or in a public place in the offices of the JBE at least 24 hours before the contract is awarded. Once the notice has been posted, the time for submitting a protest begins to count down.

Exception: The JBE does not need to post a notice of intent to award if (i) the JBE has adopted a protest threshold applicable to non-IT goods, and (ii) the procurement is below that protest threshold. For more information regarding protest thresholds, see chapter 7, section 7.2 of this Manual.

## D. Notification

If the contract will be awarded to a Bidder that did not submit the lowest Bid (because, e.g., the lowest Bid was not a Responsive Bid, or the Bidder that submitted the lowest Bid was not a Responsible Bidder), the JBE must notify the lowest Bidder at least 24 hours before awarding the contract. The 24-hour period excludes Saturdays, Sundays, and legal holidays. If the lowest Bidder submits a valid protest, the JBE must not make an award until either the protest has been withdrawn or the JBE’s protest hearing officer has responded ~~has made a final decision regarding the action to be taken relative~~ to the protest. For more information regarding protest procedures, see chapter 7 of this Manual.

## STEP 13—CREATE THE CONTRACT

The Buyer should memorialize the purchase using a contract. ~~Except in extraordinary circumstances, negotiations should be limited to finalizing the form of agreement and non-substantive terms.~~ The contract must be signed by an authorized representative of the Bidder who can bind the Bidder contractually.

## STEP 14—CREATE THE PROCUREMENT SUMMARY DOCUMENT

The Buyer should create a procurement summary document and place it in the procurement file. For more information on procurement summary documents, see chapter 4, section 4.7 of this Manual.

## STEP 15—NOTIFY BSA OF LARGE CONTRACTS

If the total cost of the purchase is estimated to be more than \$1,000,000 ~~or higher~~, the Buyer must notify the Bureau of State Audits (BSA) in writing of the existence of the

contract. The JBE must make this notification within 10 days of execution of the contract. BSA may review the contract to ensure compliance with the California Judicial Branch Contract Law.

## SELECTED TOPICS RELEVANT TO SOLICITATIONS OF GOODS

### A. Incidental Services

Unless an exemption is granted, incidental services included with the purchase of non-IT goods:

- May not exceed \$4,999.99, and
- Should be directly related to the purchase of ~~the~~ non-IT goods, such as setup or installation.

Unless an exemption is granted, the solicitation must be advertised if the value of incidental services included in the purchase exceeds \$4,999.99, even if the total estimated value of the solicitation is under \$50,000.

The Approving Authority, or his or her delegee, may grant an exemption to these requirements if ~~the Approving Authority~~ he or she determines, in his or her sole discretion, that the cost of complying with the requirement will likely exceed the savings generated by complying with the requirement.

### B. California Seller's Permit

~~The Each Prospective~~ Bidder must certify that it and all of its affiliates that make sales for delivery into California are holders of either:

- A California seller's permit issued under Revenue and Taxation Code section 6066 and following; or
- A certificate of registration issued under Revenue and Taxation Code section 6226.

The selected Bidder must submit supporting documentation before a contract is executed.

There are two exemptions to this requirement:

- Purchases of \$2,500 or less if the JBE is using a credit card to pay for the purchase (**note:** the total amount allowed under this exception for each Vendor per year is \$7,500 per JBE); and
- Purchases where the Approving Authority, or his or her delegee, makes a written finding that the contract is necessary to meet a “compelling state interest.” “Compelling state interests” include ensuring the provision of essential services, ensuring the public health, safety, and welfare, and responding to an emergency, as that term is defined in PCC 1102.

### C. Motor Vehicles

In establishing specifications for the purchase of a motor vehicle, and in determining the lowest responsible bidder, a JBE may consider the probable resale value of the vehicle as determined by:

- Recognized published used car marketing guides;
- Other established historical evidence of future used motor vehicle value; or
- Contractual guarantee of the apparent low Bidder that the resale value of the vehicle will be no less in proportion to Bid price than any other comparable vehicle complying with specifications for which a Bid was received.

### D. Solicitations of Printer or Copier Cartridges

If a JBE procures printer or copier cartridges, it must include a statement on the cover of the Solicitation Document (or in some other prominent place in the Solicitation Document) informing Bidders that it is unlawful to prohibit a printer or copier cartridge that is sold to a JBE from being recycled or remanufactured, except as noted below.

**Exception:** This requirement does not apply where the Bidder enters into signed agreements with its customers consenting to the return of the used cartridge to the Bidder for (a) recycling and remanufacturing, or (b) recycling.



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 4B  
Page 1 of 19

## **STEP-BY-STEP GUIDE FOR THE PROCUREMENT OF NON-IT SERVICES**

CHAPTER 4B

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## INTRODUCTION

The Public Contract Code (PCC) is more flexible in the procurement of non-IT services than in the procurement of non-IT goods. When procuring non-IT services, Judicial Branch Entities (JBEs) have the ability to use a “lowest responsible bidder” approach or a “highest scored bid” approach.

This chapter sets forth a step-by-step guide that Buyers can use when competitively soliciting non-IT ~~goods~~services. For noncompetitive solicitation of non-IT services, see chapter 5 of this Manual.

## DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

## STEP 1—DETERMINE THE PROCUREMENT VALUE

The value of the procurement directly affects the processes used in the procurement. The JBE employee requesting the procurement should estimate the total value of the procurement, including:

- Value of the non-IT services to be procured;
- Taxes (if applicable); and
- Other associated costs, as applicable.

JBEs may not split a single transaction into a series of transactions for the purpose of evading procurement requirements.

## STEP 2—DETERMINE THE TYPE OF SERVICE

The Buyer should determine the type of non-IT services being procured. Certain types of non-IT services have special or different procurement and contract requirements, so it is important to make this determination early in the procurement process.

Are the non-IT services being procured **consulting services**? Consider these factors:

- Is the primary purpose of the procurement some type of recommendation, or product of the mind?

- Is the unique knowledge or intellectual abilities of an individual of critical importance to the success of the non-IT services?

Are the non-IT services being procured **legal services**? Consider these factors:

- Must the services be performed by a licensed attorney?
- Are the services directed by an attorney or necessary for the performance of attorney services? Examples include services performed by jury consultants and expert witnesses.

**Note:** Contracts for legal services may be competitively bid, but there is no requirement to do so (for more information on non-competitively bid procurements, see chapter 5 [of this Manual](#)).

### STEP 3—DEVELOP LIST OF PROSPECTIVE BIDDERS

The JBE employee requesting the procurement should develop a list of Prospective Bidders. See chapter 4, section 4.1.B [of this Manual](#) for additional information on developing a list of Prospective Bidders.

~~The Buyer should consider verifying whether any of the Prospective Bidders identified is ineligible for contract award. By doing so, the Buyer will avoid soliciting Bids from entities to which the JBE cannot award the contract. The verification must be completed in any event before contract award. See chapter 4, section 4.4.C for additional information on ineligible entities.~~

### STEP 4—ASSEMBLE PROCUREMENT TEAM

The Buyer, with assistance from the JBE employee requesting the procurement, should identify additional JBE personnel who will be involved in the procurement. These may include:

- Personnel to help develop the Solicitation Document;
- Evaluation Team members; and
- Legal counsel, if applicable. (See [chapter 8, section 8.34](#). ~~Chapter 2, section 2.1.C~~ [of this Manual](#) for more information on seeking legal participation.)

If required by the Local Contracting Manual, the Buyer should have these personnel sign confidentiality/conflict statements. See chapter 4, section 4.1.C [of this Manual](#) for additional information on confidentiality/conflict statements.

**STEP 5—SELECT SOLICITATION DOCUMENT TYPE**

Three types of Solicitation Documents are used in the procurement of non-IT services:

- Requests for Quote (RFQs);
- Invitations for Bid (IFBs); and
- Requests for Proposal (RFPs).

~~For procurements valued at less than \$5,000, the Buyer may use an RFQ, IFB, or RFP. For procurements of \$5,000 or above, the Buyer may use an IFB or an RFP.~~

The table below provides guidance on when to use the various types of Solicitation Documents.

Solicitation Document	Procurement Size	Description	Awarded to:
RFQ	Less than \$5,000 <sup>1</sup>	Used for very small purchases.	Lowest Responsible Bidder <u>or Highest Scored Bid, at the JBE's discretion</u>
IFB	Any size	Used <del>for for a wide range of non-IT services, from (a) simple, common, or routine services that may require personal or mechanical skills to (b) complex services in which professional expertise is needed.</del>	Lowest Responsible Bidder

<sup>1</sup> ~~A JBE may adopt a higher threshold for the use of RFQs in its Local Contracting Manual. -If the JBE adopts a higher threshold, the JBE must ensure that (i) the higher threshold is reasonable and appropriate, and (ii) the JBE provides adequate oversight for the use of larger-value RFQs. Also, note that Alternately, procurements under \$5,000 may be conducted without a competitive solicitation; see chapter 5 section 5.1 of this Manual.~~

Solicitation Document	Procurement Size	Description	Awarded to:
RFP	Any size	Used for <del>very</del> -complex or unique non-IT services in which professional expertise and methods may vary greatly, and creative or innovative approaches are needed.	Highest Score Bid

An ~~RFP-IFB is often should not be~~ used when the non-IT services are routine, or common, or when there is a standard associated with the service. For example, the hiring of a pest-control firm to do routine exterminations ~~should would typically~~ be solicited using an IFB, not an RFP. However, in any solicitation, the JBE may choose to use either an IFB or an RFP in its sole discretion.

**Note:** The JBE may use other names for these Solicitation Documents; it does not need to refer to or title them as “RFQs,” “IFBs,” or “RFPs.”

## STEP 6—DRAFT SOLICITATION DOCUMENT

For requirements applicable to Solicitation Documents, see chapter 4, section 4.2 of this Manual. The Solicitation Document should comply with the applicable requirements set forth in chapter 4, section 4.2. In particular, it must include all provisions identified as required. In addition, the Solicitation Document should specify any warranty requirements.

The more thorough a JBE is in communicating its specific needs, requirements, goals, and objectives in the Solicitation Document, the more complete, responsive, and acceptable the Bids received will be.

The following subsections provide additional information on drafting the three types of Solicitation Documents.

### A. RFQs

An RFQ is used for straightforward procurements where Bids ~~are may be~~ solicited by telephone or another method of electronic communication. If the Buyer solicits Bids by

telephone, the Buyer must prepare and use a script (a narrative of the Bid requirements) so that each Prospective Bidder receives the same information and Bids may be evaluated fairly. Similarly, if the Buyer solicits Bids by e-mail or another written manner, the Buyer must send the same information to each Prospective Bidder so that Bids may be evaluated fairly.

The RFQ should:

- Be short, concise, and to the point;
- Include a general description of the non-IT services to be solicited;
- Include any deliverable resulting from the non-IT services (such as a report);
- Specify when the non-IT services must be completed and any deliverable must be delivered;
- Specify how the Prospective Bidder must deliver its Bid (e.g., by telephone, e-mail, fax, etc.); and
- Include a reference to the web page containing the current bidder instructions and applicable general provisions associated with the purchase, if applicable.

Before soliciting Bids in response to an RFQ, the JBE should determine whether the RFQ will be awarded on a “lowest responsible bidder” basis or on a “highest scored bid” basis. The determination is solely within the JBE’s discretion.

## B. IFBs and RFPs

IFBs and RFPs share many characteristics and requirements. These shared aspects are addressed in this section B. Section C contains additional information applicable only to IFBs, and section D contains additional information applicable only to RFPs.

Information about the Procurement Process: IFBs and RFPs must include:

1. The standards the JBE will use in evaluating Bids.
2. Time schedules relating to the procurement, including:
  - Date to submit questions or seek clarification (if applicable);
  - Date of Bidders’ conference (if applicable);
  - Bid Closing Time;
  - Timetable that the JBE will follow in evaluating Bids and awarding the contract; and
  - Anticipated contract term, including start and end dates.

3. The JBE's standard terms and conditions for the acquisition of non-IT services. To the extent practicable, the JBE should also distribute with the IFB or RFP the terms and conditions specific to the procurement, or simply attach the entire proposed contract, including available appendices.
- 3.4. Where the intent to award notice will be posted. If the JBE will post the intent to award notice on its web-site, the JBE should specify the applicable URL.

Description of Services: The IFB or RFP must contain a description of the desired non-IT services. The description should include:

- A clear, precise description of the work to be performed, services to be provided, problem to be solved, questions to be answered, issues to be addressed, or the goals and objectives to be met;
- An explanation of the desired approach to the problem, if any;
- Any requirements as to where the work must be performed (e.g., at the JBE's site);
- A description of any specific functions, tasks, or activities that must be performed, in their order of importance and probable sequence, if applicable;
- Performance timelines or completion dates;
- Required quality control standards to be met, if applicable;
- A description of any required deliverables (such as progress reports or a final report summarizing a consultant's findings);
- A description of the assistance to be provided by the JBE, if applicable;
- Acceptance criteria; and
- Practical and policy information, technological requirements or specifications, and legal limitations, if applicable.

Payment Information: The IFB or RFP should contain some basic payment information, including (as applicable):

- Whether and to what extent Progress Payments will be allowed;
- Whether payments are subject to payment withholding;
- Penalties for late or inadequate performance;
- Known or estimated budgetary limitations on the contract price; and
- Travel expenses (what will and will not be paid by the JBE).

**Note:** See chapter 9 [of this Manual](#) for more information regarding Progress Payments.

Format and Required Elements of Bids: IFBs and RFPs ~~should~~ specify what Bidders must address or include in their Bids, such as:

1. A description of the Bidder's qualifications, including which may include at the JBE's discretion:
  - Copies of current business licenses, professional certifications, or other credentials;
  - Proof of financial solvency or stability (e.g., balance sheets and income statements);
  - Proof that the Bidder, if a corporation, is in good standing and qualified to conduct business in California; and
  - For Bidders that are nonprofit organizations, proof of nonprofit status.
2. A list of references for whom the Bidder has performed similar work.
3. A list of similar services successfully completed by the Bidder, with samples, if applicable.
4. Identification of the lead personnel and anticipated supporting personnel to be employed during performance (by classification or title) and their qualifications to perform the work.
5. Identification of a project coordinator.
6. Resumes for each major contract participant who will exercise a major policy, administrative, or consultative role in carrying out ~~the~~ non-IT services (resumes are required, not optional, for consulting services contracts).
7. An overall description of the techniques, approaches, and methods to be used in performing ~~the~~ non-IT services.
8. If subcontractors are contemplated:
  - identification of those persons or firms;
  - the portions and monetary percentages of the work to be done by ~~the~~ subcontractors;
  - how and why ~~these~~ subcontractors were selected;
  - resumés of each major subcontractor participant; and
  - description of how subcontracted work will be controlled, monitored, and evaluated.
9. The total cost of the non-IT services, with a detailed breakdown showing how the costs were determined, and the desired method of payment. The detailed budget breakdown may include:

- Identification of position/classification titles funded;
- Salary rates or ranges;
- Percentage of time devoted to the work;
- Fringe benefits;
- Operating expenses;
- Travel and per diem expenses;
- Overhead or indirect costs;
- Subcontractors with the same type of cost details; and
- Other costs.

~~When using an IFB or RFP, the Buyer should consider whether to use a negotiation process. If so, appropriate language must be included in the IFB or RFP. See chapter 2, section 2.1.G for additional information on using a negotiation process.~~

### C. IFBs Specifically

IFBs are awarded to the lowest Responsible Bidder. Accordingly, IFBs must be drafted in a manner to allow the JBE to determine which Bidders meet the minimum requirements specified in the IFB. For each specific requirement, a yes or no answer is required. There is no “fully,” “barely,” “almost,” or “exceeded” level of evaluation.

The IFB should state that any material exception (addition, deletion, or other modification) to the JBE’s terms and conditions will render a Bid nonresponsive. Note that the JBE, in its sole discretion, will determine what constitutes a material exception.

The IFB must state the time and place Bids will be publicly opened. This place must be accessible to Bidders and other members of the public, and may be at the JBE’s facilities.

Bid Requirements: The IFB must include a requirement that the cost portion of a Bid be submitted in a sealed envelope separate from the remainder of the Bid.

~~Other Procurement-Related Information: The IFB must state where the intent to award notice will be posted, if any Bidder requests such posting. If the JBE will post the intent to award notice on its web site, the JBE should specify the applicable URL.~~

### D. RFPs Specifically

RFP Content Requirements: The RFP should identify any “minimum terms” in the JBE’s terms and conditions. “Minimum terms” are the terms so important that a proposed

exception (addition, deletion, or other modification) will render a Bid nonresponsive. The RFP should require that Bidders identify all proposed exceptions (if any) to the JBE's terms and conditions. The RFP should state that (i) a Bid that takes a material exception (addition, deletion, or other modification) to a minimum term will be deemed nonresponsive, and (ii) the JBE, in its sole discretion, will determine what constitutes a material exception.-

The RFP must specify how the cost portion of the Bid will be submitted. The cost portion of the Bid may be submitted in a sealed envelope separate from the remainder of the Bid, or it may be included with the remainder of the Bid.

Evaluation Plan: Although not part of the RFP itself, the Buyer should develop an evaluation plan along with the RFP. By developing the evaluation plan with the RFP, the Buyer will ensure that the JBE receives all information necessary to properly evaluate the Bids.

The evaluation plan must provide for a fair and equitable evaluation of all Bids. The evaluation plan must include:

- Rating and scoring factors that will be considered; and
- Criteria for assigning cost points (see step 13 regarding assignment of cost points).

The evaluation plan should include the following:

- Price is given substantial weight in relationship to all other criteria used. JBEs should seek legal counsel before issuing an RFP where cost points are less than 30 percent of the total points.
- Exceptions (additions, deletions, or other modifications) to the JBE's terms and conditions may be considered as part of the evaluation process. are evaluated and given substantial weight in the score assigned to the Bid.
- If a material exception (addition, deletion, or other modification) is taken to a minimum term, the Bid is nonresponsive will be deemed nonresponsive. Note that the JBE, in its sole discretion, will determine what constitutes a material exception.

JBEs should disclose in the RFP the evaluation criteria or categories and the percentage weight for each criterion or category. Examples of criteria include price and prior experience.

Other Procurement-Related Information: The RFP should state the date of oral interviews, if any. The date for oral interviews may be tentative. ~~The RFP must also state where the intent to award notice will be posted. If the JBE will post the intent to notice award on its web site, the JBE should specify the applicable URL.~~

### STEP 7—PREPARE ADVERTISING

A JBE must advertise any solicitation of non-IT services of **\$5,000 or more.**<sup>2</sup> See chapter 4, section 4.1.D [of this Manual](#) for advertising methods.

Because the advertisement should be released before or simultaneously with the Solicitation Document, the Buyer should prepare any necessary advertisement in conjunction with the Solicitation Document.

### STEP 8—OPTIONAL: HOLD BIDDERS' CONFERENCE

Bidders' conferences provide Prospective Bidders an opportunity to understand better the non-IT services being procured by a JBE. Holding a Bidder's conference is always optional, at the JBE's discretion. Bidders' conferences are more common in solicitations for complex non-IT services. Accordingly, they are rarely held in solicitations using IFBs, but are held more often in solicitations using RFPs.

**Note:** Bidders' conferences are not held for RFQ solicitations.

### STEP 9—RECEIVE BIDS

Bids are received and handled as described in chapter 4, section 4.3 [of this Manual](#). In addition to those general requirements, this step sets forth additional requirements applicable to solicitations of non-IT services using different Solicitation Documents.

#### A. RFQs

Bids must be submitted as specified in the RFQ. The Buyer should document all Bids received and retain the documentation in the procurement file. In addition, the RFQ (script, e-mail, or other writing) should be retained in the procurement file.

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<sup>2</sup> [All solicitations of non-IT services of \\$5,000 or more must be advertised, even if the JBE adopts a threshold for use of RFQs that is higher than \\$5,000.](#)

Bids received pursuant to an RFQ solicitation remain confidential until a contract is executed.

## B. IFBs and RFPs

Bids must be submitted as specified in the IFB or RFP. A JBE ~~should~~may wish to date/time stamp Bids as they are received.

Bids received pursuant to an IFB solicitation remain confidential until the Bids are publicly opened. Bids received pursuant to an RFP solicitation remain confidential until the scoring process is completed.

## STEP 10—OPEN BIDS

The way in which Bids are opened differs for IFBs and RFPs. Because RFQs do not involve sealed Bids, this step is inapplicable to solicitations using RFQs.

### A. IFBs

~~The Buyer~~A JBE staff member must publicly open the sealed Bids. ~~review all Bids received to determine those that meet the format requirements and the standards specified in the IFB. The sealed envelopes containing the cost portions for those Bids that meet the format requirements and standards must then be publicly opened at the time and place specified in the IFB.~~

~~A JBE staff member~~The Buyer (or designee) must read the cost information for each Bid ~~that meets the format requirements and standards.~~

### B. RFPs

The Bids do not need to be publicly opened and read unless the specific RFP requires otherwise.

## STEP 11—DETERMINE IF COMPETITION HAS BEEN ACHIEVED

Two methods are used to determine whether competition has been achieved: -one for RFQs and another for IFBs and RFPs.

### A. RFQs

If a Buyer obtains a single Bid, and the Buyer determines that the Bid is fair and reasonable, the Buyer does not need to obtain additional Bids. If a Buyer obtains a single Bid, and the Buyer determines that the Bid is not fair and reasonable, the Buyer should obtain at least one additional Bid.

## B. IFBs and RFPs

The JBE must receive at least three Bids in response to an IFB or RFP, unless one of the following exceptions applies:

- The JBE advertised the solicitation in the California State Contracts Register ([CSCR](#)) (which may be accessed via DGS's [BidSync eProcurement](#) system<sup>3</sup>) and has solicited all known Prospective Bidders, but still received fewer than three Bids;
- The contract will be awarded to a Community Rehabilitation Program (CRP) entity (see Welfare and Institutions Code section 19404); or
- The JBE could have completed the transaction without a competitive solicitation (e.g., procurements of legal services [or licensing or proficiency testing examinations](#)).
- ~~The procurement is for the development, maintenance, administration, or use of licensing or proficiency testing examinations.~~

If the JBE does not receive at least three Bids, and none of the exceptions above applies, then [the Buyer should consider canceling and reissuing the solicitation. If the Buyer takes this course, the Buyer should consider modifying any possible restrictive requirements in the IFB or RFP.](#)

~~The Buyer should consider canceling and re-issuing the solicitation. If the Buyer takes this course, the Buyer should consider modifying any possible restrictive requirements in the IFB or RFP.~~

If the Buyer decides to award the contract, the Buyer should document in the procurement file the names and addresses of the firms or individuals that were solicited for Bids.

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<sup>3</sup> [DGS's eProcurement system currently uses BidSync technology. JBEs may be required to register with BidSync to use certain features of DGS's eProcurement system.](#)

**STEP 12 – CHECK FOR INELIGIBLE BIDDERS**

~~The Buyer should verify whether any of the Bidders are ineligible for contract award. See chapter 4, section 4.4.C for additional information on ineligible entities.~~

~~In addition, when non-IT services are to be performed in the state by a corporation, the JBE should obtain verification that the Bidder is currently qualified to do business in California in order to ensure that all obligations to the state have been fulfilled.~~

**STEP 12—OPTIONAL: HOLD ORAL INTERVIEWS/CLARIFICATIONS**

Oral interviews provide the JBE an opportunity to understand better or clarify the Bids submitted by Bidders. Holding oral interviews is always optional, at the JBE’s discretion. The JBE is not obligated to hold an oral interview with every Bidder; it may limit interviews to only those Bidders whose Bids need clarification. Oral interviews are more common in solicitations for especially complex non-IT services.

**Note:** Oral interviews are not held for RFQ or IFB solicitations.

If the JBE otherwise requires clarification regarding a Bid, the JBE may should contact the Bidder that submitted the affected Bid.

**STEP 13—EVALUATE BIDS**

~~The requirements in this step are in addition to the general requirements set forth in chapter 4, section 4.4 of this Manual. The JBE should evaluate the Bids in accordance with chapter 4, section 4.4 and this step. The JBE will award the contract as described in this step, if at all. However, there is no requirement to award a contract; see chapter 4, section 4.4.B of this Manual for additional details. if:~~

- ~~• In the opinion of the JBE, no Bid contained a reasonable contract price, or~~
- ~~• There is another business-based reason not to make an award.~~

**A. RFQs**

The JBE may award the RFQ on a “lowest responsible bidder” basis or on a “highest scored bid” basis, depending on which methodology was selected in step 6 above.

For more information about the “lowest responsible bidder” basis, see section B below. For more information about the “highest scored bid” basis, see section C below.

## B. RFQs and IFBs

The JBE must evaluate the Bids and award the contract, if at all, to the **Responsible Bidder** that submitted the lowest **Responsive Bid** after application of any preference, incentives, or discounts, if applicable.

For ease of reference, the following definitions are excerpted from the glossary:

- **Responsible Bidder** means a Bidder that possesses the required experience, facilities, and financial resources and is fully capable of performing the relevant contract.
- **Responsive Bid** means a Bid that ~~complies indicates compliance with the without material deviation from the~~ requirements of the Solicitation Document and the terms and conditions of the proposed contract without material deviation (see chapter 4, section 4.4.D of this Manual for guidance on determining whether a deviation is material).

**Note:** See chapter 3 of this Manual for more information regarding preferences, incentives, and discounts.

## C. RFPs

~~A JBE staff member~~ The Buyer must review all Bids to determine which Bids meet the format requirements specified in the RFP.

All Bids meeting the format requirements must then be submitted to the Evaluation Team that will evaluate and score the Bids using the methods specified in the RFP. The JBE must make all Bids and all evaluation and scoring summary sheets available for public inspection at the conclusion of the scoring process.

The JBE must award the contract, if at all, to the Bidder whose Bid is given the highest score by the Evaluation Team. ~~As discussed above, however, the JBE may decide not to award the contract at all.~~

Suggested Noncost Evaluation Criteria: The JBE may consider using the following criteria when evaluating and scoring Bids.

- Does the Bidder understand the JBE's problem or needs?

- Has the Bidder taken any exceptions (addition, deletion, or other modification) to the terms and conditions that are detrimental to the JBE?
- Can the Bidder fit this work into its existing obligations?
- Are the Bidder's proposed approaches, methods, and procedures reasonable and feasible?
- Do the expected results, outcomes, and deliverables appear to be achievable in a timely manner, given the approaches, methods and procedures proposed?
- Does the Bidder have the organization, management capability, management competency, fiscal and personnel resources, and experience to perform the non-IT services being sought?
- Does the Bidder have experience performing work of a similar nature, size, and scope?
- Does the Bidder's past experience qualify the Bidder to perform these non-IT services?
- What are the professional qualifications of the personnel who the Bidder will commit to the project?
- Did the Bidder allocate sufficient staff resources?
- Has the Bidder addressed all goals, objectives, service demands, and required deliverables specified in the RFP?
- Does the Bidder appear to be able to handle and resolve unanticipated complications and delays without interrupting the delivery of non-IT services?
- Are any proposed timelines for performance presented by the Bidder feasible?
- Did the Bidder include plans that will show how performance will be monitored and measured to ensure that all non-IT services are successfully performed and that the objectives, goals, and requirements are met?
- Does the Bidder appear to have the capacity to manage fiscal resources responsibly?
- Does the Bidder have sound fiscal, accounting, cost-monitoring or budget-monitoring procedures in place?

### Suggested Cost Evaluation Criteria

JBEs may use the process for awarding-assigning cost points set forth in chapter 4C, appendix A of this Manual. Alternately, JBEs may adopt their own processes for awarding-assigning cost points.

### STEP 14—NOTICE OF INTENT TO AWARD

In certain circumstances, JBEs must issue or post a notice of intent to award a contract. The requirements differ for solicitations using IFBs and RFPs. ~~The JBE may issue notices of intent to award in other circumstances in its own discretion.~~

Note: The requirements in this step relating to IFBs and RFPs apply even if the IFB or RFP is used in a procurement valued less than the JBE's protest threshold for non-IT services.

### A. RFQs

When using an RFQ, the JBE is not required to post a notice of intent to award.

~~Note: This step is inapplicable to solicitations using RFQs.~~

### B. IFBs

Posting: The JBE must post a "notice of intent to award" on its website or in a public place in the offices of the JBE at least five Court Days before the contract is awarded.

~~Once the notice has been posted, the time for submitting a protest begins to count down.~~

Notification: -If the contract will be awarded to a Bidder that did not submit the lowest Bid (because, e.g., the lowest Bid was not a Responsive Bid, or the Bidder that submitted the lowest Bid was not a Responsible Bidder), the JBE must notify the lowest cost Bidder at least five Court Days before awarding the contract.

The JBE may, as a courtesy to Bidders, send a copy of the notice of intent to award to each Bidder by e-mail or fax.

If any Bidder submits a valid protest before award of the contract on the grounds that the protesting Bidder was the lowest Responsible Bidder, the JBE must not award the contract until either the protest has been withdrawn or the JBE's protest hearing officer has responded ~~has made a final decision as to the action to be taken relative to~~ the protest. For more information regarding the protest procedure, see chapter 7 of the Manual.

### C. RFPs

**Posting:** When using an RFP, the JBE must post a notice of intent to award the contract in a place accessible by the general public (including any Internet site identified in the RFP) for at least five Court Days before awarding the contract.

