

Judicial Council of California • Administrative Office of the Courts

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INVITATION TO COMMENT SP11-12

Title	Action Requested
Judicial Branch Contracting Manual	Review and submit comments by 5:00 p.m., July 29, 2011.
Proposed Rules, Forms, Standards, or Statutes	
Adopt Judicial Branch Contracting Manual	Proposed Effective Date October 1, 2011
Proposed by	Contact
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Summary

Senate Bill 78, which created a new Part 2.5 of the Public Contract Code (PCC) designated the California Judicial Branch Contract Law,¹ requires the Judicial Council to adopt a Judicial Branch Contracting Manual (Manual) containing policies and procedures applicable to judicial branch entities² related to the procurement of goods and services. (Stats. 2011, ch. 10, effective March 24, 2011 (SB 78).) The new law applies to all contracts initially entered into or amended by judicial branch entities on or after October 1, 2011 (“operative date”). As discussed further below, the October 1, 2011, operative date of the Judicial Branch Contract Law necessitates that the council adopt a Manual at its business meeting on August 26, 2011, the last regular business meeting before the operative date. Because of this condensed timeline, the proposed Manual is being circulated for public comment for two weeks to allow for as much comment as possible within that timeframe.

Background

The Judicial Branch Contract Law requires that all judicial branch entities comply with provisions of the PCC applicable to state agencies and departments related to the procurement of goods and services, including information technology goods and services. The proposed Manual, which governs procurement and contracting by judicial branch entities, implements the

¹ PCC, §§ 19201-19210, referred to as “Judicial Branch Contract Law.”

² PCC, § 19205 defines “judicial branch entity” to mean “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.”

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provisions of the Judicial Branch Contract Law by setting forth policies and procedures that are consistent with the PCC and substantially similar to the provisions contained in the *State Administrative Manual (SAM)* and the *State Contracting Manual (SCM)*.³ Specifically, the proposed Manual interprets and applies applicable provisions of the PCC, SCM and SAM in a way that appropriately reflects the business and organization of the judicial branch.

The need for timely adoption of the Manual

Although the Judicial Branch Contract Law does not require the adoption of the Manual until January 1, 2012,⁴ the Manual has been developed with the intent that its proposed adoption be placed on the agenda for the August 26, 2011, business meeting of the council. This will enable the Manual to have an effective date concurrent with the operative date of the Judicial Branch Contract Law of October 1, 2011. In the absence of an adopted manual, all judicial branch entity contracting would be subject to the governance of the SAM and SCM from October 1, 2011, until such time as a manual is adopted by the council.⁵

Because the SCM and the SAM were written specifically for executive branch entities, it would be unworkable to have judicial branch entities operate under these manuals. Collectively consisting of four volumes and thousands of pages, the SCM and SAM contain many provisions that are inapplicable to judicial branch contracting. For example, several parts of the SCM apply only to local agencies and specific entities such as the University of California and the California State University system. Furthermore, the SAM, which is developed by executive branch agencies such as the Governor's Office, Department of General Services (DGS), Department of Finance, and Department of Personnel Administration, is more of a compilation of statewide management-level policies, procedures, regulations, and information than a practical guideline for contracting and procurement.

The primary source of incompatibility between the executive branch's SAM and SCM and judicial branch contracting is DGS's predominant role in executive branch contracting. In the executive branch, DGS is vested with most purchasing authority that it then delegates to executive branch entities that meet certain requirements. Much of the SCM provides parameters for this delegation and how executive branch entities must operate within their delegated authority. Many SCM provisions require the approval, review, or involvement of DGS in contracting and procurement. Because the Judicial Branch Contract Law specifically provides that the approval, review, or involvement of DGS or any other state entity in the procurement of judicial branch goods and services is not intended (except as specifically provided in statute),⁶ applying the SCM and SAM to judicial branch contracting would be problematic. Further confusion would be created by having each judicial branch entity interpret the SCM and SAM individually. To avoid these problems and confusion, it is necessary to adopt before the October

³ PCC, § 19206.

⁴ Ibid.

⁵ PCC, § 19204(d).

⁶ PCC, § 19207.

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1 operative date a manual that more appropriately reflects the business and organization of the judicial branch.

Process for Development of the Judicial Branch Contracting Manual

The Administrative Office of the Courts (AOC) has worked closely with the trial courts in developing the proposed Manual. Promptly following enactment of the Judicial Branch Contract Law, information regarding its requirements was presented at the three AOC Regional Office meetings in May 2011. An outline of the proposed Manual was presented and discussed at the joint Court Executives Advisory Committee (CEAC)/Trial Court Presiding Judges Advisory Committee (TCPJAC) meeting on May 26, 2011.

To assure that all affected judicial branch