If any Bidder submits a valid protest before award of the contract, the JBE will not award the contract until either the protest has been withdrawn or the JBE's protest hearing officer has responded ~~has made a final decision as to the action to be taken relative to~~ the protest. For more information regarding the protest procedure, see chapter 7 of this Manual.

#### **STEP 15—CREATE THE CONTRACT**

The Buyer should memorialize the purchase using a contract. ~~Except in extraordinary circumstances, negotiations should be limited to finalizing the form of agreement and non-substantive terms.~~ The contract must be signed by an authorized representative of the Bidder that can bind the Bidder contractually.

#### **STEP 16—CREATE THE PROCUREMENT SUMMARY DOCUMENT**

The Buyer should create a procurement summary document and place it in the procurement file (for more information on procurement summary documents, see chapter 4, section 4.7 of this Manual).

#### **STEP 17—NOTIFY BSA OF LARGE CONTRACTS**

If the total cost of the purchase is estimated to be more than \$1 million ~~or higher~~, the Buyer must notify the Bureau of State Audits (BSA) in writing of the existence of the contract. The JBE must make this notification within 10 business days ~~Court Days~~ of execution of the contract. BSA may review the contract to ensure compliance with the California Judicial Branch Contract Law.



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 4C  
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## **STEP-BY-STEP GUIDE FOR THE PROCUREMENT OF IT GOODS AND SERVICES**

CHAPTER 4C

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## INTRODUCTION

In light of the unique aspects of information technology (IT) and its importance to Judicial Branch Entity (JBE) programs, the Public Contract Code (PCC) allows for a flexible and expeditious approach to IT procurements. The most significant difference between IT and non-IT procurements is that IT procurements may be awarded on the basis of “value effectiveness” within a competitive framework. When procuring IT goods and services, JBEs must consider factors other than price. (See PCC 12102(b).) In addition, JBEs may use a phased approach of Bid development.

This chapter sets forth a step-by-step guide for the procurement of IT goods and services.

## DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.~~The definitions of capitalized terms used in this chapter are set forth in the glossary.~~

## STEP 1—PERFORM PRELIMINARY ANALYSIS

The Buyer should perform two analyses, discussed below, at the beginning of any IT procurement.

### Procurement Value

The value of the procurement directly affects the processes that are used in the procurement. The JBE employee requesting the procurement should estimate the total value of the procurement, including:

- Value of the IT goods to be procured;
- Value of the IT services to be procured;
- Taxes (if applicable); and
- Other associated costs, as applicable.

JBEs may not split a single transaction into a series of transactions for the purpose of evading procurement requirements.

## IT-Specific Issues

The Buyer may consider the following issues, which are drawn from PCC 12103.5, to help plan and execute the IT procurement:

- The judicial branch policy, legislative mandate, or operational reason for the IT procurement;
- The existing business processes currently used to implement the judicial branch policy, legislative mandate, or operational reason;
- The most important priorities for the IT project to accomplish;
- What current technology is being used and how it is being used;
- If the data used in a proposed IT system comes from multiple sources, the existing business processes or technical systems that produce and maintain the source data to ensure interoperability;
- How the new IT project leverages existing technology investments while accomplishing its business objectives; and
- How to meet the JBE's anticipated IT life cycle requirements.

### STEP 2—DEVELOP LIST OF PROSPECTIVE BIDDERS

The JBE employee requesting the procurement should develop a list of Prospective Bidders. See chapter 4, section 4.1.B [of this Manual](#) for additional information on developing a list of Prospective Bidders. ~~The Buyer should consider verifying whether any of the Prospective Bidders identified are ineligible for contract award. By doing so, the Buyer will avoid soliciting Bids from entities to which the JBE cannot award the contract. The verification must in any event be completed before contract award. See chapter 4, section 4.4.C for additional information on ineligible entities.~~

### STEP 3—ASSEMBLE PROCUREMENT TEAM

The Buyer, with assistance from the JBE employee requesting the procurement, should identify additional JBE personnel who will be involved in the procurement. These may include:

- Technical experts;
- Personnel to help develop the Solicitation Document;
- Evaluation Team members; and
- Legal counsel, if applicable. (See [chapter 8, section 8.34](#). ~~chapter 2, section 2.1.C~~ [of this Manual](#) for more information on seeking legal participation.)

If required by the Local Contracting Manual, the Buyer should have these personnel sign confidentiality/conflict statements. See chapter 4, section 4.1.C [of this Manual](#) for additional information on confidentiality/conflict statements.

#### STEP 4—SELECT SOLICITATION DOCUMENT TYPE

Two types of Solicitation Documents are used in the procurement of IT goods and services:

- Request for Quotes (RFQs)
- Requests for Proposal (RFPs)

The table below provides guidance on when to use the two types of Solicitation Documents.

Solicitation Document	Procurement Size	Type of Procurement
RFQ	Up to \$100,000 <sup>1*</sup>	<u>IT goods, IT services, and any combination of IT goods and services</u> <del>IT goods</del>
	Up to \$5,000	<del>IT services</del>
RFP	Any size	IT goods, IT services, and any combination of IT goods and services

~~\* A JBE may adopt a lower threshold when using RFQs. Any lower threshold should be included in the JBE’s Local Contracting Manual.~~ **Note:** The JBE may use other names

<sup>1</sup> ~~A JBE may adopt a higher or lower threshold for the use of RFQs in its Local Contracting Manual. -If the JBE adopts a higher threshold, the JBE must ensure that (i) the higher threshold is reasonable and appropriate, and (ii) the JBE provides adequate oversight for the use of larger-value RFQs. Also, note that A JBE may adopt a lower threshold when using RFQs. Any lower threshold should be included in the JBE’s Local Contracting Manual. Also, procurements under \$5,000 may be conducted without a competitive solicitation; see chapter 5, section 5.1 of this Manual.~~

for these Solicitation Documents; it does not need to refer to or title them as “RFQs” or “RFPs.”

## **STEP 5—CONSIDER PHASED APPROACH**

**Note:** This step is applicable to RFP-based procurements, but is inapplicable to RFQ procurements.

The JBE should consider a phased approach when using an RFP to solicit IT goods and services. A phased approach may be particularly useful in especially complex procurements. A phased approach allows for an interactive, conversational mode of Bid and contract development. It requires the JBE, working together in confidence with each Bidder, to assess and discuss the viability and effectiveness of the Bidder’s proposed methods of meeting the JBE’s needs as reflected in the RFP. It is a departure from the rigid “accept or reject” philosophy of traditional competitive bidding, yet it is highly competitive in nature. It provides the flexibility needed for the Bidder to test a solution before formal submittal of a Bid, and it facilitates the correction of defects before they become fatal to the Bid.

A phased approach includes one or more of the following:

- Submission of a conceptual proposal by the Bidder;
- Submission of a detailed technical proposal by the Bidder; and
- Submission of a draft Bid by the Bidder.

Conceptual proposal: A conceptual proposal may be included to allow each Bidder to provide a general concept of a Bid with just enough detail to enable the Evaluation Team to determine if the Bidder is on the right track toward meeting the functional requirements as stated in the RFP and, if not, where the Bidder must change a concept. This step invites the Bidder to be as innovative as the RFP requirements allow in eliminating unnecessary constraints.

Detailed technical proposal: The detailed technical proposal may be included to allow each Bidder to provide a detailed technical description of its Bid to determine at an early stage whether the Bid is totally responsive to all the requirements of the RFP, and if not, which elements are not responsive and what changes would be necessary and acceptable.

Draft Bid: A draft Bid may be included to allow each Bidder to submit an "almost final" Bid in order to identify any faulty administrative aspect of the Bid that, if not corrected, could cause the final Bid to be rejected for ministerial reasons.

The RFP must be drafted to implement the phased approach, if applicable.

## STEP 6—DRAFT SOLICITATION DOCUMENT

The Buyer should draft the final Solicitation Document. For requirements applicable to Solicitation Documents, see chapter 4, section 4.2 of this Manual. ~~The Solicitation Document should comply with the applicable requirements set forth in chapter 4, section 4.2. In particular, it must include all provisions identified as required. In addition, the Solicitation Document should specify any warranty requirements.~~

If the solicitation includes IT goods, the Bidder must submit a California seller's permit certification. See section A in the "Selected Topics Relevant to Solicitations of IT Goods and Services" section below for additional information.

The more thorough a JBE is in communicating its specific needs, requirements, goals, and objectives in the Solicitation Document, the more complete, responsive, and acceptable the Bids received will be.

The following subsections provide additional information useful in drafting the two types of Solicitation Documents.

### A. RFQs

An RFQ is used for ~~straightforward~~ procurements where Bids ~~are~~ may be solicited by phone or another method of electronic communication.

If the Buyer solicits Bids by phone, the Buyer must prepare and use a script (a narrative of the Bid requirements) so that each Prospective Bidder receives the same information and Bids may be evaluated fairly. Similarly, if the Buyer solicits Bids by e-mail or another written manner, the Buyer must send the same information to each Prospective Bidder so that Bids may be evaluated fairly.

The RFQ should:

- Be short, concise, and to the point;

- Include a description of the IT goods or services to be solicited;
- Include any required technical specifications;
- Include any deliverable resulting from the IT services;
- Specify when the IT services must be completed and any deliverable must be delivered;
- Specify how the Prospective Bidder must deliver its Bid (e.g., by telephone, e-mail, fax, etc.); and
- Include a reference to the web page containing the current bidder instructions and applicable general provisions associated with the purchase, if applicable.

## **B. RFPs**

RFPs are used to procure a wide variety of IT goods and services. Depending on the type and value of the procurement, the RFP content requirements will vary.

### Information about the Procurement Process:

RFPs must include:

1. The standards the JBE will use in evaluating Bids;
2. Time schedules relating to the procurement, including:
  - Date to submit questions or seek clarification (as applicable);
  - Date of Bidders' conference (as applicable);
  - Due date for the conceptual proposal (as applicable);
  - Due date for the technical proposal (as applicable);
  - Due date for the draft Bid (as applicable);
  - Bid Closing Time;
  - Timetable that the JBE will follow in evaluating Bids and awarding the contract; and
  - Anticipated contract term, including start and end dates.
3. Time and place where the sealed cost portions of the Bid will be opened (the place must be accessible to Bidders and other members of the public, and may be at the JBE's facilities);
4. Where the intent to award notice will be posted (e.g., website address);
5. The JBE's contact person for administration of the solicitation; and
6. The JBE's standard terms and conditions for the acquisition of IT goods and services.

To the extent practicable, the JBE should also distribute with the RFP the terms and conditions specific to the procurement, or simply attach the entire proposed contract, including available appendices.

Description of IT Goods: The RFP must contain a description of the desired IT goods (if any). The description should include:

- Product specifications;
- Description of when and where the IT goods are to be delivered; and
- Support and maintenance requirements.

Description of IT Service: The RFP must contain a description of the desired IT services (if any). The description should include:

- A clear, precise description of the work to be performed, services to be provided, problem to be solved, questions to be answered, issues to be addressed, or the goals and objectives to be met;
- An explanation of any-the desired approach to the problem, if any;
- Any requirements as to where the work must be performed (e.g., at the JBE's site);
- A description of any specific functions, tasks, or activities that must be performed, in the ~~if~~ order of importance and probable sequence, if applicable;
- Performance timelines or completion dates;
- Required quality control standards to be met, if applicable;
- A description of any required deliverables (such as progress reports or a final report summarizing a consultant's findings);
- A description of the assistance to be provided by the JBE, if applicable; and
- Practical and policy information, technological requirements or specifications, and legal limitations, if applicable.

Terms and Conditions: The RFP should identify any "minimum terms" in the JBE's terms and conditions. "Minimum terms" are the terms so important that a proposed exception (addition, deletion, or other modification) will render a Bid nonresponsive. The RFP should require that Bidders identify all proposed exceptions (if any) to the JBE's terms and conditions. The RFP should state that (i) a Bid that takes a material exception (addition, deletion, or other modification) to a minimum term will be deemed nonresponsive, and (ii) the JBE, in its sole discretion, will determine what constitutes a material exception.

Acquisition of additional items: It is sometimes difficult at the RFP stage to know with certainty the exact quantities of IT goods that will be required. To the extent practical, the RFP should provide for a contract to be written so as to enable acquisition of additional items. This will avoid redundant acquisition processes if the JBE determines it needs more of the IT goods of the type already procured.

Payment Information: The RFP should contain some basic payment information, including (as applicable):

- Whether and to what extent Progress Payments will be allowed;
- Penalties for late or inadequate performance;
- Known or estimated budgetary limitations on the contract price; and
- Travel expenses (what will and will not be paid by the JBE).

**Note:** See chapter 9 [of this Manual](#) for more information regarding Progress Payments.

Format and Required Elements of Bids: RFPs must specify what Bidders must address or include in their Bids, such as:

1. A description of the Bidder's qualifications, [which may include at the JBE's discretion](#) including:
  - Copies of current business licenses, professional certifications, or other credentials;
  - Proof of financial solvency or stability (e.g., balance sheets and income statements);
  - Proof that the Bidder, if a corporation, is in good standing and qualified to conduct business in California; and
  - For Bidders that are nonprofit organizations, proof of nonprofit status.
2. A list of references for whom the Bidder has provided similar goods or performed similar work; and
3. If subcontractors are contemplated:
  - Identification of those persons or firms;
  - The portions and monetary percentages of the work to be done by the subcontractors;
  - How and why these subcontractors were selected;
  - Resumés of each major subcontract participant; and

- Description of how subcontracted work will be controlled, monitored, and evaluated.

If the RFP is soliciting IT services, the JBE may also require Bids to include:

- A list of similar services successfully completed by the Bidder, with samples if applicable;
- A description of the lead personnel and anticipated supporting personnel to be employed during performance (by classification or title) and their qualifications to perform the work;
- Identification of a project coordinator;
- Resumés for each major contract participant who will exercise a major policy, administrative, or consultative role in carrying out the services;
- An overall description of the techniques, approaches, and methods to be used in performing the services; and
- The total cost of the services, with a detailed breakdown showing how the costs were determined, and the desired method of payment. The detailed budget breakdown may include:
  - Identification of position/classification titles funded;
  - Salary rates or ranges;
  - Percentage of time devoted to the work;
  - Fringe benefits;
  - Operating expenses;
  - Travel and per diem expenses;
  - Overhead or indirect costs;
  - Subcontractors with the same type of cost details; and
  - Other costs.

**Evaluation Plan:** Although not part of the RFP itself, the Buyer should develop an evaluation plan along with the RFP. By developing the evaluation plan with the RFP, the Buyer may ensure that the JBE receives all information necessary to properly evaluate the Bids.

The evaluation plan must provide for a fair and equitable evaluation of all Bids. The evaluation plan should ensure the following:

- Cost is appropriately considered (see the section below regarding the assignment of cost points).

- Exceptions to the JBE's terms and conditions (additions, deletions, or other modifications) may be considered as part of the evaluation process~~are evaluated and given substantial weight in the score assigned to the Bid.~~
- If a material exception (addition, deletion, or other modification) is taken to a minimum term, the Bid will be deemed nonresponsive. Note that the JBE, in its sole discretion, will determine what constitutes a material exception.

The JBE may consider the following criteria when developing the evaluation plan.

- Quality of the IT goods or services.
- Technical competency of Bidder's personnel.
- Reliability of delivery and implementation schedules.
- The maximum facilitation of data exchange and systems integration.
- Warranties, guarantees, support, and return policy.
- Bidder's understanding of the JBE's problem or needs.
- Ability to deliver IT goods and services on time.
- Reasonability and feasibility of the Bidder's proposed approaches, methods, procedures, and time-lines.
- Organizational and management capability, management competency, fiscal and personnel resources.
- Exceptions (additions, deletions, or other modifications) to the terms and conditions that may be detrimental to the JBE.
- Professional qualifications of the personnel who the Bidder will commit to the project.
- Sufficiency of allocated staff resources.
- Performance monitoring plans and procedures.
- Adequate fiscal, accounting, cost-monitoring or budget-monitoring procedures.

**Cost Points:** The evaluation criteria must be based on value-effective factors that include cost. These factors are weighted; generally, the administrative and technical requirements should equal 50 percent and cost should equal 50 percent.

Except as noted below, the evaluation criteria for the acquisition of IT goods and services must not be limited to cost alone. The JBE may not assign 100 percent of the total points to cost; other factors must be considered.

**Exception:** If the JBE is acquiring hardware independently of a system integration project, the JBE may assign 100 percent of the total points to cost. In other words, the

JBE can award such contracts to the Responsible Bidder that submitted the lowest Responsive Bid after application of any preference, incentives, or discounts, if applicable.

JBEs should disclose in the RFP the evaluation criteria or categories and the percentage weight for each criterion or category. Examples of criteria include price and prior experience.

Bid Sealing Requirements: The RFP must require the Bidder to submit the cost portion of its Bid in a sealed envelope separate from the remainder of the Bid.

Phased Approach—Notice to Bidders: If the RFP is to include a conceptual proposal and/or a detailed technical proposal step, the JBE should include the following (or substantially similar) [paragraphs-language](#) in the RFP:

This procurement will follow a phased approach designed to increase the likelihood that Bids will be received without disqualifying defects. The additional step(s) will (1) ensure that the Bidders clearly understand the JBE's requirements before attempting to develop their final solutions; (2) ensure that the JBE clearly understands what each Bidder intends to propose before those Bids are finalized; and (3) give the JBE and each Bidder the opportunity to discuss weaknesses or potentially unacceptable elements of a Bid and give the Bidder the opportunity to modify its Bid to correct such problems.

As part of the phased approach, the JBE may review a Bidder's submissions for errors, defects, or other problems. **The JBE makes no warranty that all errors, defects, or other problems will be identified. The Bidder is solely responsible for submitting a Bid that is free of errors and defects, and complies with all RFP requirements.**

If a draft Bid is included in the procurement, the RFP should specify that the draft Bid must contain all the material required in the final Bid, except that no cost information may be included.

Consulting Services—Follow-On Contracting Language: All RFPs that include a consulting services component [must-should](#) include the language below (or substantially similar language). [Amendments to contracts that incorporate a consulting](#)

~~services component that was not part of the original Solicitation Document must also contain this (or substantially similar) language.~~

~~No consultant shall be paid out of JBE funds for developing recommendations on the acquisition of IT goods or services or assisting in the preparation of a feasibility study, if that consultant is to be a source of such acquisition or would otherwise directly and/or materially benefit from the JBE's adoption of such recommendations or the course of action recommended in the feasibility study.~~

Bids in response to JBE procurements for assistance in the preparation of feasibility studies or the development of recommendations for the acquisition of IT goods and services must disclose any financial interests (e.g., service contracts, original equipment manufacturer **(OEM)** agreements ~~(OEM)~~, remarketing agreements) that may foreseeably allow the **B**idder to benefit materially from the JBE's adoption of a course of action recommended in the feasibility study or of the acquisition recommendations.

~~In addition, should a consultant establish or become aware of such a financial interest during the course of contract performance, the consultant must inform the JBE in writing within ten court days. If, in the JBE's judgment, the newly-established financial interest will jeopardize the objectivity of the recommendations, the JBE shall have the option of terminating the contract. A consultant's failure to disclose a relevant financial interest is grounds for termination of the contract with all associated costs to be borne by the consultant.~~

~~The Buyer should consider whether to use a negotiation process. If a negotiation process is desired, appropriate language must be included in the RFP. See chapter 2, section 2.1.G for additional information on using a negotiation process.~~

**STEP 7—PREPARE ADVERTISING**

A JBE must advertise solicitations as shown in the following table:<sup>2</sup>

Procurement for	Advertising required
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<sup>2</sup> All IT solicitations must be advertised as set forth in this table, even if the JBE adopts a threshold for use of RFQs that is higher than \$100,000.

IT Goods	If total procurement value is \$100,000 or more
IT Services	If total procurement value is \$5,000 or more
IT Goods and Services	If the total procurement value is \$100,000 or more <b>or</b> the services portion of the procurement is \$5,000 or more

Although not required, a JBE may advertise a solicitation that has a total procurement value less than the applicable amount shown in the table above. Because the advertisement should be released before or simultaneously with the Solicitation Document, the Buyer should prepare any necessary advertisement in conjunction with the Solicitation Document. See chapter 4, section 4.1.D [of this Manual](#) for advertising methods.

**Note:** If the JBE is using an RFP, the JBE must post the RFP in a public location such as the JBE’s website. All changes to the RFP must also be posted in the same public location in which the RFP was originally posted.

**STEP 8—OPTIONAL: HOLD BIDDERS’ CONFERENCE**

Bidders’ conferences provide Prospective Bidders an opportunity to understand better the IT goods or services being procured by a JBE. Holding a Bidder’s conference is always optional, at the JBE’s discretion. Bidders’ conferences are more common in solicitations for complex procurements.

**Note:** Bidders’ conferences are not held for RFQ solicitations.

**STEP 9—OPTIONAL: COMPLETE PHASED APPROACH STEPS**

If included in the RFP, the JBE should complete the various steps of the phased approach, as described below.

**Note:** A phased approach is not used in RFQ solicitations.

**Review Conceptual Proposal and Detailed Technical Proposal**

The Evaluation Team will receive and review the conceptual proposal and/or the detailed technical proposal to determine if either proposal (or portion thereof):

- Is nonresponsive to a requirement;
- Is otherwise defective; or
- Requires clarification so that the JBE may fully understand the proposed solution.

The Evaluation Team must review each proposal in accordance with any evaluation methodology outlined in the RFP.

### **Confidential Discussions with Bidder**

Based on its review of the proposal(s), the Evaluation Team will prepare an agenda of items to be discussed separately with the Bidder and transmit the agenda to the Bidder. The agenda will include the identification of discovered defects, but may also include a discussion of the Bidder's proposed support, implementation plans, validation plans, demonstration plans, and proposed contracts, as appropriate. The Evaluation Team **will should** meet with the Bidder to discuss the items on the agenda. These discussions are confidential.

The primary purpose of the discussion is to ensure that the Bidder's final Bid will be responsive. ~~The Evaluation Team should not make counter-proposals.~~ The Evaluation Team should **only** identify its concerns, ask for clarification, and express its reservations if a particular requirement of the RFP is not appropriately satisfied, in the opinion of the Evaluation Team.

At the conclusion of the meeting, the JBE **may-should** prepare a memorandum documenting the clarified items and how the Bidder proposes to correct the noted defects. The JBE may schedule additional meetings with a Bidder at the JBE's discretion. If additional meetings are scheduled, the process set forth in this sub-step ("Confidential Discussions with Bidder") will be repeated. The JBE may require the resubmission of selected materials as part of this process.

If, after discussion with a Bidder, the JBE is of the opinion that the Bidder's conceptual proposal or detailed technical proposal cannot be restructured or changed in a reasonable time to satisfy the needs of the JBE, and that further discussion would not likely result in an acceptable Bid in a reasonable time, the Evaluation Team **will-should**

give the Bidder written notice that the conceptual proposal or detailed technical proposal has been rejected and that a final Bid submitted along such lines would be nonresponsive.

### Evaluate Draft Bids

The Evaluation Team will-should review draft Bids for administrative or clerical errors and inconsistencies that, if contained in the final Bid, may cause the Bid to be rejected. If the Evaluation Team discovers errors that can be corrected without overhauling the Bid, the Evaluation Team will-should communicate this information to the Bidder and give the Bidder an opportunity to correct the identified errors before the Bid Closing Time. The Evaluation Team may communicate this information through a confidential memo, or through a confidential meeting.

**Note:** The draft Bid review is not intended to check for responsiveness to RFP requirements, but only for administrative or clerical errors and inconsistencies that could cause the Bid to be deemed nonresponsive on a technicality.

### STEP 10—RECEIVE BIDS

Bids are received and handled as described in chapter 4, section 4.3 of this Manual. In addition to those general requirements, this step sets forth additional requirements applicable to solicitations of IT goods and services using different Solicitation Documents.

#### A. RFQs

Bids must be submitted as specified in the RFQ. The Buyer must document any-all Bids received. ~~The Buyer should document all Bids received~~ and retain the documentation in the procurement file. In addition, the RFQ (script, e-mail, or other writing) should be retained in the procurement file.

Bids received pursuant to an RFQ solicitation remain confidential until a contract is executed.

#### B. RFPs

The Bids must be submitted as specified in the RFP. A JBE may-wish-should time/date stamp Bids as they are received.

Bids received pursuant to an RFP solicitation remain confidential until an intent to award notice is posted.

### STEP 11—OPEN BIDS

The opening and evaluation of Bids in response to IT RFPs is a multi-step process. See step 14 for information for additional details.

The JBE must first open the noncost portion of all Bids received. This does not need to be done publicly. The sealed cost portions of the Bids must not be opened until the Evaluation Team has completed evaluating the noncost portion of all Bids.

The sealed cost portion of a Bid will not be opened if the noncost portion of the Bid contains one or more material deviations. See section 4.4.D for more information regarding material deviations.

**Note:** This step is inapplicable to RFQs, which do not use sealed Bids.

### STEP 12—DETERMINE IF COMPETITION HAS BEEN ACHIEVED

Two methods are used to determine whether competition has been achieved: one for RFQs and another for ~~IFBs and~~ RFPs.

#### A. RFQs

A Buyer should use his or her procurement expertise and experience to determine whether the Bid to be selected is fair and reasonable. Buyers should obtain at least two Bids from Bidders whenever there is reason to believe a response from a single Bidder is not a fair and reasonable price.

#### B. RFPs

If the JBE does not receive at least two Bids then:

- The Buyer should consider cancelling and re-issuing the solicitation. If the Buyer takes this course, he or she should consider modifying any possible restrictive requirements in the RFP.

- If the Buyer decides to award the contract, the Buyer should document in the procurement file the names and addresses of the firms or individuals that were solicited for Bids.

### ~~STEP 13 – CHECK FOR INELIGIBLE BIDDERS~~

~~The Buyer should verify whether any of the Bidders are ineligible for contract award. See chapter 4, section 4.4.C for additional information on ineligible entities.~~

~~In addition, when IT services are to be performed in the state by corporations, the JBE should obtain verification that the Bidder is currently qualified to do business in California to ensure all obligations to the state have been fulfilled.~~

### STEP 13—OPTIONAL: HOLD ORAL INTERVIEWS/CLARIFICATION

Oral interviews provide the JBE an opportunity to understand better or clarify the Bids submitted by Bidders. Holding oral interviews ~~is~~<sup>are</sup> always optional, at the JBE's discretion. The JBE is not obligated to hold an oral interview with every Bidder; it may limit interviews to only those Bidders whose Bids need clarification. Oral interviews are more common in complex procurements. If the JBE opts for a phased approach, the Evaluation Team will usually meet with Bidders as part of that process. In such procurements, a separate oral interview may not be necessary.

**Note:** Oral interviews are not held for RFQ solicitations.

If the JBE otherwise requires clarification regarding a Bid, the JBE ~~may~~<sup>should</sup> contact the Bidder that submitted the affected Bid.

### STEP 14—EVALUATE BIDS

The process of evaluating Bids differs significantly for RFQs and RFPs. ~~The requirements in this step are in addition to the general requirements set forth in chapter 4, section 4.4 of this Manual. The JBE should evaluate the Bids in accordance with chapter 4, section 4.4, and any requirements listed in the~~ the Solicitation Document, ~~and this step.~~ There is no requirement to award a contract ~~if~~<sup>;</sup> ~~see chapter 4, section 4.4.B of this Manual for additional details.~~

- ~~• In the opinion of the JBE, no Bid contained a reasonable contract price, or~~

- ~~• There is another business-based reason not to make an award.~~

## A. RFQs

The JBE must award the contract (if at all) to the Bidder whose Bid is given the highest score by the Evaluation Team, after applying any preference, incentives, or discounts. See chapter 3 [of this Manual](#) for more information regarding preferences, incentives, and discounts.

## B. RFPs

The evaluation of Bids received in response to RFPs involves a five-step process.

1. The Evaluation Team must review the non-cost portion of each Bid to confirm that it meets the format requirements specified in the RFP.
2. The Evaluation Team must complete its evaluation of non-cost criteria for all Bids using the methods specified in the RFP.
3. The JBE must publish the results of the completed [noncost](#) evaluation. Unless specified otherwise in the Local Contracting Manual, this publication must occur on the JBE's website.
4. The Evaluation Team must publicly open the cost portion of the Bids as specified in the RFP (except Bids determined to have a material deviation in the non-cost portion).
5. The Evaluation Team must evaluate the cost portion of the Bids opened in item 4 above.

~~In addition, the evaluation process may include a demonstration, at the JBE's discretion.~~

The Evaluation Team must not use any requirements other than those provided by law or specified in the RFP (or addenda thereto) to score Bids. [The JBE must award the contract \(if at all\) to the Bidder whose Bid is given the highest score by the Evaluation Team, after applying any preference, incentives, or discounts. See chapter 3 of this Manual for more information regarding preferences, incentives, and discounts.](#)

~~[Suggested Non-Cost Evaluation Criteria:](#) In addition to any criteria specified in the RFP, the JBE may consider using the following criteria when evaluating and scoring Bids.~~

- ~~• Quality of the IT goods or services.~~
- ~~• Technical competency of Bidder's personnel.~~
- ~~• Reliability of delivery and implementation schedules.~~
- ~~• The maximum facilitation of data exchange and systems integration.~~
- ~~• Warranties, guarantees, support, and return policy.~~

- ~~Bidder's understanding of the JBE's problem or needs.~~
- ~~Ability to deliver IT goods and services on time.~~
- ~~Reasonability and feasibility of the Bidder's proposed approaches, methods, procedures, and time lines.~~
- ~~Organizational and management capability, management competency, fiscal and personnel resources.~~
- ~~Exceptions to the terms and conditions that may be detrimental to the JBE.~~
- ~~Professional qualifications of the personnel who the Bidder will commit to the project.~~
- ~~Sufficiency of allocated staff resources.~~
- ~~Performance monitoring plans and procedures.~~
- ~~Adequate fiscal, accounting, cost-monitoring or budget-monitoring procedures.~~

Suggested Cost Evaluation Criteria: JBEs may use the process for ~~awarding~~ assigning cost points set forth in appendix A of this chapter. Alternately, JBEs may adopt their own processes for ~~awarding~~ assigning cost points.

**Note:** There ~~are~~ is an additional cost evaluation requirement for solicitations that are required to be advertised (see the table in step 7 for which solicitations must be advertised). For those solicitations, the JBE must ~~provide for consideration of~~ consider a Bidder's "best financing alternative" (including lease or purchase alternatives) if any Bidder requests such consideration at least 30 days before the Bid Closing Time. However, the JBE does not need to consider a particular financing alternative if, in the judgment of the Approving Authority, that financing alternative should not be considered. (See PCC 12102(e).)

Demonstration: The evaluation process may also include a demonstration ~~of some aspect of a Bid, at the JBE's discretion~~. The demonstration may be used to verify the claims made in the Bid, corroborate the evaluation of the Bid, or confirm that the hardware and software are actually in operation. If a demonstration is required, the JBE will give notice to the Bidder. The Bidder must make all arrangements for demonstration facilities at no cost to the JBE. The location of the demonstration ~~will~~ may be determined by the JBE ~~Bidder; however, its performance within California is preferred and will be attended at the JBE's expense. Demonstration outside California will be attended only if the Bidder agrees to reimburse the JBE for travel and per diem expenses~~. The Evaluation Team, in its good faith judgment, will determine whether or not a demonstration has been successfully executed.

**Certification:** The JBE's contact person for administration of the solicitation (who should have been identified in the RFP) must execute a certificate under penalty of perjury, that the cost portions of all Bids received by the JBE were maintained sealed and secured until the time all cost portions of Bids were opened. The signed certificate should be included in the procurement file.

A sample certificate that JBEs may use is included as appendix B [of this chapter](#).

## STEP 15—NOTICE OF INTENT TO AWARD

### A. RFQs

When using an RFQ, the JBE is not required to post a notice of intent to award.

### B. RFPs

When using an RFP, the JBE must post a notice of intent to award on its website or in a public place in the offices of the JBE at least five Court Days before the contract is awarded. ~~Once the notice has been posted, the time for submitting a protest begins to count down.~~

**Exception:** ~~The JBE does not need to post a notice of intent to award if (i) the JBE has adopted a protest threshold applicable to IT goods and services, and (ii) the procurement is below that protest threshold. For more information regarding protest thresholds, see chapter 7, section 7.2 of this Manual.~~

The JBE may, as a courtesy to Bidders, send a copy of the notice of intent to award to each Bidder by e-mail or fax.

If a Bidder submits a valid protest within five Court Days of the posting of the intent to award, the JBE must not award the contract until either the protest has been withdrawn or the JBE's ~~Protest Hearing Officer has responded has made a final decision regarding the action to be taken relative~~ to the protest. For more information regarding the protest procedure, see chapter 7 [of this Manual](#).

## STEP 16—CREATE THE CONTRACT

The Buyer should memorialize the purchase using a contract. ~~Except in extraordinary circumstances, negotiations should be limited to finalizing the form of agreement and non-substantive terms.~~ The contract must be signed by an authorized representative of the Bidder that can bind the Bidder contractually.

## STEP 17—CREATE THE PROCUREMENT SUMMARY DOCUMENT

The Buyer should create a procurement summary document and place it in the procurement file. For more information on procurement summary documents, see chapter 4, section 4.7 [of this Manual](#).

## STEP 18—MANDATORY REPORTING

There are two types of reports that may be required, depending on the dollar value of the procurement, ~~discussed below~~.

### California Technology Agency (CTA) Reporting

All administrative and infrastructure IT projects of the Judicial Council or the courts with total costs estimated at more than \$5 million are subject to the review and recommendations of the CTA, as specified in Government Code (GC) 68511.9.<sup>3</sup>

### Bureau of State Audits (BSA) Reporting

If the total cost of the purchase is [estimated to be more than \\$1 million](#) ~~or higher~~, the Buyer must notify the BSA in writing of the existence of the contract. The JBE must make this notification within 10 [business](#) days of execution of the contract. BSA may review the contract to ensure compliance with the California Judicial Branch Contract Law.

**Note:** Excluded from this requirement are contracts covered by GC 68511.9, which covers contracts for the California Case Management System and all other administrative and infrastructure [IT](#) projects of the Judicial Council and courts with total costs estimated at more than \$5 million.

<sup>3</sup> [Note that GC 68511.9 refers to the Office of the Chief Information Officer \(OCIO\). However, the OCIO has been renamed the California Technology Agency in accordance with Assembly Bill 2408 \(Stats. 2010, ch. 404\)-Chapter 404, Statutes of 2010 \(AB 2408\).](#)

## SELECTED TOPICS RELEVANT TO THE SOLICITATION OF IT GOODS AND SERVICES

### A. California Seller's Permit

If the solicitation includes IT goods, the Bidder must certify that it and all of its affiliates that make sales for delivery into California are holders of either:

- A California seller's permit issued under Revenue and Taxation Code section 6066 and following; or
- A certificate of registration issued under Revenue and Taxation Code section 6226.

The selected Bidder must submit supporting documentation before a contract is executed.

There are two exemptions to this requirement:

- Purchases of \$2,500 or less if the JBE is using a credit card to pay for the purchase (**note:** the total amount allowed under this exception for each Vendor per year is \$7,500 per JBE); and
- Purchases where the Approving Authority, or his or her delegee, makes a written finding that the contract is necessary to meet a "compelling state interest." "Compelling state interests" include ensuring the provision of essential services, ensuring the public health, safety, and welfare, and responding to an emergency, as that term is defined in PCC 1102.

### A.B. New IT Equipment

To avoid the purchase of unreliable or outdated equipment, JBEs should procure new IT equipment unless budget priorities dictate otherwise. All equipment should be the latest model in current production. Used, shopworn, demonstrator, prototype, or discontinued models are not recommended.

### B.C. Performance-Based or Share-In Savings Contracts

For contracts related to IT integration or development projects that generate revenues or achieve savings over a quantifiable baseline of existing costs, JBEs must consider

and may incorporate performance-based or share-in-savings contract terms to manage risks and create incentives for successful contract performance.

Performance-based or share-in-savings contracts may have the following characteristics, among others:

- Contract terms that specify business outcomes to be achieved, not the solution to be provided;
- Contract terms that structure the contract to maintain maximum Vendor commitment to project success and minimize risk to the JBE by sharing risk with the private sector;
- Utilization of “best value” evaluation methods, which means to select the solution that will achieve the best result based on business performance measures, not necessarily the lowest price; and
- Contract terms that base payments to the Vendor primarily on achieving predefined performance measures.

#### **C-D. Solicitations of Printer or Copier Cartridges**

If a JBE procures printer or copier cartridges, it must include a statement on the cover of the Solicitation Document (or in some other prominent place in the Solicitation Document) informing Bidders that it is unlawful to prohibit a printer or copier cartridge that is sold to a JBE from being recycled or remanufactured, except as noted below.

**Exception:** This requirement does not apply where the Bidder enters into signed agreements with its customers consenting to the return of the used cartridge to the Bidder for (a) recycling and remanufacturing, or (b) recycling.

**APPENDIX A**  
**SAMPLE METHOD FOR ASSIGNING COST POINTS**  
**WHEN EVALUATING RFPs**

**STEP ONE:**

The Bid with the lowest cost is assigned the maximum number of cost points.

**STEP TWO:**

Use the worksheet below to calculate the number of cost points to be assigned to each of the remaining Bids. The number of cost points to be assigned to the Bid being evaluated is the number in line 6.

Line 1      Enter the maximum number of cost points..... \_\_\_\_\_

Line 2      Enter the dollar amount of the lowest bid..... \$ \_\_\_\_\_

Line 3      Enter the dollar amount of the bid you are evaluating. \$ \_\_\_\_\_

Line 4      Divide the number in line 2 by the number in line 3,  
and enter the resulting number ..... \_\_\_\_\_

Line 5      Multiply the number in line 1 by the number in  
line 4, and enter the resulting number..... \_\_\_\_\_

Line 6      Round the number in line 5 to the nearest whole  
number and enter that number..... \_\_\_\_\_

**Example:**

A superior court issues an RFP where the maximum number of cost points is 60. The court receives three bids:

<u>Bidder</u>	<u>Bid Amount</u>
A	\$90,000
B	\$98,000
C	\$80,000

| In this scenario, Bidder C submitted the lowest Bid and is awarded-assigned the maximum 60 cost points.

| Bidder A is awarded-assigned 53 cost points, as shown below:

Line 1	60
Line 2	\$80,000
Line 3	\$90,000
Line 4	.8888
Line 5	53.3333
Line 6	53

| Bidder B is awarded-assigned 49 cost points, as shown below:

Line 1	60
Line 2	\$80,000
Line 3	\$98,000
Line 4	.8163
Line 5	48.9795
Line 6	49

Judicial Branch Contracting Manual	<b>Step-by-Step Guide for the Procurement of IT Goods and Services</b>	Chapter 4C Page: 28 of 28 (Appendix B)
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**APPENDIX B  
SAMPLE COST PROPOSAL CERTIFICATION**

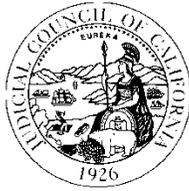
**Cost Proposal Certification  
For  
RFP # \_\_\_\_\_**

I certify under penalty of perjury under the laws of the State of California that I have kept the cost portion of each Bid received for the RFP identified above sealed and secured from its receipt until the Bid opening on **[date]**.

\_\_\_\_\_

**[Buyer's name]** **[date]**

Executed in \_\_\_\_\_ [city], \_\_\_\_\_ [state]



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 5  
Page 1 of 10

## **NON-COMPETITIVELY BID (NCB) PROCUREMENTS**

### **CHAPTER 5**

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## INTRODUCTION

In certain circumstances, Judicial Branch Entities (JBEs) may procure non-IT goods, non-IT services, and IT goods and services without going through a competitive process (advertising, receiving Bids, etc). In these non-competitively bid (NCB) procurements, a single entity is afforded the opportunity to provide the specified non-IT goods, non-IT services, or IT goods and services.

The following are the categories of allowed NCB procurements:

- Purchases under \$5,000;
- Emergency purchases;
- Purchases from ~~a~~ governmental entitiesy;
- Legal services;
- Certain Leveraged Prourement Agreements (LPAs);
- Purchases from a business entity operating a Community Rehabilitation Program (CRP); ~~and~~
- Licensing or proficiency testing examinations;
- Subvention and local assistance contracts; and
- Sole source.

This chapter explains when NCB procurements are allowed and the processes required in conducting an NCB procurement.

## DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

~~The definitions of capitalized terms used in this chapter are set forth in the glossary.~~

### 5.1 PURCHASES UNDER \$5,000

For very small purchases, NCB procurements are permitted because the cost of conducting a competitive procurement may exceed the savings expected from the competitive process.

JBEs may purchase non-IT goods, non-IT services, or IT goods and services that cost less than \$5,000 without conducting a competitive procurement so long as the Buyer determines that the pricing is fair and reasonable.

The Buyer should include documentation on fair and reasonable pricing in the procurement file. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required.

**Note:** JBEs may not split a single transaction into a series of transactions for the purpose of evading competitive solicitation requirements.

**Note:** Although not required to do so, JBEs may competitively solicit Bids for purchases under \$5,000. An RFQ is usually used for such procurements.

## 5.2 EMERGENCY PURCHASES

In the event of an emergency, JBEs may purchase non-IT goods, non-IT services, or IT goods and services of any value without conducting a competitive procurement.

~~Public Contract Code (PCG) 1102 defines an emergency as “a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services.”~~

An emergency procurement must be approved in writing by the Approving Authority or his or her delegee. The Approving Authority (or delegee) ~~should~~ may approve an emergency procurement only if he or she determines that immediate acquisition is necessary for the protection of the public health, welfare, or safety~~an emergency (as defined in PCG 1102) exists.~~

When completing an emergency purchase, the Buyer should include in the procurement file the following information:

- A description of the emergency;
- A description of the non-IT goods, non-IT services, or IT goods and services to be purchased, and their prices;
- The names and quotations of suppliers contacted; and
- A copy of the written approval.

## 5.3 PURCHASES FROM GOVERNMENTAL ENTITIES

JBEs may purchase non-IT goods, non-IT services, and IT goods and services of any value from other governmental entities without conducting a competitive procurement.

**Note:** The procurements covered by this section are those in which the governmental entity directly sells the non-IT goods, non-IT services, or IT goods or services to the JBE. This situation is distinct from when a governmental entity has signed an LPA with a Vendor and allows the JBE to purchase from that Vendor using the LPA. For more information on LPAs, see section 5.5 below.

The Buyer should note in the procurement file that the purchase is being made from a governmental entity. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required.

**Note:** Contracts with governmental entities cannot be used to circumvent bidding requirements (see, e.g., PCC 10340(b)(3)).

**Note:** For purposes of this chapter, a "governmental entity" includes, without limitation, (i) a governmental agency from California or any state, (ii) a state college or state university from California or any state, (iii) a local governmental entity or agency, including those created as a joint powers authority, (iv) an auxiliary organization of the California State University, or a California community college, (v) the federal government, (vi) a foundation organized to support the Board of Governors of the California Community Colleges, or (vii) an auxiliary organization of the Student Aid Commission established under Education Code section 69522.

## 5.4 LEGAL SERVICES

JBEs may purchase legal services of any value without conducting a competitive procurement. Legal services include:

- Services performed by an attorney or an attorney's staff; and
- Services performed by consultants and expert witnesses in connection with pending or anticipated legal proceedings.

The Buyer should note in the procurement file that the purchase is for legal services. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required.

## 5.5 CERTAIN LPAs

JBEs should carefully review individual LPA user instructions to determine if the LPA is exempt from competitive bidding.

If the LPA is exempt from competitive bidding, the JBE may purchase non-IT goods, non-IT services, or IT goods and services pursuant to the LPA without conducting a competitive procurement. The JBE may make those purchases up to the maximum amount allowed under the LPA, as applicable.

The Buyer should note in the procurement file that the purchase is made through an LPA. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required. See chapter 6 [of this Manual](#) for further information on LPAs.

### **5.6 COMMUNITY REHABILITATION PROGRAMS (CRPs)**

JBEs may purchase non-IT goods, non-IT services, and IT goods and services of any value from a business entity operating a CRP without conducting a competitive procurement, provided that the goods or services meet the specifications and needs of the JBE and are purchased at a fair market price as determined by the JBE.

**Note:** The CRP must meet the criteria established by Welfare and Institutions Code section 19404 in order for the JBE to purchase from the CRP. To confirm compliance, the JBE should request a copy of the CRP's approval certificate, issued by the Department of Rehabilitation.

The Buyer should note in the procurement file the purchase is being made from a CRP. The JBE should document its procurement file to support that the price offered by a CRP is fair and reasonable.

### **5.7 LICENSING OR PROFICIENCY TESTING EXAMINATIONS**

JBEs may purchase non-IT services of any value related to the development, maintenance, administration, or use of licensing or proficiency testing examinations, without conducting a competitive procurement.

The Buyer should note in the procurement file that the purchase is for licensing or proficiency testing examinations. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required.

## **5.8 SUBVENTION AND LOCAL ASSISTANCE CONTRACTS**

These are contracts providing assistance to local governments and aid to the public directly or through an intermediary, such as a nonprofit corporation organized for that purpose. JBEs may enter into subvention and local assistance contracts without conducting a competitive procurement.

The Buyer should note in the procurement file that the contract is a subvention or local assistance contract. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required.

## **5.9 SOLE SOURCE**

JBEs may purchase non-IT goods, non-IT services, and IT goods and services of any value without conducting a competitive procurement if (i) the goods, services, or goods and services are the only non-IT goods, non-IT services, or IT goods and services that meet the JBE's need, or (ii) an AOC non-recurring grant application submittal deadline does not permit the time needed for a competitive procurement of services.

**Example:** A JBE needs to purchase a replacement fuse. The JBE's electrical systems are quite old, and only one entity currently manufactures the type of fuse that is needed. The JBE may purchase the fuse from that entity as a sole source.

**Example:** A JBE needs a piece of software customized. Only one entity has the intellectual property rights necessary to alter the software and license the resulting modifications to the JBE. The JBE may contract with that entity as a sole source.

### **A. Sole Source Purchase**

A sole source request must be provided to the sole source approver. The JBE employee requesting the procurement should submit a sole source request to the sole source approver.

The sole source request should include the following information:

- Description of the non-IT goods, non-IT services, or IT goods and services to be procured;
- Explanation of why the non-IT goods, non-IT services, or IT goods and services cannot be procured competitively;
- The effort made to solicit competitive Bids, if any;

- Documentation that the pricing offered is fair and reasonable; and
- Special factors affecting the cost or other aspect of the procurement, if any.

The sole source approver is:

- The Approving Authority;
- The delegee of the Approving Authority; or
- Another person identified as the sole source approver in the JBE's Local Contracting Manual.

The sole source approver ~~should~~ approves or deny-denies the sole source request. ~~if he or she determines that the JBE's best interests are served by allowing the sole source procurement.~~ If the sole source approver approves the sole source request, the Buyer may-should conduct the procurement as proposed. If the sole source approver denies the sole source request, the Buyer will either cancel the procurement or conduct a competitive solicitation to acquire the same or equivalent non-IT goods, non-IT services, or IT goods and services.

The JBE may, in its Local Contracting Manual, place restrictions on the use of sole source procurements or specify a form for sole source requests. If no form is specified in the Local Contracting Manual, the sole source request may take the form of a memorandum.

### **B. Repeat Sole Source Authorization**

The JBE may, under certain circumstances, establish a repeat sole source authorization for the NCB procurement of non-IT goods, non-IT services, or IT goods and services. The repeat sole source authorization is limited to a specific type of non-IT goods, non-IT services, or IT goods and services for which:

- There is no viable competition; or
- Competitive bidding cannot be completed using reasonable efforts before the time such non-IT goods, non-IT services, or IT goods and services are required.

The JBE may, in its Local Contracting Manual, place restrictions on the use of repeat sole source authorizations or specify a form for use in repeat sole source authorizations. If no form is specified in the Local Contracting Manual, the repeat sole source authorization may take the form of a memorandum.

The repeat sole source authorization must be signed by the sole source approver. The Buyer should place a copy of the repeat sole source authorization in the procurement file for any procurement of the affected non-IT goods, non-IT services, or IT goods and services.

## 5.10 AMENDMENTS

The JBE must-should submit certain amendments to the NCB process outlined below. The NCB process ensures that the amendment is in the best interest of the JBE.

### A. Amendments Covered

The types of amendments covered are those that affect the competitive basis on which the contract was awarded, including amendments that increase or decrease quantity, dollar amounts, or time. Specifically:

- Amendments to a competitively-solicited contract where the type of change contemplated in the amendment was not evaluated in the selection process;
- Amendments to an LPA order where the type of change contemplated in the amendment was not evaluated in the RFO process; and
- Amendments to a small purchase (originally under \$5,000) which increase the value of the purchase to \$5,000 or more, if the original purchase was completed pursuant to section 5.1 above.

**Example:** The JBE has a services contract that is nearing expiration, and the JBE wishes to extend the term of the contract using an amendment. The contract was competitively solicited, but renewal terms were not addressed in the Solicitation Document and were not considered by the Evaluation Team. Before extending the term of this contract using an amendment, the JBE must-should submit the amendment to an NCB process.

**Example:** The JBE has a contract that grants the JBE the option to extend the term of the contract for one year. The contract is nearing expiration, and the JBE wishes to extend the term of the contract using an amendment. The contract was competitively solicited, and the extension term was evaluated during the solicitation process. There is no need to submit the amendment to an NCB process.

**Example:** The JBE purchases 40 chairs, each costing \$100. The value of the purchase (\$4,000) is below \$5,000, and the purchase was completed as an NCB procurement pursuant to section 5.1 above. The JBE wishes to purchase an additional 20 chairs,

each costing \$100, through use of an amendment. Because the new value of the contract (\$6,000) will be over \$5,000, the JBE ~~must~~ should submit the amendment to an NCB process.

**Note:** Amendments correcting incidental omissions or mistakes (not affecting quantity, dollar amounts, or time) do not require an NCB process. For example, an amendment correcting or updating contact information would not require an NCB process.

## B. NCB Process for Amendments

The Buyer submits an NCB amendment request to the sole source approver.

The NCB amendment request should include the following information:

- Description of the contract terms to be changed;
- Documentation that the pricing of the amended contract is fair and reasonable; and
- Why the Buyer has determined that the amendment is in the JBE's best interest.

### 5.11 TRIAL COURTS: PUBLIC INPUT REQUIREMENT

A trial court must seek input from the public at least 15 Court Days before execution of an NCB contract in an amount that exceeds the greater of \$400,000 or 10 percent of the total trial court budget.

This requirement does not apply to a contract between a trial court and a county that is provided for by statute (e.g., court-county MOUs under GC 77212).

For detailed requirements regarding this public-input process, see CRC 10.620.



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 6  
Page 1 of 17

## LEVERAGED PROCUREMENT

### CHAPTER 6

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## **INTRODUCTION**

This chapter addresses benefits, risks, conditions, and processes related to leveraging a procurement undertaken by another government entity or a not-for-profit organization (NPO) established for a public purpose. This chapter also addresses how a Judicial Branch Entity (JBE) may allow another government entity or NPO to leverage a procurement undertaken by the JBE.

## **DEFINED TERMS**

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

## **6.1 BASICS**

### **A. What is Leveraged Procurement?**

“Leveraged procurement” is an alternative to competitive or non-competitively bid (NCB) procurement and refers to undertaking and documenting a purchase of goods or services through collaboration with one or more entities, or without collaboration by “tagging on” to an initiating entity’s procurement, under a price schedule negotiated by the initiating entity. Typically, the purpose of leveraged procurement is to:

- Combine buying power, for example, to reduce pricing or improve terms and conditions; or
- Improve efficiency by reducing administrative expense or delay.

An ancillary benefit of leveraged procurement is that certain non-IT goods valued at \$25,000 or more may be awarded based on a “best value” (also known as “value effectiveness”) basis, instead of the “lowest responsible bidder” basis required under chapter 4A.

A leveraged procurement agreement (LPA) refers in this Manual to any contract between an issuing government entity or issuing NPO and its supplier that permits a third entity (e.g., a JBE) to procure the same or substantially similar goods or services on the same or better terms as the issuing entity.

## **B. When Is Leveraged Procurement Permitted?**

Leveraged procurement is optional. A JBE may procure goods or services itself or under the LPA of another purchaser, consistent with all of the following:

- Efficient use of public funds;
- Maintenance of sound fiscal practices; and
- Compliance with this Manual and the JBE's Local Contracting Manual, the California Judicial Branch Contract Law, and other applicable law.

## **C. Certain Issues Concerning the Efficient Use of Public Funds**

### **1. LPA Pricing and Terms**

A JBE must assure itself that undertaking the procurement through an LPA can be reasonably expected to result in the efficient use of public funds. JBEs are cautioned that leveraged procurement does not necessarily promote the efficient use of public funds.

**Example:** A prospective supplier may wish to promote its goods by making them available under a California Multiple Award Schedule (CMAS) contract. The supplier may, however, offer better *prices* to customers that assure the supplier of a certain purchase volume (e.g., under a contract providing for a fixed purchase volume) or enter into a requirements contract. The supplier may also offer its other customers better *terms and conditions*, for example, to include acceptance testing by the customer. In fact, the supplier may *expect* its CMAS pricing and terms to be merely a starting point in negotiations for a separate contract.

In the above example, unless the JBE negotiates better pricing and terms, any administrative cost savings associated with the LPA could be undercut by paying the published price or accepting risk associated with the existing terms of the CMAS contract. This chapter includes step-by-step processes intended to help JBEs obtain value for money under leveraged procurement.

### **2. Administrative Fees**

The Department of General Services (DGS), other entities that establish LPAs, or LPA Vendors may impose LPA-related administrative fees on entities that wish to purchase through LPAs. By undertaking its own procurement, a JBE may avoid the payment of LPA administrative fees.

## **6.2 DESCRIPTION OF LPA PROGRAMS**

For purposes of this Manual, there are two varieties of LPA:

- A collaboratively procured LPA is either:
  - A contract procured in accordance with the procurement requirements applicable to a JBE under this Manual and the JBE’s Local Contracting Manual, and with the active participation of the JBE and one or more other public entities or NPOs, and that permits the JBE and the other entity to procure goods or services off of the LPA; or
  - A “piggybacking arrangement,” whereby the entity that executes the contract (the “issuing entity”) assigns its purchase rights under the contract (e.g., rights under an option to purchase a specified quantity of goods) to a third party. The third party utilizes the issuing entity’s rights by executing a contract with the issuing entity. The third party may require the use of terms and conditions that are different from those of the issuing entity, but this requires agreement by the supplier either by use of a separate contract, or tripartite agreement among the issuing entity, third party and supplier.
- A non-collaboratively procured LPA is a contract executed by one or more entities for the entities’ own purchases of goods or services, but does not provide for a third party’s purchases. The third party purchases off the LPA by “tagging” onto the pricing and other terms of the LPA by executing a separate contract with the supplier on terms and conditions that are substantially similar to those in the issuing entity’s contract.

### **A. California State LPA Programs**

#### **1. JBE LPA Programs**

- a. Use of a JBE LPA Program: JBEs may procure goods and services using LPAs established by the AOC or another JBE under terms and conditions

established by the AOC or other JBE. A JBE may also procure goods and services under an LPA that the JBE itself has previously established on the same terms as the LPA provides for other entities to procure them. The JBE, however, must not divide a single procurement into two or more transactions to avoid competitive procurement and other requirements applicable to a larger procurement.

**Note:** At the time of publication of this Manual, the AOC has established LPAs for payroll services, banking services, office supplies, collection of court-ordered debt services, translation services, telephonic court appearance services, security CCTVs, and access and security equipment and related maintenance.

- b. Establishment of a JBE LPA: A JBE may undertake its own procurement and establish by means of an option in the contract for the Vendor to extend the same pricing and terms to other JBEs or NPOs. The contract that includes the options would thus be an LPA.

To calculate the procurement amount for purposes of determining what procurement requirements (e.g., competitive or non-competitive solicitation, etc.) apply to establishing an LPA, a JBE may decide to use only its own total estimated payments under the LPA. If so, the establishing JBE must state in either the LPA or user instructions (i.e., terms and conditions for use of the LPA) a maximum dollar amount for procuring off of the LPA. The total amount procured by JBEs and NPOs must not in combination with the issuing JBE's purchases exceed the maximum dollar ceiling permitted by this Manual for the procurement method used by the issuing JBE to establish the LPA.

**Note:** Tagging on to another entity's LPAs that add quantities *after* the issuing entity's solicitation to allow other entities to use the same pricing are generally disfavored, because the purchases that are "tagged on" are not vetted through a competitive process. Therefore, a JBE undertaking an initial solicitation should specify potential additional purchases as options to permit other JBEs and NPOs to procure goods and services not purchased by the JBE.

## 2. DGS LPA Programs

JBEs may procure goods and services under a DGS LPA, either by piggybacking or tagging on, *if the supplier agrees to extend substantially similar or more favorable terms and conditions to the JBE under a JBE Purchase Document*. A list of current LPAs and related materials may be obtained through the DGS website or by contacting DGS's LPA suppliers identified on the website. For reference, DGS LPA programs as of the time of publication are summarized below.

- a. LPAs that are treated as NPOs by DGS: The programs discussed below extend to multiple state agencies and departments pricing and terms that have not been competitively procured by DGS. Pricing and terms do not reflect advantages that could be realized by a JBE through a competitive process, or cost reductions suppliers may be willing to pass through based on definite quantity or requirements purchases by JBEs. Consequently, JBEs should consider whether they can improve value for money by undertaking further negotiations or through a competitive procurement process.
  - CMAS (California Multiple Award Schedules): A multiple award contract is one that is awarded to multiple suppliers for the same or similar products or services that offer substantially similar pricing and terms. The CMAS program provides pricing and terms for the purchase of a wide variety of commodity goods and services at prices DGS considers "fair, reasonable, and competitive." CMAS contracts are based primarily on products, services, and prices, which may or may not have been competitively bid, from the federal GSA multiple award schedule program. With agreement of the supplier, DGS then substitutes DGS contract terms and conditions for federal terms and conditions. Examples of products offered under CMAS contracts are computers and laptops, printers, copiers, ergonomic equipment, paint, and records storage.
  - State Price Schedules: This program provides statewide pricing and terms for the purchase of unique or unusual items for which competition may be very limited. Examples are adaptive equipment and services for persons with disabilities.

- b. LPA that are treated as competitively procured by DGS: The programs discussed below extend to multiple state departments and agencies pricing and terms that have been competitively procured. Consequently, pricing and terms reflect the benefits of competition. They do not, however, reflect cost reductions suppliers may be willing to make based on definite quantity or requirements purchases by JBEs. JBEs should consider whether they can improve value for money by undertaking further negotiations or through a competitive process.
- **Statewide Contracts**: This program provides for statewide pricing and terms for the purchase of goods, and is intended to take advantage of lower costs passed on by suppliers bidding on large quantities of goods repetitively used by multiple state agencies and departments. Statewide commodities contracts include contracts for envelopes (recycled paper), safety supplies, office supplies, toner and ink cartridges (new and remanufactured), and vehicles.
  - **Master Agreements**: This program provides for statewide pricing and terms for goods, rental of goods, and services, and it is intended to simplify the purchasing process for government users through the prequalification of suppliers and service providers. Master agreements provide for document conversion services, office moving services, Cal-Card purchases, copiers, and telephone equipment for the deaf and hearing impaired.
  - **Cooperative Agreements**: This program provides pricing and terms for goods and services based on procurements undertaken by a government entity other than the state executive branch. As a practical matter, pricing and terms are available most frequently through the state's participation in the Western States Contracting Alliance (WSCA) or the National Association of State Procurement Officials (NASPO). Examples of WSCA agreements are for copiers, postage and mail processing equipment, wireless telecommunications services, and mailing equipment and maintenance. Examples of NASPO agreements are for automatic external defibrillators and toner cartridges.
  - **Software Licensing Program (SLP)**: This program provides statewide software discounts through authorized resellers based on pricing and

terms negotiated by DGS with major software publishers. The reseller contracts provide for the purchase and warranty of the publisher's software, software maintenance, and technical support; consulting, training, and installation services, however, are not available under the contracts. SLP contracts are established to reduce the need for individual departments to conduct repetitive acquisitions for proprietary software licenses and software upgrades without taking advantage of volume discounts offered by the software publishers. Participating software manufacturers include HP, IBM, Microsoft, and Oracle.

- c. Maximum amount of procurement: For each type of DGS LPA, unless otherwise specified in an LPA's user instructions, the dollar maximums<sup>1</sup> in the chart below apply to use of the LPA:

LPA Program Type	Non-IT Dollar Maximum		IT Dollar Maximum
	Goods	Services	Goods and Services
CMAS	\$100,000	\$250,000	\$500,000
State Price Schedules Program	\$100,000	N/A	\$100,000
Statewide Contracts Program	Unlimited	N/A	Unlimited
Master Agreements Program			
• Purchase or Price Agreement	\$500,000*	N/A	\$1,500,000*
• Master Services Agreement	N/A	\$500,000*	\$1,500,000*
• Master Rental Agreement	\$500,000*	N/A	\$1,500,000*
Cooperative Agreements Program	\$500,000*	\$500,000*	Unlimited
Software Licensing Program	N/A	N/A	\$2,000,000*

\* May be exceeded if the JBE's Approving Authority and the particular LPA's user instructions specify a higher maximum.

<sup>1</sup> DGS dollar maximums are exclusive of sales and use taxes, finance charges and costs, postage, handling, and shipping charges.

- d. Administrative fees: DGS administrative fees, if applicable, are identified in either the DGS State Price Book or the LPA user instructions associated with a particular LPA.<sup>2</sup> JBEs are cautioned that a potential supplier's published LPA pricing may already incorporate LPA administrative fees that the supplier must forward to DGS. Before placing an order JBEs should determine whether pricing includes DGS administrative fees or whether DGS will invoice the JBE separately for the fees.

### **B. County, Federal, and Other LPA Programs**

Counties and other local agencies, states other than California, the federal General Services Administration (GSA), and other government entities or NPOs may also have established LPAs. References in this Manual to specific programs are not intended to preclude procuring off of LPAs of counties, other government entities, or NPOs within the United States of America and its territories. When procuring from the LPA of an entity other than a State of California entity, the following limits apply:

LPA Program Type	Non-IT Dollar Maximum		IT Dollar Maximum
	Goods	Services	Goods and Services
Non-competitively Bid Program	\$100,000	\$250,000	\$500,000
Competitively Bid Program	\$500,000*	\$500,000*	\$1,500,000*
Competitively Bid Software Licensing Program	N/A	N/A	\$2,000,000*

\* May be exceeded if the JBE's Approving Authority and the particular LPA's user instructions specify a higher maximum.

A JBE may conclude that using the LPA of such an entity is impractical or impossible because the potential supplier will not agree to the JBE's certification requirements, or

<sup>2</sup> Administrative fees are waived for CMAS purchase orders issued to California certified small businesses.

contract terms and conditions. In that case, the JBE may undertake a separate procurement, or seek to establish a separate LPA.

### **6.3 USE OF LPA PROGRAMS**

#### **A. Accessing Available LPAs**

As of the time of publication of this Manual, the AOC is developing a site on which AOC LPAs and related materials will be made available to other JBEs. Other JBEs may wish to provide for a site or sites where their LPAs may be located.

As of the time of publication of this Manual, a JBE may follow the following link to access DGS LPAs and related materials:

[www.dgs.ca.gov/pd/Programs/Leveraged.aspx](http://www.dgs.ca.gov/pd/Programs/Leveraged.aspx).

#### **B. Step-By-Step Guide to Procurement of Information Technology (IT) and non-IT Goods and Services Through an LPA**

A JBE that intends to procure non-IT goods or services off of an LPA must undertake the following steps:

Step 1—Define business requirements, for example in a Statement of Work (SOW).

Step 2—Estimate in good faith the projected total cost of what is to be procured.

Step 3—Identify a relevant LPA and determine whether pricing is fair and reasonable. If a JBE wishes to use an LPA (i) issued by DGS, (ii) not issued by a California government entity (other than DGS), or (iii) that was not competitively bid by the issuing entity, identify by reasonable means, including reviewing AOC and DGS websites, at least *three* relevant LPAs, including at least one that in which a certified Disabled Veterans Business Enterprise (DVBE) participates,<sup>3</sup> and list them for comparison

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<sup>3</sup> A listed DVBE must perform a commercially useful function.

against one another.<sup>4</sup> The listed LPAs must be similar enough that work, pricing, and terms and conditions are subject to reasonable comparison.

**Note:** JBEs *must* consider LPAs of certified DVBEs when available, but need not list for consideration an LPA that includes a DVBE unless the JBE identifies more than two relevant LPAs. If so, the JBE must include at least one LPA with a California certified DVBE (if available) in the comparison.<sup>5</sup>

**If using DGS LPAs:** For purposes of identifying at least three LPAs, a JBE may not consider LPAs from more than one type/category (for types and categories, refer to the chart in section 6.2) of DGS LPAs because, under DGS LPAs:

- Offers from different categories of DGS LPA programs may not be mixed when executing a single order; and
- LPA types (e.g., CMAS or master agreement) may not be combined to obtain offers and select a supplier.

If purchasing off of a Statewide Contract Program contract or a Cooperative Agreement Program contract established by WSCA, it is not necessary to list or obtain offers from three suppliers or to document best value.

If three relevant LPAs are required but cannot be identified, the JBE must undertake an independent procurement (refer to chapter 2, chapter 4, and chapter 5), unless the JBE determines that pricing is fair and reasonable, documentation that supports the JBE's conclusion is retained in the procurement file, and either:

1. The LPA meets one of the following three criteria:

- The procurement is for goods or services estimated to cost less than \$5,000;

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<sup>4</sup> Consequently, a competitively bid LPA issued by a California county, the AOC, or another JBE may be used without the need to list and compare three LPAs, but, if the JBE wishes to use a non-collaborative LPA, the JBE should consider undertaking its own competitive procurement or, as previously stated, at least negotiating with the supplier for better pricing and terms.

<sup>5</sup> Most DGS user instructions provide JBEs with a means to claim certain expenditures towards meeting DVBE goals or requirements, whether the potential supplier is a DVBE or subcontracts with a DVBE. If using a DVBE subcontractor, the JBE must obtain from the prime contractor the dollar amount that may be applied towards meeting DVBE participation.

- The procurement is off an LPA under the DGS Statewide Contracts Program (for goods), a DGS Cooperative Agreements Program LPA established by WSCA or NASPO; or an LPA consisting of a contract (other than a price schedule) under which an issuing JBE or another state entity makes actual purchases of goods or services; or
  - The procurement is off an LPA established by a JBE, DGS, or other state entity, and the LPA or user instructions provide that multiple offers are not required to be compared.
2. Applicable law (e.g., statute or rule of court) provides an independent basis for exempting the JBE from comparing three LPAs (e.g., if availability is limited under patent or copyright law).

**Note:** If user instructions for an LPA include a provision for “not specifically priced” (NSP) items, items incidental, subordinate, or peripheral to those listed in the schedule may be purchased under the same contract as the primary items, subject to certain dollar limits and limitations, as follows:

- Total purchase price is \$250,000 or less: The total, maximum dollar amount of NSP items is \$5,000.
- Total purchase price exceeds \$250,000: The total, maximum dollar value of all NSP items is the lower of (i) \$25,000, and (ii) 5% of the total purchase price.

**If using DGS LPAs:** The NSP provision is not included in contracts that are only for services or software.

Step 4—Obtain LPA documentation<sup>6</sup> for the listed LPAs, and review it for applicable terms and conditions of use, including pricing<sup>7</sup> and the term of the LPA. Using the documentation:

<sup>6</sup> Documentation may include user instructions, contract terms and conditions, order documents, specifications, certifications, payee data records, registration and permits, references, etc.

<sup>7</sup> Pricing may be fixed, or based on a discount to published prices. Be aware of cost of living or other adjustments.

- Confirm whether actual pricing is at or below listed pricing, and determine whether the projected total price is within the maximum dollar amount permitted to be procured under the LPA;
- Confirm whether the desired goods or services as listed are actually offered and not specifically excluded;
- Confirm whether the potential supplier has a valid seller's permit (for goods), is licensed as necessary, and is otherwise authorized to perform the services or sell the goods desired;
- Ascertain the commercial sufficiency of warranties, guarantees, maintenance provisions, product return policies, bond requirements, travel costs, etc.;
- Determine whether additional approvals, forms, filings, etc. are required;
- Confirm whether the supplier is a California certified DVBE, if applicable;<sup>8</sup> and
- Obtain the supplier's signed Payee Data Record.

Step 5—If not comparing multiple LPAs, skip to step 6. If comparing multiple potential LPAs, determine what factors the JBE will use to compare the listed suppliers against one another to determine “best value.” The “best value” comparison must include a comparison of pricing offered by the suppliers for the product or service. Refer to chapters 4B and 4C of this Manual for other criteria a JBE may wish to use. Document the factors in the procurement file.

Step 6—If there is any uncertainty as to LPA terms and conditions or a potential LPA supplier's willingness to accept an order from the JBE, the JBE should first solicit specific offers from the listed LPA suppliers by use of a Request for Offer (RFO)<sup>9</sup> or similar document. An RFO may be formal or informal (e.g., an email). The RFO must describe the JBE's business requirements (e.g., through an SOW for services). To save time and expense of negotiations after award, a written RFO may include the JBE's general terms and conditions, as modified to comply with the LPA user instructions or applicable law or policy.

Because use of an LPA is not a competitive solicitation, do **not** include in the RFO:

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<sup>8</sup> If documentation of a potential DVBE supplier from a DGS LPA is being reviewed and considered, the JBE must confirm the supplier's DVBE status through DGS's database.

<sup>9</sup> An RFO is a document sent to potential LPA suppliers to specify requirements for a specific transaction. The RFO requests a specific response or offer from the supplier based on the RFO.

- Competitive solicitation language, e.g., DVBE provisions, bid protests, intent to award notices, evaluation criteria, and advertising requirements;
- Words such as “bid,” “quote,” “solicitation,” or “evaluation”; or
- Use of the two-envelope evaluation process for offers.

If the JBE is comparing multiple LPAs, the RFO should provide that the JBE will evaluate offers to determine “best value,” but the JBE should not describe in the RFO the priorities it will use to determine “best value.”

**If using DGS LPAs:** A JBE must select the type/category of LPA it wants to use before issuing an RFO. A JBE must not solicit offers from potential suppliers whose LPAs are not in the same type and category.

An RFO process may be conducted by mail, fax, email, phone, or by other means so long as it complies with applicable user instructions and requirements of the LPA. JBEs must document all potential LPA suppliers that were contacted, provide a recap of their offers, and record the criteria used to compare best value and how the selection was made.

Step 7—Determine based on available LPAs and LPA offers whether procurement off of an LPA will satisfy applicable law and policy. If not utilizing an LPA, plan to undertake an independent procurement (refer to chapters 2, 4, and 5). If utilizing an LPA, proceed to Step 8.

Step 8—If required, compare at least three LPAs/LPA offers on a best value basis. In doing so, the JBE may wish to prepare and use a “best value worksheet.” If fewer than three offers are received, the JBE may nevertheless proceed with the procurement, but the JBE must document the procurement file with an explanation<sup>10</sup> as to why at least three potential suppliers did not respond with offers. Even if a procurement is exempt from the comparative evaluation process (see step 3), conducting price comparisons among multiple suppliers, if available, is encouraged.

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<sup>10</sup> Contact potential suppliers as necessary to find out why they did not respond.

Step 9—Determine what form of contract the JBE will use to execute its purchase off of the LPA. If using a non-collaborative LPA, consider whether a document similar to STD-65 (see below) or another document are appropriate, and, if using a cooperatively procured LPA, consider whether a contract with both the issuing entity and the potential supplier are required. Prepare the document, considering the LPA user instructions, any RFO, and any supplier offer. List all NSP items separately from the principal items. Finalize the contract and notify the supplier selected by the JBE that the JBE intends to award the contract to the supplier under the contract provided. After consulting with the supplier, make any mutually acceptable final revisions to the contract.

**If using DGS LPAs:** DGS user instructions state that a state agency or department must implement a DGS LPA by executing DGS form STD-65 (Purchasing Authority Purchase Order), STD-213 (Standard Agreement (non-IT services)), GSOP-191-2 (Master Agreement Order), GSOP-191-2 (Master Agreement Form) or an approved alternative. The specified forms are appropriate, however, for purchases by state departments and agencies rather than JBEs. A JBE procuring off of such a DGS LPA should modify the DGS form so that terms and conditions are consistent with law and policy applicable to the JBE.

Step 10—After obtaining appropriate internal approvals, use the JBE’s standard procedures under its Local Contracting Manual to sign and date the JBE’s PO, and deliver it to the supplier.

**Note:** If using a contract requiring a mutual signature of the parties, the JBE should instead deliver an unsigned contract to the potential supplier and countersign the contract upon its return.<sup>11</sup>

Step 11—Create a procurement summary document and place it in the procurement file. Review the file to ensure it includes, as applicable, a list of all potential LPA suppliers contacted and a recap of their offers, a description of how the selection was made (including criteria for determining “best value”), and the signed contract or a reference as to where it is located.

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<sup>11</sup> A contract (instead of a PO) must be used to obtain the supplier’s commitment to deliver the goods or perform the service.

If the contract is for a total cost of more than \$1 million, notify the State Auditor, in writing, of the existence of the contract within 10 business days of entering into it (PCC 19204(a)).

### **C. Amendment of an LPA**

An NCB process is required to amend an LPA, except:

- A JBE may amend an LPA executed under the terms of any option in the LPA that provides for changes (e.g., quantity or time) and was evaluated and considered in the comparison of offers during the RFO process.
- Unless the user instructions or LPA specify otherwise, amendments may also be executed for contractor name changes or to increase the original transaction amount by \$4,999 or less.
- A JBE may amend an LPA if pricing and other terms and conditions of the LPA as amended are substantially similar to, or improve upon, the terms and conditions of the original LPA, or to correct incidental errors or omissions.

**If amending a DGS CMAS LPA or a JBE LPA that is substantially similar in form to a DGS CMAS LPA:** If the original LPA permitted amendments, a JBE may amend the LPA without using an NCB process regardless of whether the LPA specifies the changes permitted, subject, however, to the following limitations:

- This exception applies only to the first amendment;
- The time for performance may not be extended for more than one year; and
- The amendment must not add more than 30 percent of the transaction amount under the LPA, not to exceed \$250,000.



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 7  
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## PROTESTS

### CHAPTER 7

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## INTRODUCTION

There are two types of protests in Judicial Branch Entity (JBE) procurement: solicitation specifications protests and award protests. This chapter provides information on these types of protest and how they are handled by JBEs.

## DEFINED TERMS

~~If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary. The definitions of capitalized terms used in this chapter are set forth in the glossary.~~

### 7.1 DESIGNATION OF JBE PROTEST PERSONNEL

Each JBE should designate a protest hearing officer to evaluate and issue written determinations regarding protests. To ensure proper segregation of duties, the protest hearing officer should be someone other than the Buyer. Each JBE should also designate a protest appeals officer to evaluate and issue written determinations regarding appeals of the protest hearing officer's written determinations. These designations should be documented in the JBE's Local Contracting Manual.

If a JBE does not designate a protest hearing officer, the Buyer's manager will act as the protest hearing officer. If a JBE does not designate a protest appeals officer, the ~~Approving Authority~~ protest hearing officer's manager will act as the protest appeals officer.

### 7.2 PROTEST THRESHOLDS

~~A JBE may adopt, in its Local Contracting Manual, thresholds for the acceptance of protests. The thresholds adopted by the JBE may not be higher than the dollar amounts in the following chart, for the applicable type of procurement.~~

<u>Type of Procurement</u>	<u>Threshold</u>
<u>Non-IT goods</u>	<u>\$50,000</u>
<u>Non-IT services</u>	<u>\$5,000</u>

<u>IT goods and services</u>	<u>\$100,000</u>
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If the JBE adopts protest thresholds, the JBE must (i) state in any Solicitation Document associated with a procurement estimated to be below the applicable threshold that protests will not be accepted, and (ii) reject any protest received for a procurement if the procurement is below the applicable threshold.

The remainder of this chapter is applicable only to procurements above the applicable protest thresholds.

### 7.3 SOLICITATION SPECIFICATIONS PROTESTS

A solicitation specifications protest is a protest alleging that a Solicitation Document contains a technical, administrative, or cost specification or requirement that is defective. The specification or requirement may be defective because it is:

- Onerous, unfair, or illegal; or
- Imposes unnecessary constraints in proposing less costly or alternate solutions.

**Example:** A JBE inappropriately requires that goods be of a specific brand, when goods of another brand meet the JBE’s requirements equally well at a lower cost. The requirement could result in a solicitation specifications protest.

A Protester’s Failure to comply with the protest processes set forth in this chapter may result in the JBE’s rejection of a solicitation specifications protest.

#### A. Who May Submit a Solicitation Specifications Protest

Any Prospective Bidder may submit a solicitation specifications protest.

#### B. Deadline for Receipt of Protest

The deadline for the JBE to receive a solicitation specifications protest is the applicable date specified in the Solicitation Document. If no date is specified in the Solicitation Document, the deadline for the JBE to receive a solicitation specifications protest is the Bid Closing Time.

The Prospective Bidder is solely responsible for ensuring that a solicitation specifications protest is received by the JBE by the deadline. The failure of a

Prospective Bidder to submit a timely solicitation specifications protest constitutes a waiver of the Prospective Bidder's right to protest the solicitation's specifications or requirements.

### **C. Required Information**

A solicitation specifications protest must include the following information:

- Contact information of the Prospective Bidder or its representative (this must include name, address, and telephone number, and should include e-mail address and fax number);
- The title of the Solicitation Document to which the protest is related;
- The specific alleged deficiency in the solicitation's technical, administrative, or cost specifications or requirements;
- A detailed description of the specific legal and factual grounds of protest and any supporting documentation; and
- The specific ruling or relief requested.

A solicitation specifications protest lacking any of this information may be rejected by the protest hearing officer.

The protest hearing officer may issue a written determination regarding the solicitation specifications protest without requesting further information from the Prospective Bidder. Therefore, the solicitation specifications protest must include all grounds for the protest and all evidence available at the time the protest is submitted. If the Prospective Bidder later raises new grounds or evidence that was not included in the initial protest submittal but which could have been raised at that time, the JBE shall not consider the new grounds or new evidence.

### **D. Submission of the Protest**

The Prospective Bidder must send the solicitation specifications protest to the protest hearing officer or other individual identified in the Solicitation Document to receive protests. Unless personal delivery is permitted as noted below, the Prospective Bidder must send the solicitation specifications protest by certified mail, registered mail, or overnight courier.

If allowed by the Solicitation Document, the Prospective Bidder may also deliver the solicitation specifications protest personally as specified in the Solicitation Document. If

the solicitation specifications protest is personally delivered, a receipt must be provided to the Prospective Bidder if requested.

### E. Evaluation

When evaluating the solicitation specifications protest, the protest hearing officer should consider:

- The validity and defensibility of the allegedly defective technical, administrative, or cost specification or requirement;
- Whether the Prospective Bidder has raised a valid issue; and
- Whether competition would be advanced by revising the allegedly defective technical, administrative, or cost specification or requirement.

The protest hearing officer should seek legal advice as needed.

**Note:** The Prospective Bidder bears the burden of proof to show that the Solicitation Document contains a defective technical, administrative, or cost specification or requirement.

### F. Written Determination

The protest hearing officer must issue a written determination before the JBE opens the Bids (or evaluates the Bids, if the Bids are not sealed). If required, the JBE may extend the Bid Closing Time to allow for time to review the solicitation specifications protest.

If the protest hearing officer determines that the solicitation specifications protest has merit, the protest hearing officer should take appropriate remedial action. Such action may include:

- Changing or clarifying the defective technical, administrative, or cost specification or requirement through an addendum to the Solicitation Document; or
- Canceling the solicitation.

If an addendum to the Solicitation Document is issued and the addendum may require additional time for Prospective Bidders to respond, the addendum should extend the Bid Closing Date-Time by an appropriate amount of time (as determined by the protest hearing officer).

## G. Appeal

The protest hearing officer's written determination is the final action by the JBE unless the Prospective Bidder submits an appeal to the protest appeals officer within two Court Days of the issuance of the protest hearing officer's written determination.

**Note:** The JBE may adopt in its Local Contracting Manual a different deadline for the filing of an appeal, provided it is not fewer than two Court Days.

See section 7.5 for the handling of appeals.

## 7.4 AWARD PROTESTS

An award protest is a protest alleging that:

- The JBE has committed an error in the award process sufficiently material to justify invalidation of the proposed award; or
- The JBE's decisions are lacking a rational basis and are, therefore, arbitrary and capricious.

**Example:** The Solicitation Document stated that 50 percent of a Bid's total score would be cost points, but the JBE instead made cost points only 30 percent of the Bid's total score. This error could result in an award protest.

Failure to comply with the protest processes set forth in this chapter may result in the JBE's rejection of an award protest.

### A. Who May Submit an Award Protest

A Bidder may submit an award protest if the Bidder meets the following requirements:

- The Bidder submitted a Bid that the Bidder believes to be responsive to the Solicitation Document; and
- The Bidder believes that the JBE has incorrectly selected another Bidder for an award.

A person or entity who did not submit a Bid may not make-submit an award protest.

In no event will a JBE consider a protest if the JBE rejected all Bids or the solicitation was canceled for any reason.

## B. Deadline for Receipt of Protest

For ~~any~~ solicitations using an RFQ, the deadline for the JBE to receive an award protest should be specified in the RFQ. If no deadline is specified in the RFQ, the award protest must be received by the JBE before the contract is executed. In no event will a JBE consider a protest for a solicitation using an RFQ after the contract has been executed.

For solicitations using an IFB or RFP, the deadline for the JBE to receive an award protest is specified in the table below.

The Bidder is solely responsible for ensuring that an award protest is received by the JBE by the applicable due date. ~~In no event will a JBE consider a protest after the contract has been awarded.~~

Non-IT goods	Non-IT services	IT goods and services
The JBE must receive the award protest within <b>24 hours</b> after the JBE <del>post</del> issues the intent to award.	The JBE must receive the award protest within <b>5 Court Days</b> after the JBE <del>post</del> issues the intent to award.	The JBE must receive the award protest within <b>5 Court Days</b> after the JBE <del>post</del> issues the intent to award.
The Bidder will have <b>10 calendar days</b> after the JBE receives the protest to submit all information in section C below to the JBE.	The Bidder will have <b>5 calendar days</b> after the JBE receives the protest to submit all information in section C below to the JBE. <sup>1*</sup>	The Bidder will have <b>10 calendar days</b> after the JBE receives the protest to submit all information in section C below to the JBE.

~~\* A JBE may extend this deadline to 10 calendar days in its Local Contracting Manual if the JBE prefers to have a uniform deadline for all three types of procurements.~~

## C. Required Information

An award protest must include the following information:

<sup>1</sup> ~~A JBE may extend this deadline to 10 calendar days in its Local Contracting Manual if the JBE prefers to have a uniform deadline for all three types of procurements.~~

- Contact information of the Bidder or its representative (this must include name, address, and telephone number, and should include e-mail address and fax number);
- The title of the Solicitation Document to which the protest is related;
- The specific alleged error or irrational decision made by the JBE;
- A detailed description of the specific legal and factual grounds of protest and any supporting documentation; and
- The specific ruling or relief requested.

If an award protest is missing any of this information (by the date the Bidder is required to have all such information to the JBE), the award protest may be rejected by the protest hearing officer.

The protest hearing officer may issue a written determination regarding the award protest without requesting further information from the Bidder. Therefore, the award protest must include all grounds and all evidence available at the time the award protest is submitted. If the Bidder later raises new grounds or evidence that was not included in the initial protest submittal but which could have been raised at that time, the JBE shall not consider such new grounds or new evidence.

**Note:** For protests of non-IT goods solicitations, the Bidder must assert that it is the lowest responsible bidder meeting specifications unless the JBE waives this requirement. A JBE may include a general waiver of this requirement in its Local Contracting Manual.

#### **D. Submission of the Protest**

The Bidder must send the award protest (and any supporting documentation) to the protest hearing officer or other individual identified in the Solicitation Document to receive protests. Unless personal delivery is permitted as noted below, the Bidder must send these materials by certified mail, registered mail, or overnight courier.

If allowed by the Solicitation Document, the Bidder may also deliver these materials personally to the JBE as specified in the Solicitation Document. If the materials are personally delivered, a receipt must be provided to the Bidder if requested.

#### **E. Evaluation**

When evaluating the award protest, the protest hearing officer should consider:

- Whether the JBE committed an error in the award process;
- Whether an allegedly defective decision lacks a rational basis; and
- If the JBE committed an error in the award process or made a decision that lacks a rational basis, the materiality of the error or decision.

The protest hearing officer should seek legal advice as needed.

The Bidder bears the burden of proof to show that (i) the JBE has committed an error in the award process sufficiently material to justify invalidation of the proposed award, or (ii) the JBE's decisions are lacking a rational basis and are, therefore, arbitrary and capricious.

**Note:** The following do **not** constitute the absence of a rational basis:

- The Bidder disagrees with the scores assigned by the Evaluation Team; or
- The Evaluation Team could have assigned different scores based on the same information.

#### **F. Written Determination**

The protest hearing officer must respond to an award protest with a written determination before the contract is awarded. The protest hearing officer should issue the written determination within 10 Court Days of the complete submission of the award protest, or notify the Bidder that additional time will be required. The JBE may extend the award date to allow for time to review the award protest.

If the protest hearing officer determines that the award protest has merit, the protest hearing officer should take appropriate remedial action. In determining the appropriate remedial action, the protest hearing officer should consider all circumstances surrounding the procurement, including:

- The seriousness of the procurement deficiency;
- The degree of prejudice to other Bidders;
- The impact on the integrity of the competitive procurement system;
- The good faith of the parties;
- The cost to the JBE;
- The urgency of the procurement; and
- The impact on the JBE.

Remedial actions may include:

- Issuing a new solicitation;
- Re-competing the contract;
- Terminating the contract (e.g., if a contract was executed despite a pending appeal);
- Refraining from the exercise of options under the awarded contract; and
- Awarding the contract consistent with law.

### **G. Appeal**

The protest hearing officer's written determination is considered the final action by the JBE unless the Bidder submits an appeal to the protest appeals officer within five calendar days of the issuance of the protest hearing officer's written determination.

The JBE may, at its sole discretion, delay the contract award until the appeal is resolved or proceed with the award and execution of the contract. See section 7.5 for the handling of appeals.

### **7.5 APPEALS**

Unless personal delivery is permitted as noted below, the Protester must send the appeal to the protest appeals officer by certified mail, registered mail, or overnight courier. If allowed by the Solicitation Document, the Protester may also deliver the appeal personally to the JBE as specified in the Solicitation Document. If the appeal is personally delivered, a receipt must be provided to the Protester if requested.

Any appeal not received by the protest appeals officer by the applicable deadline for submission will be rejected by the protest appeals officer. The Protester is solely responsible for ensuring that an appeal is received by the protest appeals officer by the applicable due date.

The appeal must include:

- Contact information of the Protester or its representative (this must include name, address, and telephone number, and should include e-mail address and fax number);
- The title of the Solicitation Document to which the protest is related;
- A copy of the protest hearing officer's written determination;
- A detailed description of the specific legal and factual grounds for the appeal and any supporting documentation; and

- The specific ruling or relief requested.

An appeal lacking any of this information may be rejected by the protest appeals officer. The appeal must include all information that the Protester wants the protest appeals officer to consider.

The Protester bears the burden of proof to show that the protest hearing officer's written determination is incorrect:

- In light of new information related to the protest that was not available at the time the protest was originally submitted; or
- Because it is in error of law or regulation.

The protest appeals officer reviews the appeal and issues a written determination. Issues that could have been raised earlier are not to be considered on appeal. The written determination of the protest appeals officer constitutes the final determination of the JBE regarding the protest. ~~Issues that could have been raised earlier will not be considered on appeal.~~

If the protest appeals officer determines that the appeal has merit, the protest appeal officer will direct the protest hearing officer to take appropriate remedial action.

## ~~7.5 POST-AWARD DISPUTES~~

~~— A post-award dispute is a disagreement or conflict between a Vendor and a JBE after a contract has been executed. Most often, post-award disputes arise due to contract performance issues on the part of either the Vendor or the JBE. For more guidance on post-award disputes, see chapter 11.~~

### ~~A. Deal in Good Faith~~

~~JBEs and Vendors should deal with one another in good faith and attempt to resolve post-award disputes quickly and fairly.~~

### ~~B. Resolving Disputes~~

~~Buyers and other JBE personnel should consider the following when a post-award dispute arises.~~

- ~~The Buyer should review the dispute resolution language contained in the contract to see if a specified dispute resolution process is required. The Buyer should ensure that any dispute resolution process is followed.~~
- ~~When possible, the JBE should attempt to resolve the dispute through informal discussions and negotiations. These discussions and negotiations should include the Buyer, the contract managers, and any other key parties.~~
- ~~A JBE cannot make a gift of public funds. Accordingly, any settlement to be paid by a JBE must be justifiable and not constitute a gift.~~
- ~~JBE management and/or legal counsel should be involved, as appropriate.~~
- ~~If a dispute resolution requires a change to the contract, the Buyer should prepare and process an amendment to document the change expeditiously.~~

~~Post-award disputes, regardless of magnitude, must be documented in the procurement file.~~



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Judicial Branch Contracting Manual

Chapter 8  
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## CONTRACTS

### CHAPTER 8

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## INTRODUCTION

This chapter provides information on preparing, approving, and executing JBE contracts.<sup>1</sup> The main body of this chapter discusses the basic construction of contracts and the mandatory and permissive subject matters for inclusion in JBE contracts. The appendices to this chapter identify mandatory and permissive contract terms for JBE contracts.

## DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

Under California law a “contract” is “an agreement to do or not to do a certain thing.”<sup>2</sup> This chapter refers specifically to agreements for goods and services. Unless expressly excluded, or the context dictates otherwise, the term “contract” as used in this chapter includes all agreements for goods or services, including purchase orders (POs), intergovernmental contracts (IGCs), and other documents for goods and services, regardless of the document’s form or title.

### 8.1 BASIC PRINCIPLES

#### A. Writing Requirement

All contracts entered into by JBEs must be in writing.

#### B. Roles and Responsibilities

Each JBE is responsible for the commercial risks that flow from contracts it enters into and should undertake risks only in proportion to the benefits expected from a contract. Contracts should be prepared, negotiated, and executed in the best interests of the JBE. Contracts should be prepared and negotiated only by persons with appropriate skill and experience who are free from conflicts of interest. Contracts must be executed only by persons with legal authority to do so.

It is the JBE’s responsibility to ensure that the contract meets applicable legal requirements and that the contract terms are appropriate to the type of contract.

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<sup>1</sup> This chapter does not address contracts for public works. Contracts for public works will be addressed in the AOC’s Local Contracting Manual.

<sup>2</sup> Civil Code section 1549.

## 8.2 CATEGORIES OF CONTRACTS

This subsection describes the basic categories of contracts used by JBEs and when those contracts are used. The category names are used for reference, as an individual contract may have a different name or title. For example, certain MOUs with executive branch agencies may be called “Interagency Agreements” or “IAs.” Requirements in this Manual apply to all contracts in the following categories of contract, regardless of the name or title of the contract.

### A. Purchase Orders (POs)

These contracts may be used for purchase of goods from nongovernmental entities<sup>3</sup> regardless of the purchase amount. POs are also often used for purchase of goods and for services that are ancillary to the purchase of the goods. In addition, POs are typically used for “off the shelf” goods and software or for routine, low cost, or low risk services.

- Goods that must be customized or specially manufactured and services of a higher dollar amount should be purchased using a standard agreement.
- Unless the PO is signed by both parties, the proposed Vendor has no duty of performance unless and until the Vendor commences performance of its duties under the PO. If the PO is not to be countersigned and returned to the JBE, the PO should contain a clause that states that Vendor’s commencement of performance under the PO constitutes acceptance and binds the Vendor to all contract terms.

### B. Standard Agreements

These contracts may be used for the purchase of goods or services from nongovernmental entities regardless of the contract amount.

### C. Short Form Agreements

These contracts include fewer terms and conditions than a Standard Agreement, and are typically used for the purchase of goods or services not to exceed \$50,000 from

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<sup>3</sup> For purposes of this chapter, a “governmental entity” includes, for example, (i) a California department or agency, or a department or agency of any other state, (ii) a public college or state university established by California or any other state, (iii) a local government entity or agency in the United States or its territories, (iv) an auxiliary organization of the California State University, or a California community college, (v) the federal government, (vi) a foundation organized to support the Board of Governors of the California Community Colleges, (vii) an auxiliary organization of the Student Aid Commission established under Education Code section 69522, or (viii) a public benefit organization. A public benefit organization is an organization chartered by a governmental entity and designed to perform some public benefit such as building or maintaining public infrastructure, or raising bond money for those purposes.

nongovernmental entities. The agreement is intended to be used for routine purchases and in situations where not all of the provisions found in a Standard Agreement would be appropriate. As noted in the appendices to this chapter, fewer terms are required to be included in these agreements than are required in Standard Agreements.

#### **D. Intergovernmental Contracts (IGCs)**

These contracts may be used for any purchase of goods and services between a JBE and another governmental entity. If the other governmental entity is not within the judicial branch, the agreement is often called a Memorandum of Understanding (MOU). If the other governmental entity is another JBE, the agreement is often called an Intra-branch Agreement (IBA). IGCs<sup>4</sup> are simpler and have fewer provisions than POs or Standard Agreements. A JBE, however, always has the option of using a PO or Standard Agreement when contracting with a governmental entity.

### 8.3 PREPARATION OF CONTRACTS

This subsection describes the elements of a contract and typical contract provisions and, where applicable, describes the specific subject matters JBEs should address in particular contract provisions.

Appendices A and B supplement this subsection. Appendices A and B identify the substance of the certifications and provisions that are required to be included in specified categories of JBE contracts. These appendices also indicate which terms are recommended to be included in JBE contracts but are not legally required.

#### **A. Content of Contracts**

JBEs must include legally required terms in their contracts and should include other terms that the JBE determines are necessary to protect the JBE and mitigate the risks associated with the contract.

Sample language for terms and certifications required to be included in JBE contracts is available from the AOC, together with templates for complete contracts.

Use of these provisions and templates is optional. Each JBE may modify the provisions or templates or use its own forms provided that the substance of the requirements is included. JBEs may also use a Vendor-provided form contract provided the final contract includes appropriate terms and meets applicable legal requirements.

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<sup>4</sup> IBAs and MOUs are collectively referred to as IGCs in this Manual.

- **Contract Provisions**

Each contract must identify the contracting parties. Contracts typically consist of three major elements:

- Statement of Work (SOW), including the schedule of performance;
- Pricing and Payment; and
- Terms and Conditions.

Each of these elements must be clearly defined so that the JBE's needs are met, and the contractor and the JBE understand their performance obligations.

- Each major element is described below, including typical subject matters that are frequently grouped together in contract sections regarding the specific element. However, contract provisions are not required to be in any specific location in the contract. For example, a topic listed below as part of a typical SOW may be placed under a different heading in a particular contract.

**1. Statement of Work (SOW)**

The SOW describes the goods to be purchased and/or the services to be performed. The JBE must include a detailed description of the goods to be delivered or the services to be performed, together with any deliverables required and conditions of performance, if applicable. The contract must specify (as applicable): (i) when goods are to be delivered, (ii) when services are to be performed (start date and end date), (iii) when deliverables must be provided to the JBE, and (iv) when other contract milestones must be completed.

- The following are matters that are typically included in the SOW as part of the detailed description of the goods, services, deliverables, and required conditions of performance:
  - Quantities, specifications, and specific requirements;
  - Quality standards and warranties;
  - Delivery instructions;
  - Acceptance criteria including inspections;
  - Results and required deliverables (e.g., reports, data, or other documentation);
  - Location of performance of services, and contractor's work hours;
  - Performance timelines (schedule) or completion dates;

- Standards of performance and skill level required and, if applicable, specific personnel and staffing requirements and identification of contractor's key personnel;
- Details regarding equipment, labor, or materials to be provided by the parties, and coordination of effort, if applicable;
- Optional goods or services, and provisions for requesting these items; and
- Possible conditions that may arise during performance of the contract that would trigger modifications to the SOW, cost, or schedule.

## **2. Pricing and payment**

The price the JBE will pay for goods and services under a contract must be clearly stated. The contract should clearly specify the basis for compensation and the terms of payment, such as: lump sum (one-time payment), firm fixed price, unit price, labor rate, or other specific basis.

- Required terms:
  - A provision that makes payment subject to appropriation of funds is required in all multiyear contracts requiring the payment of state funds and in contracts to be performed entirely within a single budget year; and
  - If a JBE is contracting for labor, a schedule listing the hourly, daily, weekly, or monthly cost for each person or job classification must be incorporated into the contract.
- Contracts typically include provisions covering the following subjects, as applicable in the particular circumstances, to specify the basis for compensation and set out the terms of payment:
  - Firm Price or not to exceed amount of all compensation;
  - Basis of pricing such as (i) hours times hourly rate (e.g., rates contained in a fee schedule), (ii) costs incurred plus any agreed markup, or (iii) a firm fixed price;
  - For lump sum or firm fixed price contracts, a schedule of billing rates if the schedule was used to establish the lump sum or fixed price of authorized work. The schedule may also be used as the basis for establishing the cost of additional work authorized under the contract;
  - Any cost substantiation requirements and processes;
  - Any allowances that are a part of established prices;
  - Allowable and unallowable pass-through expenses (e.g., travel expenses at state rates);
  - Expense reimbursement substantiation requirements and processes;

- Payment frequency, and schedule for progress payments;
- Retention or withholding amounts:
  - Each contract should provide for payment, or a reasonable portion thereof, to be withheld pending resolution of any material dispute;
- Conditions of payment;
- Pricing of any modifications that may be effected by change order or through exercise of an option;
- Respecting IGCs only:
  - A JBE should ensure that any overhead or administrative costs are reasonable considering the services being performed and conform to any applicable requirements imposed under the JBE's A-87 Cost Recovery Plan<sup>5</sup>; and
  - A JBE should not pay overhead charges (mark-ups) on more than the first \$25,000 of a subcontract.

### 3. **Terms and Conditions**

The contract must include specified rights and obligations of either party that are not included in the SOW or the pricing and payment section, including additional provisions that apply to performance under the contract, as applicable.

- Standard Terms and Conditions. Contracts typically include the following “standard” or “general” terms and conditions:
  - Terms of shipping or packaging requirements;
  - Contract term, including any options to extend the term;
  - Where contract notices must be directed;
  - Identification of the parties' representatives;
  - Dispute resolution; and
  - Indemnification.
- Deal Terms and Conditions. The contract may also include “deal-specific” terms applicable to the particular goods or services being procured or the circumstances of a particular purchase, such as:
  - If establishing an LPA, LPA options, terms, and conditions;
  - Any performance bond requirement;
  - Permits or licenses required of the Contractor and standards of performance required by particular personnel performing the services; and

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<sup>5</sup> For superior courts, see TCFPPM, FIN 15.02 (Indirect Cost Rate Proposal) for details about cost recovery plans and Office of Management and Budget guidelines.

- Product warranties, detailed service level agreements, or performance criteria.
- Modification Provisions. Generally, provisions for modifying contract terms, including provisions for formal amendments, change orders, and exercises of options, if applicable, are required to be in a contract. These terms establish the procedure to be used for each type of modification. If a JBE wants to be able to modify a contract without a formal amendment (i.e., modifying a contract by change order or exercise of an option), the contract must include a change order provision or an option provision. See chapter 11 of this Manual for more information on contract modifications.
- Contractor Certification Clauses (CCCs). CCCs include certifications from a contractor regarding particular laws, and include a contractor's representation or warranty that certain conditions have been met or certain circumstances are true. CCCs may be included in the terms and conditions (often in the representations and warranties section) or may be placed in a separate document that is incorporated by reference into the contract. Appendix A to this chapter contains a chart that lists mandatory and typical CCCs, and indicates which categories of contract must include the listed CCCs. If the CCC is not required, it may be listed as recommended for a particular category of contract. Whether or not to include CCCs listed as recommended, and whether or not to include CCCs in contracts when the CCC is not listed as mandatory or recommended, is in the discretion of the JBE, based on JBE policy and the particular circumstances.
- Insurance. When contracting with a nongovernmental entity, the JBE should determine whether to require the contractor to maintain insurance in connection with the performance of the contract. If so, the JBE must determine what types of insurance to require and the minimum dollar levels of each required policy. At a minimum, the JBE should require insurance in contracts involving the performance of high-risk activities described in section 8.4B(a) of this chapter.

The most common types of insurance include:

- Commercial General Liability. This is a basic insurance policy the JBE should consider requiring. This policy covers bodily injury and property

- damage liability, including coverage for products, operations, hazard, personal and advertising injury liability, and contractual liability.
- Workers' Compensation and Employer's Liability. This policy must be required if the Vendor has employees.
  - Professional Liability. This policy should be required if the Vendor performs consulting or professional services.
  - Commercial Automobile Liability. This policy should be required if the Vendor uses an automobile or other vehicle in the performance of the contract.
  - Commercial Crime Insurance. If the Vendor handles or has access to the JBE's funds or property of significant value to the JBE, the JBE should consider requiring this coverage.

Notes for contracts requiring insurance:

- If required, the commercial general liability and automobile insurance policies should be endorsed to include the JBE and its officers, agents, and employees as additional insureds with respect to the work performed for or items purchased by the JBE under the contract.
- Certificates of insurance (or, if acceptable to the JBE, Certificates of Self-Insurance) for all required policies must be received from the Vendor or be verified as current and on file with the JBE prior to the beginning of any work. The certificates must be of a form and content that meet the requirements of the contract.
- The contract should state that no payments will be made to the contractor until all required current and complete certificates of insurance are properly endorsed and on file with the JBE. Agreements that include commercial crime insurance should state that the work will not begin until all required current and complete certificates of insurance are properly endorsed and on file with the JBE.
- The JBE must require that certificates of insurance include a provision that requires at least 15 days' written notice to the JBE in the event that insurance coverage is cancelled or materially changed.
- The contract should state that insurance must be issued by an insurance company that is acceptable to the JBE.
- If a Solicitation Document is used, the JBE should ensure that the required types and levels of insurance are specified in the Solicitation Document.

## **B. Special Provisions for IGCs**

Because of the inter-governmental nature of IGCs, not all of the subject matters discussed above are necessary in IGCs. In preparing an IGC a JBE should review the information above regarding each element to determine which of the topics are appropriate for inclusion in the particular contract and whether any of the specific requirements noted above apply to the contract. See the appendices for required and recommended certifications and contract provisions for IGCs.

## **C. Additional Provisions Required in Certain Types of Contracts**

Certain contracts require that specific clauses be included in the contract. Appendix C to this chapter addresses these contracts, listed below:

1. Consulting Services Contracts;
2. Credit Card Issuer Contracts;
3. Equipment Purchase Contracts;
4. Federally Funded Contracts;
5. IGCs with Counties for County Services;
6. IGCs with California Government Entities;
7. IGCs with Local Government Entities;
8. Information Technology Contracts;
9. Janitorial/Building Maintenance Contracts;
10. Legal Services Contracts;
11. Parts Cleaning Contracts;
12. Printing Contracts;
13. Equipment Rental Contracts; and
14. Subvention and Local Assistance Contracts.

In some instances a single contract may fit into more than one of these types of contracts. For example, an IGC between a court and a county fits types 5, 6, and 7 (and possibly others, depending on the content of the contract). A JBE should ensure that it has consulted all relevant information in Appendix C before finalizing a contract.

## **8.4 APPROVAL OF CONTRACTS**

### **A. Review and Approval of Commercial Terms**

Each JBE's Local Contracting Manual must establish processes and levels of approval authority for entering into contracts that are consistent with applicable law (including rules of court), and that promote responsible stewardship of public funds and help avoid

prohibited conflicts of interest. Consideration must be given to applicable financial and accounting standards and best practices associated with contracting and procurement responsibility. Each JBE should also consider its size and resources when establishing processes and levels of approval authority.

## **B. Legal Review**

JBEs may arrange for legal review of their contracts by their in-house legal staff or retained counsel, or through the AOC/OGC. In the event the JBE decides to require legal review of contracts, the JBE should adopt a policy in its Local Contracting Manual describing the circumstances where review is required.

The following are circumstances where legal review should be required.

### **1. High Risk Activities**

The JBE should provide for legal review if the contract provides for the performance of high risk activities. Each JBE should define “high risk activities” in its Local Contracting Manual. High risk activities may include, for example:

- Operating heavy equipment;
- Transporting, holding, or incarcerating a person;
- Applying, treating, removing, storing, or any other handling of hazardous chemicals or other hazardous substances;
- Carrying a firearm, explosive, or other weapon; or
- Transporting outside of secure premises cash, cash equivalents, securities, and other financial instruments with an aggregate value on any occurrence in excess of a certain dollar amount as specified in the Local Contracting Manual.

### **2. Contract template**

The JBE should provide for legal review where the JBE plans to adopt a contract template.

### **3. Contract Modifications**

The JBE should provide for legal review where one or more contract terms are to be modified, and:

- The contract is being modified to resolve a contract dispute; or
- The modification itself triggers a requirement for legal review under the JBE’s Local Contracting Manual.

#### **4. Certain Substantive Provisions Affecting Legal Risk**

The JBE should provide for legal review if the proposed terms and conditions involve, for example:

- Assuming a risk or contingent liability not under the direct control of the JBE;
- Indemnifying any contractor or third party;
- Substantially narrowing any limitation of liability that favors the JBE as set forth in the JBE's standard terms and conditions;
- Substantially limiting the liability of a contractor or other third party;
- Agreeing to liquidated damages; or
- Releasing any claim or potential claim, or otherwise settling any dispute.

The following are sample circumstances where the JBE may also wish to require legal review.

##### **1. Dollar Value of Contract**

The dollar value of the contract is above a certain dollar threshold. Appendix D sets out sample thresholds for legal review.

##### **2. Revenue Agreements; Financing Agreements**

The contract is a revenue agreement or financing agreement. Revenue agreements include reimbursement, income, receivable, and cost recovery contracts. They typically fall into one of two categories:

- Contracts between a JBE and a private entity, under which the private entity provides services and pays the state; or
- Contracts between a JBE and a governmental or private entity, under which the JBE provides services and receives payment for the services.

Financing agreements include equipment lease/finance agreements, installment sales contracts, and other contracts under which compensation for purchased goods or services comes due over time instead of on receipt.

#### **C. Review of Certain IT Contracts**

All administrative and infrastructure information technology (IT) projects of the Judicial Council or the courts with total costs estimated at more than \$5 million are subject to review and recommendations of the California Technology Agency, as specified in GC 68511.9 (PCC 19204(a)).

## 8.5 EXECUTION OF CONTRACTS

### A. Authority

Contracts may not be executed by persons without authority to do so according to established levels of authority in each JBE's Local Contracting Manual.

### B. Process

- Contracts may be either manually signed or digitally signed:
  - If the contract is signed manually, the JBE should create at least two originally signed counterparts of each contract, one for the JBE and one for each contractor. Other than purchase orders, contracts should first be provided to the contractor for signature and then delivered back to the JBE, who will countersign the document and return an original to the contractor. Contracts may be executed in multiple counterparts if the contract so provides. If a manually signed document is delivered to the other party electronically (e.g., by fax or a PDF file attached to an e-mail), receipt should be confirmed and the originally executed counterparts exchanged promptly.
  - If the contract is signed digitally, the JBE must ensure compliance with California Code of Regulations, title 2, sections 22000–22005 (Digital Signatures), promulgated under GC 16.5.
- Contracts should be mutually executed and delivered before work under the contract begins. Any work performed under a contract before it is fully executed and delivered is at the contractor's own risk. If a contract is not mutually executed and delivered before work begins, the contractor may not be paid for that work unless the effective date of the contract is no later than the date work begins.

### C. Payee Data Record

This form must be completed and signed by all private entity contractors before execution of a contract unless the JBE has previously obtained a Payee Data Record from the contractor. This form may also be requested for a limited purpose in connection with contracts with public entities (e.g., for the purpose of properly issuing warrants, or record keeping).

## APPENDIX A

**CONTRACTOR CERTIFICATION CLAUSES**

The following table lists mandatory and typical CCCs. Some Contractor Certification Clauses (CCCs) are **mandatory** in specific categories of contracts; these are marked with an “M” in the table below. A provision is designated mandatory if the JBCL requires its inclusion in a contract, or it is required to comply with some other law, rule, or policy.

Other CCCs are **recommended** in specific categories of contracts; these are marked with an “R” in the table below.<sup>1</sup>

Some CCCs are listed as recommended but not mandatory because there is no specific requirement that the contractor provide a certification or representation to that effect; the contract and contractor must still comply with the law.

Whether or not to include CCCs listed as recommended, and CCCs that are not listed as mandatory or recommended, is in the discretion of the JBE based on JBE policy and the particular circumstances.

	CCC	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
1.	Authority	R	R	R	R (see note 1)	
2.	Qualification in California	R (See note 2)	M (See note 2)	M (See note 2)		
3.	No gratuities	R	R	R		
4.	No conflict of interest	R	R			
5.	No interference with other contracts	R	R			
6.	No litigation	R	R			

<sup>1</sup> If CCC is neither mandatory (M) nor recommended (R), the table shows no mark.

	CCC	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
7.	Compliance with laws	R	R	R	R	
8.	Union activities	M (see note 3)	M (see note 3)	M (see note 3)		
9.	Drug-free workplace	R	R			
10.	No harassment	R	R	R		
11.	Nondiscrimination	M	M	M		
12.	Domestic partners, spouses, gender	M (See note 4)	M (See note 4)			
13.	National Labor Relations Board	M (See note 5)	M (See note 5)	M (See note 5)		
14.	Sweatfree Code of Conduct	M (See note 6)	M (See note 6)	M (See note 6)		
15.	Child Support Compliance Act	M (See note 7)	M (See note 7)			
16.	Use of postconsumer material	R				

Note 1: It is recommended that all contracts include a general representation as to the Vendor's authority. In MOUs with government agencies, the JBE should obtain a copy of the resolution or other document authorizing the local governing body to enter into the proposed contract, unless performance by the local government entity will be completed before any payment by the JBE will be made.

Note 2: Mandatory in contracts that include services if the services are to be performed in-state.

Note 3: Not required for fixed price contracts of \$50,000 or less.

Note 4: Applies only to contracts for \$100,000 or more.

Note 5: Not applicable to purchases of goods by credit card for an amount less than \$2,500 from any one Vendor, not to exceed in the aggregate \$7,500 per year from the Vendor.

Note 6: Mandatory only if the contract provides (i) for furnishing equipment, materials, or supplies (except related to the provision of public works), or (ii) for the laundering of apparel, garments, or corresponding accessories. Not applicable to purchases by credit card for an amount less than \$2,500 from any one Vendor, not to exceed in the aggregate \$7,500 per year from the Vendor.

Note 7: Mandatory only if the contract is in excess of \$100,000.

APPENDIX B

**MANDATORY AND RECOMMENDED CONTRACT PROVISIONS**

Some of the sample contract provisions below are **mandatory** in specific categories of contracts; these are marked with an “M” in the table below. A provision is designated mandatory if the JBCL requires its inclusion in a contract, or it is required to comply with some other law, rule, or policy.

Other sample contract provisions below are **recommended** in specific categories of contracts; these are marked with an “R” in the table below.<sup>1</sup>

**Note:** The list in the chart below is not exhaustive. Other provisions may be appropriate depending on the subject matter of the contract and desired allocation of commercial and legal risks between the parties.

For low value, low risk, and short form agreements, JBEs may consider drafting provisions with less detail than in their standard agreements and POs, to the extent the particular language or detail is not expressly required by law.

	Provision	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
1.	CCCs (Refer to Appendix A)	M	M	M	M	
2.	Budget contingency provision	M (See note 1)	M (See note 1)	M (See note 1)	M (See note 1)	
3.	Loss leader	M (see note 2)	M (see note 2)	M (see note 2)		
4.	Antitrust claims	M (See note 3)	M (See note 3)	M (See note 3)		
5.	Recycling	M (See note 4)	M (See note 4)	M (See note 4)		

<sup>1</sup> If a provision is neither mandatory (M) nor recommended (R), the table shows no mark.

	Provision	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
6.	Priority hiring		M (See note 5)			
7.	DVBE participation certification	M (See note 6)	M (See note 6)	M (See note 6)		
8.	Union activities	M (See note 7)	M (See note 7)			
9.	Insurance	M (See note 8)	M (See note 8)	M (See note 8)		
10.	BSA audit provision	M (if over \$10,000)	M (if over \$10,000)	M (if over \$10,000)	M (if over \$10,000)	M (if over \$10,000)
11.	General audit and records provision <sup>2</sup>	R	R	R	R	R
12.	Indemnification by contractor	R	R	R		
13.	Independent contractor provision	M	M	M		
14.	Termination for default	R	R	R	R	R
15.	Termination by JBE for convenience	R	R	R	R	R
16.	Effect of expiration or termination; survival provisions	R	R		R	R

<sup>2</sup> Audit or records provisions should require the contractor to retain, for a period of four years following final payment under the contract, documentation supporting the allocation of any costs to the JBE.

	Provision	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
17.	Prohibition on assignment and subcontracting	R	R	R	R	R
18.	Binding on successors	R	R			
19.	Personnel and background checks	R	R			
20.	GAAP compliance	R	R			
21.	Ownership of results, rights in work product	M (see note 9)	M (see note 9)	M (see note 9)	M (see note 9)	R
22.	Confidentiality	R	R	R	R	R
23.	Publicity	R	R			
24.	Choice of law (California)	R	R	R	R	
25.	Amendment	R	R		R	R
26.	Waiver	R	R		R	R
27.	Severability	R	R		R	
28.	Time of the essence	R	R	R	R	
29.	Negotiated agreement	R	R			
30.	Headings	R	R			
31.	Counterparts	R	R	R	R	R
32.	Entire agreement	R	R	R	R	R
33.	Informal dispute resolution					R

Note 1: Mandatory unless the JBE has the right to terminate the contract for convenience.

Note 2: Mandatory in any contract under which goods are provided to a JBE.

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- Note 3: Mandatory only if a contract was obtained by means of a competitive bid.
- Note 4: Mandatory only if a contract is for the purchase of products, materials, goods, or supplies.
- Note 5: With certain exceptions, mandatory if a contract includes services in excess of \$200,000. Exceptions: this provision should not be included in (i) consulting services contracts,<sup>3</sup> or (ii) contracts for services related to public works, if the contract value exceeds the amount set from time to time, pursuant to PCC 10105.
- Note 6: Mandatory only if a Vendor made a commitment to achieve disabled veterans business enterprise (DVBE) participation.
- Note 7: Mandatory only in contracts if the amount is \$50,000 or more (although applicable portions of GC 16645–16649 apply to all contracts).
- Note 8: In specified circumstances (see section 8.3.A.3 of this chapter) workers’ compensation and employer’s liability insurance or self-insurance is mandatory, and in any legal services contract professional liability insurance is mandatory if the legal services are provided to the JBE. Other insurance is recommended under the *Judicial Branch Contracting Manual* and may be required under a Local Contracting Manual.
- Note 9: Mandatory for IT agreements only, otherwise recommended where there is valuable work product.

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<sup>3</sup> For information regarding consulting services contracts, see Appendix C to this chapter.

## APPENDIX C

**ADDITIONAL INFORMATION FOR CERTAIN TYPES OF CONTRACTS**

This appendix contains additional information for the following types of contracts:

1. Consulting Services Contracts;
2. Credit Card Issuer Contracts;
3. Equipment Purchase Contracts;
4. Federally Funded Contracts;
5. IGCs (MOUs) with Counties for County Services;
6. IGCs with California Government Entities;
7. IGCs with Local Government Entities;
8. Information Technology Contracts;
9. Janitorial/Building Maintenance Contracts;
10. Legal Services Contracts;
11. Parts Cleaning Contracts;
12. Printing Contracts;
13. Equipment Rental Contracts; and
14. Subvention and Local Assistance Contracts.

In some instances a single contract may fit into more than one of these types of contracts. For example, a court-county MOU fits within categories 6, 7, and 8 (and possibly others, depending on the content of the MOU). A JBE should ensure that it has consulted all relevant information in this appendix before finalizing a contract.

**1. CONSULTING SERVICES CONTRACTS**

**a. Definition.** A consulting services contract (or “consultant services contract”) is a services contract in which the service to be provided is advice or recommendations rather than the use of mechanical or physical skills. The product may include anything from answers to specific questions to the design of a system or development of a plan. Consulting services may include workshops, seminars, retreats, and conferences for which paid expertise is retained by contract, grant, or other payment for services. Consulting services contracts typically do not include:

- Contracts between JBEs and the federal government;

- Contracts with any city, county, JBE, special district, authority or other political subdivision of the state, to subvene federal funds for which no matching state funds are required; and
- Contracts for architectural and engineering services (GC 4525 et seq.).

**b. Requirements.** A consulting services contract may include:

- A provision for settlement of contract disputes.
- If the contract is for \$5,000 or more:
  - Detailed performance criteria and a schedule for performance;
  - A requirement that the contractor provide a detailed analysis of the costs of performing the contract;
  - A resumé for each contract participant who will exercise a major administrative role or major policy or consultant role, as identified by the contractor; and
  - A statement that the JBE shall evaluate the contractor's performance.

**c. Recommendations.** A consulting services contract should contain:

- A clear description of the work to be done or the problem to be solved;
- What the contractor is to accomplish, including any desired approach to the problem; practical, policy, technological, and legal limitations; specific questions to be answered; the manner in which the work is to be done; a description of the items to be delivered; the format and number of copies to be made of the completed reports; and the extent and nature of the assistance and cooperation that will be available to the contractor from the JBE;
- Time schedules, including dates for commencement of performance and submission of progress reports, if any, and date of completion;
- Manner of Progress Payments, whether and to what extent they will be allowed, and, if appropriate, known or estimated budgetary limitations on the contract price;
- Final meeting requirements between the contractor and JBE management (if the contractor is to present findings, conclusions, or recommendations);
- Final report requirements that require the contractor to submit a comprehensive final report (if applicable);
- The identity of the project coordinator or manager; and
- A notice similar to the following:

Subject to certain exceptions, no person, firm, or subsidiary thereof who has been awarded a consulting services contract may submit a bid for, nor be awarded a contract for, the provision of services, procurement of goods or supplies, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract.

## **2. CREDIT CARD ISSUER CONTRACTS**

GC 6159(d) establishes the minimum requirements that must be met when a JBE enters into a contract with a credit card issuer allowing the JBE to accept payments by credit card. These contracts must define:

- The respective rights and duties of the JBE and credit card issuer regarding the presentation, acceptability, and payment of credit card drafts;
- A reasonable method to facilitate payment settlements;
- A reasonable fee or discount to be paid to the credit card issuer; and
- Other matters that may be agreed upon by the parties.

For superior courts: additional information regarding credit card payments is set forth in the TCFPPM, FIN 10.01 (Revenue Collection and Distribution) and FIN 10.02 (Cash Handling).

## **3. EQUIPMENT PURCHASE CONTRACTS**

Contracts providing for the purchase of equipment using JBE funds should include a provision in substance as follows:

- Title to equipment purchased or built with JBE funds vests in the JBE upon payment of the purchase price; and
- The JBE may, at its option, repair any damaged or replace any lost or stolen items and deduct the cost thereof from contractor's invoice to the JBE, or require contractor to repair or replace any damaged, lost, or stolen equipment to the satisfaction of the JBE at no expense to the JBE. If a theft occurs, contractor must file a police report immediately.

## **4. FEDERALLY FUNDED CONTRACTS**

All contracts subject to this Manual that are funded in whole or in part by the federal government must contain a 30-day cancellation provision and the following provisions:

- It is understood between the parties that this Agreement may have been written for the mutual benefit of both parties before ascertaining the availability of congressional appropriation of funds, to avoid program and fiscal delays that would occur if the contract were executed after that determination was made. This contract is valid and enforceable only if sufficient funds are made available to the JBE by the U.S. Government for the fiscal year in which they are due and consistent with any stated programmatic purpose. In addition, this Agreement is subject to any additional restrictions, limitations, or conditions enacted by the Congress and to any statute enacted by the Congress that may affect the provisions, terms, or funding of this contract in any manner.
- The parties agree that if the Congress does not appropriate sufficient funds for the program, this Agreement shall be amended to reflect any reduction in funds.
- The parties may invalidate this Agreement under any termination for convenience or cancellation provision or amend the contract to reflect any reduction in funds.

Exemptions from these requirements may be made by the JBE if the JBE can certify in writing that federal funds are available for the term of the contract.

JBEs using federal assistance for procurement should be aware of any applicable third party contracting requirements that may be a condition of a specific grant. JBEs should consult with legal counsel as appropriate to ensure compliance with all grant conditions.

## **5. IGCs (MOUs) WITH COUNTIES FOR COUNTY SERVICES**

If a superior court and its county agree that the county will provide or continue to provide services to the court that were provided in 1997, GC 77212 requires the superior courts and county to enter into a contract regarding the services. The parties must cooperate in developing and implementing the contract. The contract is typically in the form of an MOU.

- Services provided to the court may be discontinued by either party giving written notice to the other no later than 90 days before the end of the fiscal year (i.e., prior to April 1); some MOUs may require earlier notice. Service discontinuation only becomes effective at the beginning of the new fiscal year (July 1), per GC 77212(b) and (c).
- Under CRC 10.805, if the superior court receives or issues a notice regarding the discontinuation of county-provided services under GC 77212, a copy of the

notice must be provided to the AOC Director of Finance within 10 days of the notice issue or receipt date.

- GC 77212(d) specifically requires that a court-county agreement identify the scope of services, the method of service delivery, the term of the agreement, the anticipated services outcomes, and the cost of the services. A court-county agreement for services should also contain appropriate provisions applicable to IGCs generally under this chapter.
- In addition to the general requirements on costs, GC 77212 also requires inclusion of the following provision related to costs:

**Costs.** Costs charged to the court may not exceed the costs of providing similar services to county departments or special districts (GC 77212(a)).

- Counties periodically approve “cost allocation plans” detailing the actual expenditures by departments that provide indirect services to county departments and identifying the specific cost allocation methods that are used to distribute those costs. For purposes of determining the costs associated with its contract with the county, the contract should allow the superior court to review the specific charges in the cost allocation plan that were used to complete the plan, including the data elements provided by each county department.
- The amount of any indirect or overhead costs must be individually stated, together with the method of calculation of the indirect or overhead costs. (GC 77212 (d)).
- The Judicial Council or its delegee may audit the county figures to ensure compliance with this requirement and determine the reasonableness of the indirect or overhead costs charged to the superior court.
- CRC 10.810 defines the division of responsibility between the state and county for funding the superior court. Costs payable by a superior court under any IGC, including agreements covered by GC 77212, may not contain items that are not otherwise allowable court operations.

## 6. IGCs WITH CALIFORNIA GOVERNMENT ENTITIES

Except for IBAs, JBEs should include the following waiver provision, or a similar provision modified as appropriate to address any indemnity provision in the contract:

**Waiver of Per Capita Risk Allocation.** The parties waive the per capita risk allocation set forth in Government Code section 895.6. Instead, they agree if one of them is held liable upon any judgment for damages caused by a negligent or

wrongful act or omission occurring in the performance of this Agreement, the parties' respective pro-rata shares in satisfaction of the judgment will be determined by applying principles of comparative fault.

## 7. IGCs WITH LOCAL GOVERNMENT ENTITIES

When a JBE contracts with a county, city, district, or other local government entity, the JBE should require, together with the signed contract, a copy of the resolution or other document authorizing the local governing body to enter into the proposed contract. When performance by the local government entity will be completed before any payment by the JBE, however, such as a room rental or a one-time event, the JBE does not need to obtain this documentation. The JBE may wish to include the following provision in the contract (e.g., in the CCCs):

**Authority.** Attached is a true copy of the code, rule, resolution, order, motion, or ordinance authorizing Contractor to enter into or execute this Agreement.

## 8. INFORMATION TECHNOLOGY (IT) CONTRACTS

When contracting for the performance of IT services, the contract must specify who will own the work product. If the JBE will own the work product, the contract must assign ownership to the JBE. If the contractor or some other party will own the work product, the contract should provide the JBE a worldwide license to the work product at no additional cost. The license should be broad enough to allow the JBE to use the work product for any reasonable purpose. The JBE may also want to consider whether the contract should provide the JBE a right to sublicense the work product at no additional cost.

IT contracts should include a provision in substance as follows:

**Use Tax Collection.** In accordance with PCC 10295.1, Contractor certifies that it complies with the requirements of section 7101 of the Revenue and Taxation Code. Contractor further certifies that it will immediately advise [JBE] of any change in its retailer's seller's permit or certification of registration or applicable affiliate's seller's permit or certificate of registration as described in subdivision (a) of PCC10295.1.

If the contract is for the purchase of systems, software, or instrumentation with imbedded chips, JBEs should include a provision substantially similar to the following in the contract:

**Four-Digit Date Compliance.** Contractor represents and warrants that it will provide only Four-Digit Date Compliant deliverables and/or services to [JBE]. “Four-Digit Date Compliant” deliverables and services can accurately process, calculate, compare, and sequence date data, including without limitation date data arising out of or relating to leap years and changes in centuries. The warranty and representation are subject to the warranty terms and conditions of this Agreement and do not limit the generality of warranty obligations set forth elsewhere in this Agreement.

## 9. JANITORIAL/BUILDING MAINTENANCE CONTRACTS

- The contract should provide that the contractor must retain for 60 days any employees employed at each site by the contractor/subcontractor who previously provided those services.<sup>1</sup>
- End of Contract. The contract should require the contractor upon termination of the contract to provide upon request information sufficient to identify employees providing janitorial or building maintenance services at each site and to make the necessary notifications required under Labor Code section 1060 et seq.
- To the extent economically feasible, the contract should also require the use of supplies containing recycled products only, and must contain a recycling certification. (See chapter 3, section 3.3.)

## 10. LEGAL SERVICES CONTRACTS

Legal services contracts must contain, in substance, the following provisions.

The contractor shall:

- a. Adhere to legal cost and billing guidelines designated by the JBE.
- b. Adhere to litigation plans designated by the JBE, if applicable.
- c. Adhere to case phasing of activities designated by the JBE, if applicable.
- d. Submit and adhere to legal budgets as designated by the JBE.
- e. Maintain legal malpractice insurance in an amount not less than the amount designated by the JBE.

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<sup>1</sup> This does not apply to court/county MOUs for janitorial and maintenance service. See GC 71626.1 for applicable law regarding transfer of janitorial and maintenance services between court and county.

- f. Submit to legal bill audits and law firm audits if so requested by the JBE. The audits may be conducted by employees or designees of the JBE or by any legal cost-control provider retained by the agency for that purpose.

In addition, the following language must be added to legal services contracts for the representation of a California government entity:

Contractor agrees to make a good faith effort to provide a minimum number of hours of pro bono legal services during each year of this Agreement equal to the lesser of either (i) 30 multiplied by the number of full time attorneys in the firm's offices in California, with the number of hours prorated on an actual day basis for any contract period of less than a full year or (ii) 10 percent of this Agreement. "Ten percent of this Agreement" shall mean the number of hours equal to 10 percent of the contract amount divided by the average billing rate of the firm. Failure to make a good faith effort may be cause for nonrenewal of this Agreement or another judicial branch or other state contract for legal services, and may be taken into account when determining the award of future contracts with [JBE] for legal services.

### **11. PARTS CLEANING CONTRACTS**

To the extent economically feasible, the contract should require the use of recycled solvents only. The contract must contain a recycling certification clause. (See chapter 3, section 3.3.)

### **12. PRINTING CONTRACTS**

To the extent economically feasible, the contract should require the use of recycled paper only. The contract must contain a recycling certification clause. (See chapter 3, section 3.3.)

### **13. EQUIPMENT RENTAL CONTRACTS**

- A JBE should not agree to:
  - Indemnify a contractor;
  - Assume responsibility for matters beyond its control;
  - Agree to make payments in advance;
  - Accept any other provision creating a contingent liability against the JBE; or
  - Agree to obtain insurance to protect the contractor.

- The contract should provide that the JBE does not have responsibility for loss or damage to the rented equipment arising from causes beyond the control of the JBE. Any provision obligating the JBE to return the equipment in good condition, subject to reasonable wear and tear, also should except or exclude loss or damage arising from causes beyond the control of the JBE. The contract should expressly limit the JBE's responsibility for repairs and liability for damage or loss to that made necessary by or resulting from the negligent act or omission of the JBE or its officers, employees, or agents.
- If the JBE does not elect to maintain the equipment, the contract should:
  - Place the obligation on the contractor, as lessor, to keep the equipment in good working order and to make all necessary repairs and adjustments without qualification; and
  - Include a clear right in the JBE to terminate or cease paying rent should the contractor fail to maintain the equipment properly.
- Personal property taxes are not generally reimbursed when leasing equipment. If the contractor does not bargain for the JBE to pay the taxes, the contract should state the JBE will not do so.

#### **14. SUBVENTION AND LOCAL ASSISTANCE CONTRACTS**

These are contracts providing assistance to local governments and aid to the public directly or through an intermediary, such as a nonprofit corporation organized for that purpose. Because subvention aid or local assistance contracts are generally not awarded to a low bidder through competitive bidding, these contracts should contain adequate control language and address the necessity and reasonableness of the cost.

- a. Payment provisions in subvention aid contracts should be on a cost-reimbursement basis with a ceiling specifying the maximum dollar amount payable by the JBE. Contracts should set forth in detail the reimbursable items, unit rates, and extended total amounts for each line item. The following information is provided as a guide for items that may be included in these contracts:
  - Identify and justify direct costs and overhead costs, including employee fringe benefits.
  - Monthly, weekly, or hourly rates, as appropriate, and personnel classifications should be specified, together with the percentage of personnel time to be charged to the contract, when salaries and wages are a reimbursable item.

- Rental reimbursement items should specify the unit rate, such as the rate per square foot.
- If travel is to be reimbursable, the contract should specify that the rates of reimbursement for necessary travel and meal expenses and any other related expense shall be set in accordance with the rates of the JBE for comparable classes and that no travel outside the State of California will be reimbursed unless prior written authorization is obtained from the JBE.

Subvention aid contracts should specifically reserve title to the JBE for JBE-purchased or financed property, which is not fully consumed in the performance of the contract, even when the property is purchased in whole or in part by federally-supplied funds (absent a federal requirement for transfer of title).

- The contract should include a detailed inventory of any JBE-furnished property. (Superior courts must comply with the TCFPPM regarding state-owned property.) Provisions should be included regarding the usage, care, maintenance, protection, and return to the JBE of the property.
  - If purchase of equipment is a reimbursable item, the equipment to be purchased should be specified. Automotive equipment should be purchased by the JBE or a delegate. The contracting JBE should arrange for purchase of all other major equipment items by the JBE or a delegate, as well as other items when economies can be achieved by so doing, with the cost to be deducted from the amount payable to the contractor.
- b. Payments should not be permitted for construction, renovation, alteration, improvement, or repair of privately owned property when such work would enhance the value of the property to the benefit of the owner.
- c. The contract should require prior authorization in writing by the JBE before the contractor will be reimbursed for any purchase order or subcontract exceeding \$2,500 for any articles, supplies, equipment, or services. The contract should also require the contractor to provide in its request for authorization all particulars necessary for evaluation of the necessity or desirability of incurring such cost and the reasonableness of the price or cost. Three competitive quotations should be submitted or adequate justification provided for the absence of bidding.
- d. The contract should reserve prior JBE approval controls over the location, costs, dates, agenda, instructors, instructional materials, and attendees at any reimbursable training seminar, workshop, or conference and over any reimbursable publicity or educational materials to be made available for distribution.

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- e. The contract should require the contractor to maintain books, records, documents, and other evidence pertaining to the reimbursable costs and any matching costs and expenses and to hold them available for audit and inspection by the JBE for four years following final payment.

APPENDIX D

**SAMPLE CONTRACT DOLLAR THRESHOLDS FOR LEGAL REVIEW**

The following chart provides examples of the dollar value thresholds a JBE could establish for legal review of various contract types.

Contract Form	Goods and Materials	Consulting	Information Systems, Off-the-Shelf Software, Developed Software	General Services and Maintenance	Leases/ Real Property	Other (including hotel services and legal services)
<b>Approved Form Contract</b> (template or model contracts preapproved for specific types of procurements)	\$500,000	\$500,000	\$500,000	\$500,000	\$500,000	\$500,000
<b>General Form</b> (contracts comprising preapproved terms/conditions)	\$300,000	\$300,000	\$300,000	\$300,000	\$300,000	\$300,000
<b>Supplier's Contract Terms</b> (contracts proposed by a potential supplier)	\$200,000	\$200,000	\$200,000	\$200,000	\$200,000	\$200,000



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 9  
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## **DISBURSEMENTS AND PAYMENT PROGRAMS**

### **CHAPTER 9**

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## INTRODUCTION

This chapter describes payment practices, including when payments should be released, what is required before making invoice payments, and what are acceptable and unacceptable payment practices. Also included in this chapter is information about the use of purchase cards.

## DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

## 9.1 DISBURSEMENTS

### A. Payment Fundamentals

Payments should not be processed or released by a Judicial Branch Entity (JBE) to a Vendor for any goods or services unless the JBE possesses all of the following:

- A properly authorized contract;
- Documentation verifying the goods/services were satisfactorily received and/or performed; and
- An accurate, properly submitted Vendor invoice.

### B. Advance Payments

Advance payments are payments made to a Vendor before the Vendor performs its obligations under the contract. Advance payments ~~should only be made in special circumstances when necessary and~~ may only be made under the following ~~types of contracts~~:

- Contracts for basic ~~software~~-support/maintenance services (such as uncustomized software upgrades, a pre-established set of maintenance services, or access to a customer technical support telephone line to resolve software issues, but does not include, for example, services to develop or assist in correcting customized software programs);
- Subscriptions that are typically required to be paid in advance;
- Contracts for services provided by community-based private nonprofit agencies where advance payment is essential for implementation of a

- particular program, provided the contract amount does not exceed \$400,000,<sup>1</sup> and provided that the advance payment does not exceed 25 percent<sup>2</sup> of the annual allocation to be made under the contract;
- Memoranda of Understanding (MOUs) with counties with a population of 150,000 or less as of January 1, 1983,<sup>3</sup> if requested by the Board of Supervisors, where advance payment is essential for implementation of a particular program and where payment is not more frequent than once a month and does not exceed one-twelfth of the annual allocations required for the delivery of services by the county; and
  - Contracts with state agencies or federal government entities for the provision of services, materials, or equipment to the JBE.

**Note:**

- For superior courts, in addition to the foregoing, advance payments may also be made as authorized by FIN 8.01 (Vendor Invoice Processing), Section 6.5(1)(e) of the Trial Court Financial Policies and Procedures Manual.
- The following are not advance payments under this Manual: license payments, lease payments, and insurance premiums that are typically required to be paid in advance.
- In addition to the foregoing, if the JBE has conducted a reasonable risk assessment, and if the JBE's Approving Authority (or delegee) has authorized the advance payment, a JBE may also make an advance payment under a contract in the following situations: (i) in exchange for a contractual benefit from such advance payment (e.g., price discount from a vendor); or (ii) where it is industry standard to pay in advance for goods/services.

<sup>1</sup> This amount may be increased by the California Department of Finance; any future increases will be posted on Serranus.

<sup>2</sup> Advance payments in excess of 25 percent may be made on such contracts financed by a federal program when the advances are not prohibited by federal guidelines.

<sup>3</sup> This includes the following counties: Alpine, Amador, Calaveras, Colusa, Del Norte, El Dorado, Glenn, Humboldt, Imperial, Inyo, Kings, Lake, Lassen, Madera, Mariposa, Mendocino, Merced, Modoc, Mono, Napa, Nevada, Placer, Plumas, San Benito, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Tuolumne, Yolo, and Yuba (based on estimated populations from California Statistical Abstract).

### C. Progress Payments

A Progress Payment is a partial payment following the completion of a deliverable, milestone, or stage of progress under a contract.

#### General recommendations regarding Progress Payments:

- Discourage Progress Payments whenever possible;
- During procurement planning, and before entering into an agreement that involves Progress Payments to a Vendor, JBEs should carefully evaluate whether Progress Payments are warranted and reconfirm that the JBE's project manager has the expertise to properly monitor the Vendor's performance of its obligations;:
- Do not allow Progress Payments on agreements with a term of fewer than three months;
- If Progress Payments are to be made, they should be described in the agreement with the Vendor and made at clearly identifiable stages of progress or not more frequently than monthly in arrears, based upon written progress reports submitted with the Vendor's invoices;
- It is important that Progress Payments not be made before goods or services are provided;
- Contracts should require a withholding of at least 10 percent of each Progress Payment pending satisfactory completion of the transaction or a separate and distinct task (unless otherwise authorized by statute — please note: as further described below, PCC 12112(a) permits lower withholding percentages in certain cases for Progress Payments involving IT goods/services);
- Establish contractual procedures/criteria in the contract for release of the amount withheld; and
- A written Statement of Work should be developed to clearly define the tasks that, when completed, would permit a Progress Payment to be made.

#### **When Progress Payments are Allowed**

##### Progress Payment Requirements for Non-IT Services:

For a Progress Payment under a contract for non-IT services:<sup>4</sup>

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<sup>4</sup> These requirements are based on PCC 10346.

- At least 10 percent of the contract amount must be withheld pending final completion of the contract;
- If a contract consists of the performance of separate and distinct tasks, then any funds withheld for a particular task may be paid upon completion of that task; and
- A Progress Payment must not be made unless the JBE has established procedures to ensure that the work or services are being delivered in accordance with the contract.

**Note:** The foregoing Progress Payment requirements do not apply to contracts: (i) for the construction, alteration, improvement, repair, or maintenance of real or personal property; (ii) less than \$5,000 in amount (including contracts less than \$5,000 where only travel expenses are to be paid); or (iii) between a JBE and state agency, or between a JBE and a local agency or federal agency.

#### Non-IT Goods

#### Progress Payments Payment Requirements for Non-IT Custom Goods Involving Work at Vendor's Facility:

~~Contracts for non-IT goods may be made for work performed and costs incurred at the Vendor's shop or plant if:~~<sup>5</sup>

- ~~The goods are to be~~ specially manufactured for the ~~state, JBE~~ and not suitable for sale to others in the ordinary course of the Vendor's business;

~~The Progress Payments are made under may provide, on~~ terms and conditions that ~~the JBE deems necessary to protect the state's~~ interests; ~~for Progress Payments for work performed and costs incurred at the Vendor's shop or plant, provided that:~~<sup>6</sup>

- At least 10 percent of the contract price is withheld until final delivery and acceptance of the goods; and
- The Vendor provides a faithful performance bond, acceptable to the JBE, of at least one-half of the total amount payable under the contract.

#### Progress Payment Requirements for Custom IT Goods and Services Involving Work at Vendor's Facility:

<sup>5</sup> ~~These requirements are based on PCC 10314.~~

<sup>6</sup> ~~These requirements are based on PCC 10314.~~

~~Progress Payments Contracts~~ for IT goods or services ~~may to be made for work performed and costs incurred at the Vendor's shop or plant if:~~<sup>7</sup>

- ~~• The goods or services are especially specially manufactured or performed by the Vendor for the state, JBE and not suitable for sale to others in the ordinary course of the Vendor's Vendor's business;~~

~~The payments are made under may provide, on terms and conditions that the JBE deems necessary to protect the state's sits interests; and, for Progress Payments for work performed and costs incurred at the Vendor's shop or plant if:~~<sup>8</sup>

- ~~• At least 10 percent of the contract price is withheld until final delivery and acceptance of the goods or services;~~
- ~~• **Note:** If, provided, however, that if the JBE determines that lower withholding levels are appropriate based upon its own risk analysis, which may include consideration of financial protection items (e.g., performance bond, surety, letter of credit, additional contract terms, other forms of security or guaranty to protect against Vendor's breach), then: (i) if the contract price is \$10 million or more, the JBE must withhold at least 5 percent of the contract price until final delivery and acceptance of the goods or services; and (ii) if the contract price is less than \$10 million, the JBE must withhold at least 3 percent of the contract price until final delivery and acceptance of the goods or services.~~

~~Consideration of Progress Payments: During procurement planning, and before entering into an agreement that involves Progress Payments to a Vendor, JBEs should carefully evaluate whether Progress Payments are warranted and reconfirm the JBE's contract administrator has the expertise to properly monitor the Vendor's performance of its obligations.~~

~~General recommendations regarding Progress Payments:~~

- ~~• Discourage Progress Payments whenever possible;~~
- ~~• Do not allow Progress Payments on agreements with a term of fewer than 3 months;~~
- ~~• If Progress Payments are to be made, they should be described in the agreement with the Vendor and made at clearly identifiable stages of~~

<sup>7</sup> These requirements are based on PCC 12112(a).

<sup>8</sup> These requirements are based on PCC 12112(a).

- ~~progress or not more frequently than monthly in arrears, based upon written progress reports submitted with the Vendor's invoices;~~
- ~~• Progress Payments should not be made before goods or services are provided;~~
  - ~~• Contracts should require a withholding of at least 10% of each Progress Payment pending satisfactory completion of the purchase transaction or a separate and distinct task;~~
  - ~~• Establish procedures/criteria in the contract for release of the amount withheld; and~~
  - ~~• A written Statement of Work should be developed to clearly define the tasks that when completed would permit a Progress Payment to be made.~~

#### D. Periodic Payments

Periodic payments are payments made on a regular, recurring basis under installment purchase or lease-purchase agreements. Installment purchase and lease-purchase agreements ~~are often~~ may present complex legal issues, so JBEs are encouraged to consult with the AOC Office of the General Counsel. JBEs are also encouraged to consult with the AOC Business Services Unit on nonlegal, business-related issues.

#### E. Payee Data Record

Note: Superior courts should refer to FIN 8.01 (Vendor Invoice Processing) of the *Trial Court Financial Policies and Procedures Manual* regarding Payee Data Records in lieu of the information below.

Before executing any contract (if the Vendor is not a government entity) and before any payment is released, a JBE should confirm that a completed Payee Data Record has been obtained from the Vendor. ~~(The Payee Data Record template for trial courts can be found in section 7.0 of FIN 8.01 in the *Trial Court Financial Policies and Procedures Manual*).~~ The Payee Data Record provides, among other data, a Vendor's taxpayer identification number and is needed in order to process payments of invoices.

The Payee Data Record should be retained in the JBE's business services or accounting office, as determined by each JBE's policy, and in the procurement file. Because each Vendor's Payee Data Record is maintained at the JBE's business services or accounting office, a Vendor only needs to submit one Payee Data Record to the JBE. If any information changes, the Payee Data Record should be updated.

## F. Payment of Invoices

Note: Superior courts should refer to the *Trial Court Financial Policies and Procedures Manual*, FIN 8.01 (Vendor Invoice Processing) of the *Trial Court Financial Policies and Procedures Manual* regarding payment of invoices and to FIN 8.03 (Travel Expense Reimbursement for Trial Court Judges and Employees) regarding travel expenses in lieu of the information below.

Accurate, properly submitted invoices: JBEs should instruct Vendors to submit accurate and correct invoices to ensure timely payment for goods or services received. JBEs should not pay for anything that is not set forth in the contract (pallets, shipping, travel costs, etc.).

An accurate, properly submitted invoice includes the following:

- Detailed identification of the goods/services provided, quantities, unit price, extension, description, etc.;
- Applicable sales tax and/or use tax as a separate line item from goods;
- Service period, unit price (i.e., hourly, monthly), and quantity applicable to the service;
- Accurate billing address as stated in the contract;
- Invoice number;
- Invoice date;
- Vendor name and remittance address; and
- Submission of the invoice to the JBE address as identified in the contract as “billed to” or “invoice submitted to” for payment.

Invoice tracking: To accurately track invoices so they are paid in a timely manner, all invoices:

- Should be promptly ~~forwarded~~made available to ~~the JBE’s~~ accounts payable ~~department~~ (or other appropriate department or personnel); and
- Should be date stamped or have the receipt date ~~written on the front of the invoice~~noted when first received by ~~the JBE’s~~ accounts payable ~~department~~ (or other appropriate department or personnel).

Invoice dispute notification: If there is a dispute about a submitted invoice, the JBE should promptly notify the Vendor. Buyers and ~~contract administrators~~project managers should consult with their JBE’s accounting office (or other unit as determined by JBE policy and procedures) to develop a plan of action for resolving the dispute in a timely

manner. See chapter 10 of this Manual for information on acceptance/rejection of goods and services.

Prompt payment discounts: Some Vendors may offer discounts for prompt payment. A JBE may elect to accept these payment terms when it is in the best interests of the JBE, after considering all financial and Vendor performance factors.

Separation of duties: JBEs should ~~maintain sufficient~~ have policies and procedures in place to ensure a clear separation of duties in order to reduce the risk of error or fraud in the JBE's contracting and procurement programs. See chapter 1 of this Manual on purchasing roles and responsibilities for more information.

### **~~G. Additional Payment and Invoice Considerations~~**

~~Invoice Processing by Trial Courts: Also refer to FIN 8.01 of the *Trial Court Financial Policies and Procedures Manual* regarding invoice processing by the trial courts.~~

Travel provisions: All travel expenses should be related to official JBE business. Reimbursement for such expenses should only be permitted if provided for in the contract. If the JBE will be reimbursing the Vendor for travel expenses, the contract should include appropriate travel-related provisions, including travel expense reimbursement limits that are in accordance with the judicial branch travel guidelines.

~~Travel rates paid to Vendors should be set in accordance with the judicial branch travel rate guidelines (available at <http://serranus.courtinfo.ca.gov>). The contract should include appropriate travel-related provisions. Also refer to FIN 8.03 of the *Trial Court Financial Policies and Procedures Manual* regarding travel expenses under trial court contracts.~~

~~Training vouchers: JBEs may contract for training vouchers (e.g., reservations for IT-related training sessions) in advance of the training being provided if the Vendor does not invoice and the JBE does not pay for the training in advance.~~

## **9.2 PURCHASE CARD PROGRAMS**

### **A. Use of Purchase Cards Generally**

Purchase cards are a method of payment that works like similar to personal credit cards ~~and offers a number of streamlining advantages over traditional procurement methods.~~ JBEs should establish internal controls to monitor their use of purchase cards.

Purchase cards may not be used to circumvent established procurement procedures. All procurements executed using a purchase card should be initiated by an approved purchase requisition. Purchase cards may be used only for official JBE business; personal use is prohibited.

## B. Use of Purchase Cards by the Superior Courts

1. The state-administered procurement card program, CAL-Card, is available to all trial courts, and has usage limitations defined by the program. The AOC Business Services Procurement Supervisor can be contacted at 415-865-7978 for assistance.
2. Purchase cards ~~may be typically are~~ used only for the procurement of goods. Examples of items that may be purchased using purchase cards include library purchases, subscriptions, ~~seminar registrations,~~ office supplies, and minor equipment. ~~Purchase~~ Although purchase cards should not be used to ~~pay for procure~~ services, but if a trial court purchases goods that have ancillary services associated with them, the court does use entire transaction may be charged to a purchase card to pay for services (e.g., emergency repairs, towing services, etc.), the . For example, a court must comply with Internal Revenue Service regulations vehicle gets a flat while on a business trip and should maintain a Vendor data record or W-9 on file for each Vendor. The court a full-size replacement tire is required to track credit card expenditures for services and, unless the court's credit card provider accepts complete the trip. The tire and the associated ancillary services associated with the 1099 processing responsibilities, the court may be required to report such expenditures per IRS (Form 1099—MISC.) reporting requirements. The trial court tire (i.e., mounting, balancing) may be responsible for IRS penalties if the expenditures are not properly reported. Note that because credit card expenditures are bundled on a monthly statement, tracking of services may be extremely labor intensive charged to a purchase card.
3. Purchase cards may only be used for purchases with a maximum of \$1,500 per transaction. A suggested daily limit of \$5,000 should also be set for purchase card use. Alternative procedures should be documented, incorporated into the court's Local Contracting Manual, and distributed to court personnel. ~~Any alternative procedure that is different from what is included in this chapter is required to be approved by the AOC before its implementation. Use of~~

~~undocumented or unapproved policies will not be considered valid for audit purposes.~~

4. Purchase cardholders are responsible for providing documentation in the form of requisitions and receipts for purchases made using the purchase card (this includes providing such documentation upon receiving a monthly statement of card activity). The receipts and the statement should be forwarded to accounts payable for verification and payment.
5. If the trial court receives a monthly master statement of purchase card activity, either accounts payable or the cardholder(s) is responsible for assembling the documentation (requisitions, receipts) necessary to verify purchases before issuing payment to the purchase card company.
6. If there is no receipt issued for a purchase card charge, the employee making the purchase should provide some other form of documentation for the charge. At a minimum, a written explanation for what the purchase card was used to purchase should be provided.
7. ~~Individual court employee travel~~Travel expenses may be ~~reimbursed, or purchased with~~paid by a court credit card that is used only for travel expenses, or centrally purchased using a court travel account.

### C. Use of Purchase Cards by Other JBEs

Currently, the only purchase cards authorized for use by JBEs other than the superior courts are the CAL-Cards, ~~which should~~. It is important that CAL-Cards be used by these JBEs in accordance with the AOC's CAL-Card, State of California VISA Purchasing Card procedures.



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 10  
Page 1 of 10

## **RECEIVING, INSPECTION, AND ACCEPTANCE OR REJECTION OF GOODS AND SERVICES**

### CHAPTER 10

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**INTRODUCTION**

This chapter discusses the process for Judicial Branch Entities (JBEs) to receive, inspect, and accept or reject goods and services that they have purchased. It also includes information about asset management.

**DEFINED TERMS**

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

**10.1 GENERAL PROCESS FOR RECEIVING GOODS AND SERVICES**

**A. Receiving Process**

Each JBE ~~should determine~~determines whether or not the goods and/or services received are acceptable and conform to all of the terms and conditions of the contract. The receiving process is set forth in the table below, along with definitions, in the context of this chapter, for certain related terms. JBEs should have a current and complete contract (including technical specifications, as applicable) to compare goods/services received to what was ordered.

Documentation on receiving, inspection, and acceptance of goods/services may be maintained in electronic form and accessible through an online purchasing system. Accounts payable staff may utilize online information to process invoices. For superior courts: retain original documents in accordance with FIN 8.01 (Vendor Invoice Processing) and FIN 12.01 (Record Retention) in the *Trial Court Financial Policies and Procedures Manual*.

Term	Definition	Example
Receiving	The act of taking possession of goods or receiving services. <b>Caution:</b> Placing goods into inventory without inspection may waive inspection rights and remedies.	A JBE signs for goods, acknowledging that the goods were delivered, not that they were accepted.

Term	Definition	Example
Inspection	The act of examining goods/services to determine conformance to the contract.	A JBE inspects a delivery of office supplies and confirms that the delivery conforms to what was ordered in the contract.
Acceptance Testing	The testing of goods or services to determine compliance with contract requirements (e.g., acceptance criteria, specifications). After inspection, Acceptance Testing may be required for certain goods and services.	A JBE purchases a network printer. The contract provides for a 30-day Acceptance Testing period, during which the printer must run error-free and meet other acceptance criteria.
Acceptance	The legal act of indicating to the Vendor the acceptance of goods and/or services. <b>Note:</b> goods/services could also be deemed accepted if the JBE fails to make an effective rejection of the goods/services.	After completing an acceptance test, a JBE notifies the Vendor in writing, confirming that the equipment passed the test and the JBE accepts the product.

## B. Packaging and Shipping

JBEs should include packaging and shipping requirements/instructions (if applicable) ~~in the solicitation document and~~ in the contract.

A Vendor that ships multiple containers to a JBE should be instructed to number the containers with shipping labels and identify the total number of containers in the shipment, as well as identify the container in which the packing slip is enclosed.

JBEs should also instruct Vendors to include packing slips in all shipments. ~~So that the JBE's receiving staff can verify receipt of goods, the~~ The Vendor should provide at least the following information on the packing slip:

- Contract number as issued by the JBE;
- Description of the goods;
- Quantity and unit of measure; and
- Item/part number.

### ~~C. Timely Release of Purchasing Documents~~

~~Buyers should promptly provide fully executed and properly approved contracts to the appropriate JBE personnel involved in post-award activities such as receiving shipments, accepting goods/services or authorizing payments. Such personnel should have a current and complete contract (including technical specifications) to compare goods/services received to what was ordered.~~

### ~~D.C. Follow-up on Open Orders~~

~~Each JBE should develop policies and procedures for its Buyers and its receiving staff to follow up on goods and services ordered but not yet received.~~

## 10.2 RECEIVING GOODS

### A. Questions to Consider When Receiving Goods

A ~~JBE's receiving staff~~JBE should consider the following before taking receipt of any shipment:

- Is the shipment for this JBE?
- Is it damaged?
- Does it include a packing slip containing correct information and identifying a contract?

In addition, the following should also be considered:

- Is the delivery late, unsatisfactory, or incomplete?
- Do the goods comply with the specifications and packaging requirements in the contract?
- Are specialized skills or expertise required for inspecting the goods?
- Have all the terms listed in the contract been met and properly documented?

~~Receiving staff~~A JBE should promptly contact the Buyer with any questions or issues regarding the delivery, receipt, inspection, or acceptance of goods. If there is a partial delivery of goods, the ~~staff~~ receiving ~~staff~~the goods should notify the Buyer if the contract did not state whether or not partial deliveries are acceptable. ~~The~~Staff receiving

~~staff~~the goods should ~~provide~~make available partial delivery documentation to the Buyer on a timely basis to facilitate any necessary communications with the Vendor.

## B. Receiving Goods at Other Locations

JBEs that allow goods to be delivered at JBE locations other than main JBE sites should develop policies and procedures to inform staff receiving staffgoods at such locations of their responsibilities, which should be consistent with the policies and procedures in this chapter. ~~Buyers should provide receiving staff with contracts in a timely manner. Receiving staff should review JBE policies and procedures to facilitate accurate and efficient receiving of goods.~~

### 10.3 INSPECTION OF GOODS

Inspections should be completed within a reasonable amount of time or as specified in the contract. The ~~JBE's receiving staff~~JBE should confirm the following:

- What was delivered conforms to the contract (e.g., Statement of Work, specifications, attachments, etc.), including the product description, model, brand, and product numbers;
- The quantity ordered matches the quantity delivered;
- The goods are not damaged (and if the packaging cannot be opened immediately, it should be inspected; if a box, crate or other packaging looks damaged, it should be noted on the bill of lading);
- To the extent applicable, operability/functionality of the goods;
- Instructions regarding special handling or packaging were followed; and
- The delivery documentation (e.g., packing slip) is acceptable.

JBEs should document inspection results ~~and provide the results to its procurement office.~~ At a minimum, the documentation should identify the scope of the inspection, name/title of JBE and Vendor personnel in attendance, when and where the inspection occurred, and the inspection results. The documentation should be retained in the procurement file.

After determining that goods received and inspected are either in conformance with the terms of the contract or are to be rejected, ~~receiving staff~~the JBE should document the delivery and inspection. ~~Receiving staff should provide the following to the JBE's accounting and purchasing offices:~~

- ~~• The invoice or packing slip (and related documents such as the bill of lading, delivery receipt, etc.);~~
- ~~• A copy of the contract; and~~
- ~~• Documentation by receiving staff on the delivery (e.g., confirmation that the delivery is in accordance with the contract).~~

Failure to ~~provide~~make documentation available and follow related policies and procedures could delay payments to the Vendor. ~~Receiving staff JBEs~~ should keep contracts on file at least until Vendors have met all obligations. This is particularly important when accepting any partial deliveries or staggered deliveries over a period of time.

#### 10.4 ACCEPTANCE TESTING

~~To the extent necessary to protect the JBE's interests and comply with applicable policies~~Where appropriate, contracts should contain provisions on Acceptance Testing and acceptance criteria (including description of the Acceptance Testing period, and how acceptance of the goods or services will be defined).

JBEs are encouraged to consult with the AOC Office of the General Counsel (AOC/OGC) regarding appropriate contract terms for ~~contracts on~~ Acceptance Testing, acceptance criteria, and related matters. JBEs are also encouraged to consult with the AOC Business Services Unit on nonlegal, business-related issues.

#### 10.5 REJECTING NON-CONFORMING GOODS

If the goods do not conform to the requirements of the contract (including technical specifications) and the JBE decides to reject the goods, then the JBE should ~~promptly~~ notify the Vendor in writing as specified in the contract or, if not specified, in a timely manner. The notice should describe the non-conformity to the contract (including any applicable acceptance criteria).

To preserve its legal rights, the JBE ~~should notify the Vendor of the rejection within a reasonable time after delivery or tender of the goods.~~

**Note:** ~~in addition to this general requirement, there may be a specific deadline to reject the goods under the contract.~~

~~To preserve its legal rights, the JBE should make~~ is responsible for making arrangements to hold the rejected goods, protect them from damage, and take reasonable care of rejected goods until the Vendor can take possession of the goods.

**Note:** Acceptance/rejection of goods can involve complex legal requirements and considerations. JBEs are encouraged to consult with AOC/OGC as needed (as well as with the AOC Business Services Unit, as needed, on nonlegal, business-related issues).

## 10.6 ASSET MANAGEMENT

**Note:** Superior courts should refer to FIN 9.01 (Fixed Asset Management) of the Trial Court Financial Policies and Procedures Manual regarding asset management in lieu of the information below.

### A. Controls Over Assets

JBEs ~~should implement policies and procedures to secure and safeguard~~ are responsible for safeguarding their assets. ~~JBEs, and~~ should implement sufficient security controls for goods considered vulnerable to loss or unauthorized use. Inventory should be periodically taken and compared to control records.

The following items purchased by JBEs should be tagged:

- An item with a value of more than \$1,000 and an anticipated useful life of more than one year; or
- An item with a value less than \$1,000 but which is particularly subject to loss or theft, such as small office equipment, cellular phones, printers, monitors, etc.

JBEs should record the following information ~~when property is acquired~~ on an item transferred from the county or purchased directly by the JBE with a value of \$5,000 or more and with an anticipated useful life of more than one year:

- ~~Date acquired and name of contractor from which the property was acquired;~~
- ~~Property description and location;~~
- ~~Property identification number;~~
- ~~Cost or other basis of valuation;~~
- Description of the item;

- Date of acquisition;
- Value of depreciation (or depreciation schedule), the item (based on acquisition cost or appraisal value at time of transfer);
- Estimated useful life;
- Salvage value (if applicable); and
- Purchase Order number.
- Remaining balance (net book value), if applicable.

## B. Lost, Stolen, or Destroyed Equipment

Whenever equipment is lost, missing, stolen, or destroyed, a JBE should update its equipment records, prepare a report describing the event, and take precautions to prevent repeat situations.

JBEs should ensure that the appropriate documentation is provided to the Buyer to support the purchase of replacement equipment as a result of being lost, stolen, or destroyed.

## 10.7 RECEIVING SERVICES

### A. Accepting or Rejecting Services

~~When preparing contracts for services, JBEs should develop clear, concise, and detailed descriptions of the services to be performed.~~ Appropriate JBE personnel should be assigned to monitor Vendor performance of service contracts. Please ~~also~~ refer to ~~chapter~~chapter 11 of this Manual for information on monitoring of Vendor performance. Any non-conforming or unacceptable performance levels should be documented ~~and provided to the Buyer~~ to assist in problem resolution.

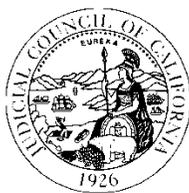
~~Acceptance/rejection of services can involve complex legal requirements and considerations. JBEs are encouraged to consult with AOC/OGC as needed.~~

### B. Maintenance Services

JBEs receiving equipment repair/maintenance services should develop a uniform process for collecting essential data on repair/maintenance incidents. JBEs should keep track of the following:

- When the JBE requested the services;

- When the contractor's personnel arrived to provide the service;
- When the equipment was returned to service; and
- A description of the equipment malfunction or incident.



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 11  
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## CONTRACT ADMINISTRATION

### CHAPTER 11

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## INTRODUCTION

This chapter describes the requirements and recommended practices associated with contract administration. It also addresses contract provisions and actions required to protect each Judicial Branch Entity's (JBE's) interests and ensure Vendor performance.

## DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

### 11.1 PRINCIPLES

Contract administration focuses on the relationship between the JBE and the Vendor from contract award to closeout to ensure the Vendor delivers the goods and/or services in conformance with contract requirements.

Contract administration is the communication between the JBE and its Vendors that conveys the JBE's expectations specified in a contract, protects its contractual interests, and documents the activities associated with the contract including payment, contract compliance, disputes, etc.

### 11.2 CONTRACT ADMINISTRATION PLAN

JBEs should establish a contract administration plan and include the plan in their Local Contracting Manual. This plan, detailing the conduct of contract administration within the JBE, should reflect or reference the principles, rules, and requirements affecting contract administration contained within this Manual.

Depending on the staffing capabilities of the particular JBE, with respect to the management of contract administration activities, this plan should provide for:

- The appointment of a senior Contract Administrator ultimately responsible for the performance of all contract administration functions;
- A grant of authority to the senior Contract Administrator to delegate to other JBE employees the authority and responsibility to perform contract administration functions that makes them Contract Administrators;
- The establishment of clear lines of authority for the management and conduct of contract administration functions; and
- A description of each Contract Administrator's function within the JBE.

### 11.3 ROLE OF CONTRACT ADMINISTRATORS

Contract Administrators are those JBE staff who perform contract administration functions. Each Contract Administrator must understand all aspects of the contract.

Contract Administrators must ensure that:

- The procurement of goods and services is appropriately documented;
- Vendors comply with the terms of their contracts as well as applicable laws, rules, and regulations;
- Contract performance progresses satisfactorily;
- Problems that may threaten performance are promptly identified; and
- Contractual disputes are addressed and resolved appropriately, applying sound administrative practice and business judgment.

Contract Administrators are responsible for the following:

- Acting only within the limits of their authority;
- Authorizing contractual actions that are within authorized budgets or available funding;
- Ensuring Vendor and JBE compliance with the terms of the contract;
- Safeguarding the JBE's interests in its contractual relationships; and
- Ensuring that Vendors receive impartial, fair, and equitable treatment.

### 11.4 ETHICAL DECISIONMAKING AND CONTRACT ADMINISTRATION

Contract Administrators must adhere to and conduct business by maintaining high ethical standards.

Contract Administrators must:

- Conduct themselves in a professional manner, refraining from mixing outside relationships with business, and not engaging in incompatible activities, conflicts of interest, or unethical behavior;
- Accurately account for expenditures and goods and services received;
- Be aware that perceptions can override reality; and
- Involve the JBE's procurement and legal staff or, alternatively, the ~~AOC Administrative Office of the Courts~~/Office of the General Counsel (AOC/OGC), when questions arise regarding acceptable or unacceptable behavior when dealing with Vendors.

No Contract Administrator may accept, directly or indirectly, any gift, [money](#), loan of money or equipment, meal, lodging, transportation, [gratuity](#), [favor](#), entertainment, service, or any other item of value from any person who is doing or seeking to do business of any kind with the Contract Administrator's JBE. Such circumstances could be construed as intent to influence the Contract Administrator in his or her official duties or as a reward for official action performed by the Contract Administrator [and such items](#) must be declined.

Other ethical issues include the following:

- Contract Administrators must not purchase goods or services from any business entity in which they have a financial interest;
- Contract Administrators are prohibited from using their position in state government to bestow any preferential benefit on anyone related to them by family, business, or social relationship; and
- Even the appearance of questionable or unethical practices is detrimental to both the Contract Administrator and the judicial branch.

## 11.5 RECORD KEEPING AND FILES

### A. Vendor Lists

The JBE should develop and maintain a list of Vendors. The JBE may use an electronic procurement system for this purpose. For each Vendor, the following information should be included:

- Firm name;
- Tax identification number;
- Firm address;
- Point of contact information including telephone and fax numbers, [e-mail](#) addresses, etc.;
- Firm's valid seller's permit number, if applicable;
- Licenses required for the firm to perform the contracted services;
- Type of business (corporation, partnership, sole proprietorship, joint venture, parent company or subsidiary, etc.);
- Types of goods or services offered;
- Firm's status as a Disabled Veteran Business Enterprise (see chapter 3 [of this Manual](#)); and

- Year the firm was established.

Files should contain each firm's data and any other information submitted by the Vendor.

## B. File Integrity

Files must be established and maintained for every procurement action.<sup>1</sup> This requirement applies to the Vendor selection process (preaward) and to postaward contract administration, maintenance, and contract closeout.

The requirement to maintain contract files is based on three standards of sound contract administration:

- **One:** A contract administration system ~~must~~ ensures that Vendors perform according to the terms, conditions, and specifications of their contracts;
- **Two:** Sound business judgment is exercised in settling all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation and the administration of protests, change orders, amendments, disputes, and claims; and
- **Three:** Documentation of a fair and competitive procurement is maintained.

Contract files should be readily available to protect and support the principles of providing transparency and accountability to the procurement process and to protect the JBE's best interests in the event of future claims, litigation, audits, reviews, or investigations.

## 11.6 VENDOR LICENSES, INSURANCE, AND PERFORMANCE/PAYMENT BONDS

The Contract Administrator must ensure that all required Vendor certificates of insurance, licenses, and performance or payment bonds are current by establishing and enforcing a compliance plan and affirmatively acting to ensure contract compliance.

Vendors that provide services must furnish the JBE Certificates of Insurance to evidence compliance with the contract insurance requirements before commencing work.

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<sup>1</sup> An electronic file system may be used for this purpose (as part of a procurement and contract management system) so long as file integrity and security are adequately maintained.

- Insurance certificates must be of a form and content that meet the requirements of the contract; and
- Vendors that have current contracts with the JBE should provide a new insurance certificate on or before the expiration date of any required certificate.

Where the contract calls for performance or payment bonds, Vendors must furnish the JBE evidence of compliance with contract bonding requirements before commencing work.

Any Vendor license required for the Vendor to perform the contracted service must be in place before commencing the service that requires the license and, unless otherwise provided for in the contract, must be maintained continuously for the duration of the contract.

## 11.7 VENDOR PERFORMANCE AND PAYMENT

### A. Performance and Delivery Control

The JBE must monitor Vendor performance to ensure that the value of the goods or services it receives is in compliance with the contract price and meets prescribed acceptance criteria and contract milestone dates. The Contract Administrator or other authorized JBE member, with feedback from the employee who requested-receives the goods or evaluates the services, must ensure that the Vendor's delivery or performance meets the JBE's contract requirements. See section 11.9 and section 11.10 for procedures related to unacceptable Vendor performance.

The Contract Administrator or other authorized JBE member, must ensure that the goods and services procured under each contract conform to quality, safety, quantity, and any other measures associated with quality assurance (e.g., warranties) specified in the contract as follows:

- Monitoring Vendor performance, quality, and warranty obligations when appropriate and necessary to protect the JBE's interests; and
- Ensuring that nonconforming goods or services are rejected.

Monitoring Vendor performance can be facilitated by the following best practices:

- Conducting status reviews of Vendor compliance at regularly scheduled project meetings;

- Requiring written monthly or quarterly reviews of the Vendor's performance in meeting goals;
- Requiring the Vendor to propose and implement plans to cure unsatisfactory performance when contract goals are not met; and
- Performing a Vendor evaluation at the conclusion of the contract and retaining the evaluation for future reference.

## B. Vendor Payment Issues

Every effort should be made to pay Vendors in a timely manner according to the terms of the contract for goods provided and services rendered. Unresolved payment problems can put the JBE in breach of contract, or may damage Vendor relationships and lead to unnecessary administrative costs. Payment issues that cannot be resolved quickly and informally should be elevated to an appropriate level of JBE management before they lead to disputed claims or litigation. Vendors should be kept aware of the effort to remedy the payment issue until a final resolution is reached.

If a portion of an invoice is in dispute, only the disputed portion of the invoice may be withheld from payment. All correspondence related to a payment dispute must be kept in the procurement file, including a description of the problem and efforts made toward resolution.

## 11.8 OPTIONS, AMENDMENTS, AND CHANGE ORDERS

### A. Options

1. An option is a party's unilateral right, agreed to by the parties and specified in the contract, to elect to exercise a privilege specified in the contract.<sup>2</sup>
2. A contract may be drafted to include an option that is exercised upon the inaction of a party. The contract may call for the extension for an additional term or multiple additional terms if a party does not issue a notice of termination of the contract by a certain time prior to the end of the then-existing term. This is known as an "evergreen clause."<sup>3</sup> Because a JBE could become unintentionally bound

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<sup>2</sup> The exercise of an option included in a contract is not an amendment of the contract but should be in writing. (If, however, a contract specifies an option must be exercised, if at all, by "amending" the contract, a party exercising the option must adhere to contractually required procedures for amending the contract.)

<sup>3</sup> Contracts containing evergreen clauses are often referred to as "evergreen contracts."

to perform for an extended term due to inaction, the use of an evergreen clause should be carefully considered and contracts containing this clause will need to be carefully managed. A more sound and risk adverse practice would be to use an option to extend the term of the contract requiring written election to be exercised.

3. A contract may provide the JBE the opportunity to issue a unilateral change amendment affecting fundamental terms such as the Statement of Work (SOW) and price. Unilateral amendments constitute a permitted change to the contract terms and the resulting altered contract has the full force and effect of the original contract. They do not prejudice or limit any of the Vendor's rights to make claims or appeal disputes under other provisions of the contract. The JBE should issue a unilateral amendment only after review and consultation with legal counsel.
4. The AOC, the HCRC, and the appellate courts should notify the appropriate person in the AOC Finance Division upon the exercise of a contract option,<sup>4</sup> including an extension of time or an increase or decrease in the contract value. In the event of an option exercised by a notice of exercise of option or other form of communication, the AOC, the HCRC, and the appellate court's notice to the AOC Finance Division should contain a copy of the notice of exercise of option or other form of communication.

## B. Modification of Contract Terms by Amendment or Change Order

A change to the original contract's terms may be accomplished by amendment or change order and may alter delivery point, date of delivery, contract period, price, quantity, or other provisions of the contract.

Most contract terms are modified by amendment. Amendments must be mutually agreed to and executed by authorized representatives of both parties. Amendments most frequently deal with changes to the work to be performed, time extensions, compensation for delays, and changes in the contract price due to any or all of the above. A request for an amendment may be initiated by the JBE or the Vendor.

Trial courts are responsible for inputting contract commitments into the Phoenix Statewide Financial System (Phoenix) and updating Phoenix so that it accurately reflects subsequent contract amendments. Trial courts should coordinate with the

<sup>4</sup> This applies regardless of whether the option is exercised by action or inaction.

AOC Trial Court Administrative Services Division, as appropriate, to ensure accurate updating of Phoenix.

Provisions for change orders are usually found in construction and large scale software development agreements where the SOW may be defined but the specifics as to how that scope will be fulfilled may not be known until the project is underway. A change order may take the form of a unilateral written order by the JBE directing the Vendor to change the contract's service and/or materials requirements that may affect contract price and time of contract completion. Such changes must be within the scope of the contract and in accordance with a contract "changes" clause that permits unilateral change by the JBE to be legally implemented without the consent of the Vendor.

Failure by the JBE and the Vendor to agree to the terms and conditions of a requested modification may occasionally result in disputes between the parties. In such cases, the dispute should be resolved according to the contract's terms and the procedures for disputes (see section 11.9 [to this chapter](#)).

### Amendments

An amendment is used to modify a contract when the modification **exceeds the scope of changes that may be made by change order. Contract modifications are documented in a mutually executed written amendment. E-mails, letter correspondence, and oral notification between parties are insufficient to amend a contract.**

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### D.C. Change Administration

#### 1. Changes Clause

The JBE should include a "changes" clause in each contract to accomplish the following:

- Specify the types of changes that must be made within the scope of the contract by amendment and those that may be made by change order. As disputes may arise over whether certain modifications to the contract terms should be made by amendment or change order, JBEs should carefully consider the scope of this provision to minimize

~~disputes. Change order provisions should be reviewed by legal counsel;~~

- ~~• Include provisions for adjustments in contract price, delivery schedules, and other contract terms that are appropriate to the type of contract; and~~
- ~~• Identify the individuals authorized to sign amendments and the project manager authorized to sign change orders.~~

### ~~2.1.~~ **Vendor Requested Changes**

If the Vendor requests a change, the Vendor must do so in writing on a timely basis according to the terms of the contract. The Vendor must be required to support its requested change through the submittal of a timely proposal as follows:

- The proposal should incorporate the appropriate billing rates and factors outlined in the contract for changes, extras, or delays (if applicable);
- Amendments for consulting services are sometimes based on the Vendor's fee schedule that is included in the contract. On unit price or fixed price line item contracts, the consideration for reductions in quantity must be at the stated contract price. Proposed increases in fixed contract prices or labor rates must be supported to the satisfaction of the JBE; and
- In some cases (e.g., the addition of hours to a time and materials contract or a simple time extension), it may be appropriate for the JBE to prepare the contract change without a proposal from the Vendor. It is within the JBE's discretion to determine whether and when a proposal from the Vendor is needed. ~~The JBE must exercise its judgment and discretion in determining when a proposal from the Vendor is needed.~~

### ~~3.2.~~ **Negotiation of Changes**

Some of the following steps may be applicable to the negotiation of changes to contract terms:

- a. Written Prenegotiation Objectives: The JBE should develop written pre-negotiation objectives for amendments and change orders, **for internal JBE use only**. This useful step establishes the JBE's goals and assures that negotiations are conducted along lines more likely to achieve the JBE's objectives.

- b. Written Memorandum of Negotiations: A written memorandum should be prepared by the Contract Administrator to record the results of negotiations. The memorandum is a summary of negotiations that sets forth the agreement between the parties on major issues (e.g., price, delivery, performance time, payment terms and any special provisions to be included in the contract).

The memorandum should explain the differences, if any, between the negotiated price adjustment and the prenegotiation position. When there are numerous differences involving significant sums, ~~use~~ a tabular format is useful to show the price differences. Price differences should be explained in a narrative accompanying the tabulation. For small purchases, this can be handwritten on the requisition or other suitable file document.

- c. Lock in the resolution or change: To avoid subsequent controversies that may result from a contract modification, JBEs should:

- Ensure that all elements of the amendment or change order have been presented and resolved; and
- Consult with legal counsel as to whether to include a release statement in the amendment or change order, by which in that the Vendor releases the JBE from any liability attributable to the facts giving rise to the Vendor's proposal for adjustment, unless specific exceptions are expressly set forth in the release statement.

No contract modification requested by the Vendor should be allowed, if it is not within the original scope, fully justified to the JBE's satisfaction, reasonably priced, and in compliance with the terms of the contract. Ultimately, modifications are made to serve the public interest. ~~Ultimately, the modification should must serve the public interest.~~

#### E.D. **Communication**

All correspondence regarding amendments, change orders and the exercise of options, as well as disputes and terminations, should be directed to the person or persons designated in the notices section of the contract. Failure to provide notice to the appropriate person in a timely fashion may result in the loss of rights under the contract.

## 11.9 CONTRACT DISPUTES, VENDOR DEMANDS, AND JBE COMPLAINTS

### A. Contract Disputes

Contract disputes generally arise when the JBE and the Vendor disagree about the interpretation of contract language, SOW, specifications, schedule, price, or other issues that impact performance, completion, payment, amendments, or other contract terms.

Minimizing and settling disputes before they become claims is one goal of contract administration. Contract Administrators should anticipate and minimize potential unresolved disputes that can disrupt operations and overrun budgets. The JBE should work with its Vendors and communicate effectively to develop a clear understanding of the contract's performance requirements.

The best forum for dispute resolution is often an informal meeting, conducted between the parties who are most knowledgeable of the facts and who have the authority to make decisions. These meetings should be conducted whenever the JBE denies a Vendor request for a significant modification of the terms of the contract or the parties express a contrary view of the contract requirements. Resolving contractual issues by mutual agreement at the lowest appropriate level of authority is a worthwhile goal.

Although two-way communication is essential to developing a mutual understanding of the issues, all Vendor-requested modifications or expressed differences in the interpretation of contract terms and requirements should be submitted in writing. The JBE must not compromise on issues of integrity or clear JBE entitlement under the contract. However, there is often a middle ground that is fair and equitable to both parties.

### B. Vendor Demands

1. If a dispute cannot be resolved to the satisfaction of the parties informally as discussed above, the Vendor can submit a formal written demand. The demand may result from the JBE's denial of the Vendor's contract modification request or invoice, JBE's notice of a unilateral amendment, rejection of work, or the failure of the parties' good faith efforts to resolve disputed issues through informal communication or meetings. Demands seek the payment of money, a time extension, adjustment or interpretation of contract terms, or other relief. A demand may or may not be allowed or timely depending on the provisions of the

contract (e.g., if the dispute resolution provision directs that disputes be submitted to mediation as a next step).

2. Vendor demands should be submitted to the JBE on or before the date of final payment. All demands must follow contract requirements, be submitted in writing, follow the format established by the contract, and include a narrative description and documents necessary to substantiate the Vendor's position.
3. Responsibility for the processing, review, and research of Vendor demands, along with participation in the dispute resolution process, should be assigned to a Contract Administrator.
4. The JBE must respond in writing to all properly submitted Vendor demands within the time limits established by contract or as mutually agreed by the JBE and Vendor.
5. Unless otherwise noted in the contract, if the Vendor disputes the JBE's written response, the JBE (with guidance from legal counsel) must inform the Vendor that it may petition the JBE.
6. The JBE must seek to resolve all demands in a fair and equitable manner by the most expeditious and cost-effective means possible. The JBE must first seek resolution by reviewing the contract and all applicable documents to find an equitable solution within the scope of the contract. If the demand has merit, the assigned Contract Administrator should prepare a negotiation settlement memorandum. If a written response meant to bind the JBE is made offering the Vendor a monetary settlement or other remedy, such offer must be executed by the Procurement and Contracting Officer (see chapter 1, section 1.1.C [of this Manual](#)) or a Buyer with the authority to execute amendments on behalf of the JBE.
7. Any resolution of a demand must include a release statement in that the Vendor releases the JBE from any liability with respect to the demand unless specific exceptions are [expressly set forth identified](#) in the release statement.

### C. JBE Complaints Regarding Vendor Performance

[Contracts typically require the](#) ~~The~~ JBE [to must](#) attempt to settle informally all complaints against the Vendor. If informal efforts are unsuccessful, the JBE should give

the Vendor written notice of its complaint and an opportunity to take corrective action, as follows (unless otherwise directed in the contract):

1. Give notice: The written notice to the Vendor detailing the complaint and asking the Vendor to comply with the terms of the contract is called a cure notice.<sup>5</sup> The cure notice informs the Vendor that it is deficient with respect to one or more contractual obligations. The Vendor is further advised that if the deficiency is not cured within the prescribed time frame, the JBE may initiate specific remedies up to and including issuing a notice of Termination for Cause.
2. Inform the AOC/OGC: JBEs, other than the HCRC, must inform the AOC/OGC in a timely manner when they have issued a cure notice and provide counsel with requested information and documents including the cure notice. (See CRC 10.202.)
3. Take Corrective Action: If the Vendor fails to meet the demands of the cure notice within a reasonable time, the JBE must take appropriate action.
4. Reclaim Expenses of Corrective Action: If the JBE takes action to correct the failures of the Vendor, appropriate back-charges ~~must~~should be assessed against the Vendor. If available and allowed by the contract, offsets against amounts owed to the Vendor should be taken from pending payments.
5. Assessment by AOC/OGC: For JBEs other than the HCRC, the AOC/OGC will evaluate the complaint. After consultation with the JBE, if appropriate, AOC/OGC may provide an additional level of negotiation, identify possible remedies (including possible contract termination), and determine whether to recommend initiating legal action.

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<sup>5</sup> Depending upon the circumstances and the terms of the contract, failure to provide a cure notice where informal settlement efforts have been unsuccessful may have a negative impact on the JBE's position. It is recommended that JBEs consult with legal counsel regarding whether or not to issue a cure notice.

## 11.10 CONTRACT TERMINATION

Each contract must contain provisions that address the potential for termination, how terminations are accomplished, and the basis for termination. JBEs should seek legal counsel when terminating any contract.

### A. Termination for Convenience

All contracts should contain provisions that allow the JBE to terminate the contract for the convenience of the JBE. A “Termination for Convenience” clause allows the JBE, at its sole option and discretion, to terminate the contract, in whole or in part, without any liability other than payment for work already performed, up to the date of termination.

Contracts should set forth the method for compensating the Vendor for work already performed upon Termination for Convenience.

Written notice to the Vendor is necessary to terminate all or part of a contract for convenience. Notice must state that the contract is being terminated under the Termination for Convenience provision, the effective date of the termination, the extent of termination, and instructions to the Vendor to stop performance under the contract.

~~Unless A Vendor termination for convenience clause may be warranted where the benefit to the JBE in permitting termination for convenience a vendor Termination for Convenience the clearly outweighs the risks of permitting a vendor to terminate at will, contracts should must not allow a Termination for Convenience by a Vendor.~~

### B. Termination Due to Nonavailability of Funds

The JBE must be allowed to terminate the contract, if expected or actual funding is withdrawn, reduced, or limited in any way before the expiration of the contract. All JBE contracts must contain a clause allowing termination in the case of nonavailability of funds. The JBE must provide the Vendor with written notice of such a termination.

In the event of a termination, in whole or in part, due to the nonavailability of funds, the Vendor will be paid for goods or services satisfactorily rendered up to the effective date of termination. The Vendor will also be released from any further obligation under the contract with respect to the cancelled portion of the contract.

Contracts whose terms extend beyond the end of the current fiscal year should specify that the contract extension is conditioned upon the appropriation of sufficient funds by the applicable legislative authority. If sufficient funds are not appropriated, this type of

contract is subject to termination at the conclusion of the fiscal year through which funds are available.

### **C. Termination for Cause**

JBE contracts must contain a Termination for Cause clause to protect the JBE in the event of a Vendor default.

Vendors must be provided with a reasonable written notice of any Termination for Cause. The Vendor must also be provided an opportunity to be heard.

If required by the contract, or allowed by the contract and deemed reasonable by the JBE, the Vendor must be notified by a written cure notice of the default and advised that if the default is not “cured” within the time prescribed in the cure notice, the JBE may immediately initiate the contract termination process and hold the Vendor and its sureties liable for associated costs and liquidated damages (if applicable).

The JBE must issue a notice of default to the Vendor, if the Vendor fails to:

- Respond in a timely manner; or
- Satisfactorily cure the default.

If included as a provision to the contract, and a Vendor's right to proceed in performing the contract is terminated for cause, the JBE may take over and complete the work or cause it to be completed by other appropriate means to protect the JBE's interests. The contract should specify that the Vendor is liable to the JBE for any increased costs incurred by the JBE associated with completing the work. In addition, the Vendor may be liable for damages, depending on the terms of the contract.

### **D. Contract Work Suspensions**

If a temporary delay is a possibility, a “Suspension of Work” provision should be included in the contract. In accordance with the contract terms, and as the need arises, the JBE may issue a written order to the Vendor to suspend, delay, or interrupt all or any part of the work for the period of time that the JBE determines appropriate.<sup>6</sup>

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<sup>6</sup> Suspensions should include a time limit, after which the provisions of the Suspension of Work clause should be clear that the work will either resume or one of the termination clauses will go into effect.

If the performance of all or any part of the contract work is delayed or interrupted (i) by an act of the JBE in the administration of the contract that is not implied or expressly authorized by the contract, (ii) by a failure of the JBE to act within the time specified in the contract (outside of a force majeure and subject to any contractually permitted or agreed-to extension of the time specified), or (iii) within a reasonable time if not specified, an adjustment should be made for an increase in the cost and time of performance of the contract caused by the delay or interruption, and the contract should be modified accordingly.

The Suspension of Work provision should state that the JBE is not liable for the Vendor's loss of anticipated profits in the event of a Suspension of Work.

### **11.11 WARRANTIES**

~~Vendor warranties consist of terms designed to protect the JBE from product defects and poor quality services. The JBE should obtain warranties for the goods and services it procures in most circumstances. Additionally, there are warranties implied by law whose breach may provide the JBE with a remedy for damages due to product defects or poor quality of services.~~

~~The JBE should take advantage of warranties for the repair and/or replacement of commercial items, where appropriate and in the JBE's best interests.~~

~~When acquiring a warranty, the JBE should consider the following factors:~~

~~1. The nature and use of the goods and services, that may include:~~

- ~~• Complexity and function;~~
- ~~• Stage of development and technological advancement;~~
- ~~• End use;~~
- ~~• Expected useful life;~~
- ~~• Difficulty in detecting defects before acceptance; and~~
- ~~• Potential harm if the goods or services are defective.~~

~~2. Warranties for durations in excess of a standard period are sometimes offered at additional cost.~~

- ~~3. The JBE's ability to track and enforce warranty provisions is essential to warranty effectiveness. If the JBE is unable to enforce warranties systematically, warranty coverage beyond customary trade practice should be scrutinized.~~
- ~~4. In many cases, warranties are included as part of the basic price of an item. If there is no price difference, the JBE should obtain the warranty. If there is a price difference, the JBE should assess the financial risk of not having a warranty.~~

~~To facilitate pricing evaluations and enforcement, the JBE should ensure that warranties clearly state:~~

- ~~• The exact nature of the goods or services that the Vendor warrants;~~
- ~~• The extent of the Vendor's warranty, including the specific duration; and~~
- ~~• The specific remedies available to the JBE in the event of a defect.~~

### 11.11 FILING PRACTICES

The initial file setup is the responsibility of the JBE employee assigned to conduct the procurement. A JBE employee should be assigned to manage file maintenance.

The following practices will ensure the integrity of JBE contract files:

- Maintain files in a safe and secure area;
- Provide access to files on a "need-to-know" basis only, to minimize the potential for documents to be lost or misplaced;
- Do not permit original files to leave the building where they are filed until the contract work is completed. After completion and a holding period of six months, files may be sent to off-site storage;<sup>7</sup>
- Establish and follow a procedure for making copies and releasing files to the public to avoid losing files and records;
- Establish and follow a system such as the use of "out cards" to control accountability and mark the locations of files removed from the filing area. Depending upon the JBE's staffing capability, the assignment of a file administrator who has sole responsibility to pull files and file out cards is recommended;

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<sup>7</sup> FIN 12.01 (Record Retention) of the *Trial Court Financial Policies and Procedures Manual* addresses the period of time that trial court contract records are retained.

- Return original file folders to their designated file locations at the end of the workday. An assigned file administrator should be responsible for assuring that files that leave the designated area are retrieved within a reasonable time; and
- Discard duplicate files and working papers.

The JBE should develop a filing method using a consistent file format. One method of organizing contract files into distinct sections is presented below. Documents should be filed in reverse chronological order within each of the following file sections:

- Correspondence (with subsections for Vendor [incoming], and JBE [outgoing]);
- Preaward/Solicitation (includes Solicitation Document, an abstract of all Bids, etc.);
- Selection and Award (includes all management input and approvals, notice of award, etc.);
- Contract (with subsections for amendments, change orders, and notices, as appropriate);
- Reports, progress reviews, schedules and payment requests/invoices and Vendor evaluation;
- Internal documents (memos, e-mails, records of meetings and telephone conversations, etc.); and
- Miscellaneous (price lists, resumes, brochures, etc.).

The JBE should conduct annual reviews to assure its compliance with established file integrity requirements.

### **11.12 CONTRACT CLOSEOUT**

The JBE must properly close out all contract files.

Closing out routine contracts for goods and other commercial products should be straightforward. The Contract Administrator must ensure that goods and services have been accepted and conform to the contract's specifications. Delivery and acceptance should be documented in the file that should also include any descriptive literature or warranty documentation. There should also be documentation confirming final payment by the accounts payable department.

Upon the authorization of final payment, the procurement file may be closed out. Closing out procurement files may consist of, but is not limited to, assuring that all pertinent documentation is included in the file, disencumbering any remaining funds (if appropriate), completing any required Vendor performance evaluation, and sending the file for appropriate storage and retention. Files should be maintained on site for six months after closeout; after that, they may be sent for off-site storage and retention.

### **Postcontract Evaluation**

The JBE may evaluate the performance of the Vendor in doing the work or delivering the services for which the contract was awarded. The JBE evaluation may include the following:

- Whether the contracted work or services were completed as specified in the contract and reasons for and amount of any cost overruns or delayed completions;
- Whether the contracted work or services met the quality standards specified in the contract;
- Whether the Vendor fulfilled all the requirements of the contract and, if not, in what ways the Vendor did not fulfill the contract;
- Factors outside the control of the Vendor that caused difficulties in Vendor performance; and
- How the contract results and findings will be utilized to meet JBE goals.

If the JBE conducts an evaluation, the JBE must notify and send a copy of the evaluation to the Vendor within 15 days. The Vendor must have the right, within 30 days after receipt, to submit to the JBE a written response statement that must be filed with the evaluation in the procurement file.

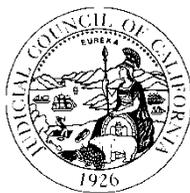
### **11.13 DISCLOSURE OF CONTRACT DOCUMENTATION**

Records created for the purpose of procuring goods and services are generally “judicial administrative records” subject to CRC 10.500, and are therefore available to the public absent an exemption. These records include, but are not limited to, contracts executed by the courts, the Judicial Council, and the AOC, as well as invoices and records maintained by these JBEs and fiscal information related to contract administration.

Specific provisions of this Manual also require disclosure of certain documents at stated intervals in the solicitation process. These requirements vary depending on the category

of purchase involved and on the type of solicitation used. These specific requirements are discussed in chapters 4, 4A, 4B, and 4C, respectively, [of this Manual](#).

Legal counsel should be consulted regarding questions about disclosure requirements under CRC 10.500 or this Manual.



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## REPORTING REQUIREMENTS

### CHAPTER 12

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## INTRODUCTION

This chapter describes the Judicial Council's obligations under PCC 19209 to provide reports to the Joint Legislative Budget Committee and the State Auditor relating to the "procurement of contracts" by any Judicial Branch Entity (JBE). In connection with these reports, this chapter describes the role of each JBE in providing information related to the JBE's contracts with Vendors to be included in the reports.

This chapter also describes the obligations under PCC 19204(a) of all JBEs to notify the State Auditor of certain contracts with total costs estimated at more than \$1 million.

## DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

## 12.1 JUDICIAL COUNCIL REPORTS UNDER PCC 19209

### A. Reporting Periods

The Judicial Council will provide two semiannual reports each year to the Joint Legislative Budget Committee and the State Auditor as required by PCC 19209. One report will cover the period from January 1 through June 30, and will be provided by August 1. The other report will cover the period from July 1 through December 31, and will be provided by February 1 of the following year.

### B. Content of Reports

The Judicial Council report will include a list of all Vendors that receive a payment from a JBE during the reporting period. PCC 19209 also requires the Judicial Council to submit additional information on each distinct contract between a Vendor and a JBE, but only if more than one payment was made under the distinct contract during the reporting period. For each distinct contract, the report will include the following information by Vendor:

- The JBE that contracted for the good or service;
- The amount of payment; and
- The type of service or good provided.

The report will also include a list of all JBE contracts that were amended during the reporting period. The report will contain the following information by Vendor for each distinct contract that was amended:

- The name of the Vendor;
- The type of service or good provided;
- The nature of the amendment;
- The duration of the amendment; and
- The cost of the amendment.

### C. Responsibility of JBEs to Provide Information for Reports

Supreme Court: ~~The AOC Finance Division maintains information relating to payments to and contracts with the Supreme Court's Vendors.~~ The Supreme Court is responsible for ~~providing to coordinating with~~ the AOC Finance Division, ~~as appropriate, to ensure~~ the information relating to payments to, and contracts with, the Supreme Court's Vendors ~~is accurate, consistent, and complete in the form and format as required by the AOC Finance Division for Judicial Council reporting purposes.~~

Courts of Appeal: ~~The AOC Finance Division maintains information relating to payments to and contracts with Vendors of each Court of Appeal.~~ Each Court of Appeal is responsible for ~~providing to coordinating with~~ the AOC Finance Division, ~~as appropriate, to ensure~~ the information relating to payments to, and contracts with, Vendors ~~is accurate, consistent, and complete in the form and format as required by the AOC Finance Division for Judicial Council reporting purposes.~~

Superior Courts: The Phoenix Statewide Financial System (Phoenix) is the source of information for compiling reports relating to payments during a reporting period by each Superior Court to Vendors and relating to contracts between Vendors and each Superior Court. Each Superior Court is responsible for ~~ensuring that the information in inputting into Phoenix the information~~ relating to payments to, and contracts with, that Superior Court's Vendors ~~is accurate, consistent, and complete as required for Judicial Council reporting purposes.~~

Habeas Corpus Resource Center (HCRC): ~~The AOC Finance Division maintains information relating to payments to and contracts with Vendors of the HCRC.~~ The HCRC is responsible for ~~providing to coordinating with~~ the AOC Finance Division, ~~as appropriate, to ensure~~ the information relating to payments to, and contracts with, the HCRC's Vendors ~~is accurate, consistent, and complete in the form and format as required by the AOC Finance Division for Judicial Council reporting purposes.~~

Judicial Council/AOC: The AOC Finance Division is responsible for maintaining and providing ~~the accurate, consistent, and complete~~ information relating to payments to, and contracts with, Vendors of the Judicial Council ~~and the~~ AOC.

~~Accurate and Consistent Information: It is important that each JBE maintain and provide accurate and consistent information so that the reports provided by the Judicial Council in turn contain accurate and complete information.~~ All JBE personnel involved in maintaining and providing the necessary information for reports must should have the appropriate training, experience, level of responsibility, and accountability as is necessary to ensure the accuracy, completeness, and consistency of the information in the reports provided by the Judicial Council ~~maintained and provided.~~

#### **D. Responsibility to Prepare Reports for Judicial Council**

The AOC Finance Division is responsible for preparing the portion of the Judicial Council reports that relates to the Supreme Court, Courts of Appeal, Judicial Council, AOC, and HCRC.

The Trial Court Administrative Services Division (TCAS) is responsible for preparing the portion of the Judicial Council reports that relates to the superior courts.

The AOC Finance Division and TCAS are responsible for coordinating with each other to ensure that all information to be included in the Judicial Council reports is reported timely, accurately, and in a consistent form and format.

The AOC Finance Division has lead responsibility for presenting the reports to the Judicial Council for approval for submission to the Joint Legislative Budget Committee (~~JLBC~~) and the State Auditor. ~~The Judicial Council may delegate to an internal council committee and/or the Administrative Director of the Courts responsibility for review and approval of reports to be provided to the JLBC and State Auditor.~~

#### **12.2 NOTIFICATIONS BY JBEs TO THE STATE AUDITOR UNDER PCC 19204**

Under PCC 19204(a), any JBE contract with a total cost estimated at more than \$1 million is subject to the review and recommendations of the Bureau of State Audits to ensure compliance with the California Judicial Branch Contract Law. Each JBE must notify the State Auditor, in writing, of the existence of any such contract within 10 ~~business days~~ Court Days of entering into the contract. The date of “entering into the contract” is the date on which the contract is fully executed by all parties.

**Note:** Excluded from this requirement are contracts covered by GC 68511.9, which covers contracts for the California Case Management System and all other administrative and infrastructure information technology projects of the Judicial Council or the courts with total costs estimated at more than \$5 million. (Under GC 68511.9, these contracts are subject to the review and recommendations of the California Technology Agency.)

## ABBREVIATIONS AND ACRONYMS

The following abbreviations and acronyms are used in this Manual:

<b>ADA</b>	Americans with Disabilities Act
<b>AOC</b>	Administrative Office of the Courts
<b>AOC/OGC</b>	Administrative Office of the Courts/Office of the General Counsel
<del><b>BPO</b></del>	<del>Blanket Purchase Order</del>
<b>BSA</b>	Bureau of State Audits
<b>CARI</b>	California Alliance of Rehabilitation Industries
<b>CCC</b>	Contractor Certification Clauses
<b>CMAS</b>	California Multiple Award Schedule
<b>CRC</b>	California Rules of Court
<b>CRP</b>	Community Rehabilitation Program
<b>CSCR</b>	California State Contracts Register
<b>CTA</b>	California Technology Agency
<b>DGS</b>	Department of General Services
<b>DVBE</b>	Disabled Veterans Business Enterprise
<b>GC</b>	Government Code
<b>GSA</b>	General Services Administration
<b>HCRC</b>	Habeas Corpus Resource Center
<b>IA</b>	Interagency Agreement
<b>IBA</b>	Intra-branch Agreement
<b>IFB</b>	Invitation for Bids
<b>IGC</b>	Intergovernmental Contract
<del><b>IRS</b></del>	<del>US Internal Revenue Service</del>
<b>IT</b>	Information Technology
<b>JBCL</b>	California Judicial Branch Contract Law
<b>JBE</b>	Judicial Branch Entity
<del><b>JPA</b></del>	<del>Joint Powers Authority Agreement</del>
<b>LPA</b>	Leveraged <del>Purchase-Procurement</del> Agreement
<b>MOU</b>	Memorandum(a) of Understanding
<b>MVC</b>	Military and Veterans Code
<b>NASPO</b>	National Association of State Procurement Officials
<b>NCB</b>	Non-Competitively Bid
<b>NPO</b>	Non-profit organization
<b>NSP</b>	Not specifically priced

<b>OSDS</b>	Office of Small Business and Disabled Business Enterprise <a href="#">Services</a>
<b>PCC</b>	Public Contract Code
<b>PCO</b>	Procurement and Contracting Officer
<b>PO</b>	Purchase Order
<b>RFI</b>	Request for Interest
<b>RFO</b>	Request for Offer
<b>RFP</b>	Request for Proposals
<b>RFQ</b>	Request for Quote
<b>SABRC</b>	State Agency Buy Recycled Campaign
<b>SAM</b>	State Administrative Manual
<b>SCM</b>	State Contracting Manual
<b>SLP</b>	Software Licensing Program
<b>SOW</b>	Statement of Work
<b>TCAS</b>	Trial Court Administrative Services Division
<b><del>TCFPPM</del></b>	<del><a href="#">Trial Court Financial Policies and Procedures Manual</a></del>
<b>U.S.</b>	United States, or federal
<b><del>WIC</del></b>	<del><a href="#">Welfare and Institutions Code</a></del>
<b>WSCA</b>	Western States Contracting Alliance

## GLOSSARY

This glossary provides definitions of key terms used throughout the Manual.

**Acceptance Testing** – The testing of goods or services to determine compliance with contract requirements (e.g., acceptance criteria and specifications).

**ADA Coordinator** – The JBE officer or employee who is available to respond to questions or concerns during the procurement process regarding reasonable accommodation for disability.

**Applicable Procurement Laws** – ~~All laws, regulations, policies, and procedures applicable to procurement activities including the *Judicial Branch Contracting Manual* and the *JBE's Local Contracting Manual*.~~

**Approving Authority** – For each type of JBE, the person identified in the following table:

JBE	Approving Authority
Supreme Court	Clerk of the Supreme Court
Courts of Appeal	Administrative Presiding Justice
Superior Courts	Presiding Judge
HCRC	Executive Director
Judicial Council / AOC	Senior Manager, Business Services

**Bid** – A response to a competitive solicitation issued by a JBE. (The term “Bid” is used in this manual, regardless of the Solicitation Document used by the JBE—(e.g., RFQ, IFB, or RFP). Thus, a response to an RFQ, IFB, or RFP is referred to as a “Bid.”)

**Bid Closing Time** – The date and time at which Bids are due for a particular solicitation.

**Bidder** – Any person or entity that submits a response to a competitive solicitation issued by a JBE, regardless of the Solicitation Document used by the JBE (e.g., RFQ, IFB, or RFP).

**Buyer** – The JBE officer or employee who performs day-to-day purchasing and contracting activities.

**Certificate of Insurance** – A document that provides evidence that an insurance policy has been underwritten and that includes a statement of the policy coverage; see chapter 8, section 8.2.D.

**Certificate of Participation** – An ancillary contract document used to demonstrate a JBE participates in the Judicial Council Litigation Management Program; see chapter 8, section 8.2.D.

**Contract Administrator** – See definition in chapter 11, section 11.3.

~~**Contract/Contractor Evaluation** – A post-contract assessment of the quality of a contractor's performance under the contract.~~

**Court Day** – A business day of the applicable JBE.

**Evaluation Team** – A group responsible for evaluating Bids.

**Intra-branch Agreement (IBA)** – A type of contract between judicial branch entities; see chapter 8, section 8.2.B.

**Invitation for Bid (IFB)** – An invitation for bid; a type of Solicitation Document used in the procurement of non-IT goods and non-IT services.

**Joint Legislative Budget Committee (JLBC)** – A committee of the California State Senate with membership from both houses created to make recommendations to the Legislature and its houses on various matters including the California state budget, revenues and expenditures, and organization and functions of the State of California.

**Judicial Branch Contract Law (JBCL)** – Part 2.5 of the PCC; PCC 19201–19210.

**Judicial Branch Entity (JBE)** – A superior court, appellate court, the Judicial Council, the Administrative Office of the Courts (AOC), or the Habeas Corpus Resource Center (HCRC).

**Leveraged Procurement** – A type of purchasing process described in chapter 6, section 6.1.A.

**Leveraged Procurement Agreement (LPA)** – See definition in chapter 6, section 6.1.A.

**Local Contracting Manual** – A manual adopted by a JBE governing its procurement and contracting activities, as required by PCC 19206.

**Memorandum of Understanding (MOU)** – A type of ~~h~~intergovernmental agreement; see chapter 8, section 8.2.B.

**Payee Data Record** – A form of document used primarily in connection with tax withholding.

**Phoenix Statewide Financial System** – The financial system maintained by the AOC for recording and processing various financial activities of the 58 ~~trial~~-superior courts, including recording transactions in the general ledger, recording purchasing activities, and processing payments for goods and services.

**Progress Payment** – A partial payment following the completion of a deliverable, milestone, or stage of progress under a contract.

**Prospective Bidder** – A person or entity who supplies non-IT goods, non-IT services, or IT goods and services relevant to a competitive solicitation conducted by a JBE, but who has not yet submitted a Bid.

**Protester** – A person or entity who has submitted a protest in connection with a competitive solicitation conducted by a JBE.

**Purchase Order (PO)** – A ~~typical purchase~~ document ~~used to purchase goods~~, as described in chapter 8.

**Request for Interest (RFI)** – A document issued by a JBE to separate those Prospective Bidders who intend to participate in an upcoming solicitation from those who have no interest in participating.

**Request for Proposal (RFP)** – A type of Solicitation Document used in the procurement of non-IT services and IT goods and services.

**Request for Quote (RFQ)** – A type of Solicitation Document used in certain low-value or low-~~r~~-risk procurements.

**Responsible Bidder** – A Bidder that possesses the required experience, facilities, and financial resources and is fully capable of performing the relevant contract.

**Responsive Bid** – A Bid that complies with the requirements of the Solicitation Document and the terms and conditions of the proposed ~~contract~~~~Purchase Document~~ without material deviation.

**Solicitation Document** – A document created by a JBE for seeking Bids from persons or entities interested in providing the non-IT goods, non-IT services, or IT goods and services being procured by the JBE. The term Solicitation Document includes ~~RFQ~~~~requests for Quote~~, IFBs, and RFPs.

**State Auditor** – The State of California's independent external auditor that provides independent and nonpartisan assessments of California government's financial and

operational activities in compliance with generally accepted government auditing standards.

**Statement of Work (SOW)** – A detailed description or reference to the object of a contract (e.g., goods, services, information technology).

**Suspension of Work** – A temporary delay of contract performance initiated by a written notice from the JBE to the Vendor.

**Termination for Cause** – A permitted termination of a contract for a specific cause. (This is usually provided as a right of a party in the event of the other party's failure to meet a material condition of a contract.)

**Termination for Convenience** – See definition in chapter 11, section 11.10.A.

**Vendor** – A person or entity with whom a JBE has entered into a contract for the provision of non-IT goods, non-IT services, or IT goods and services.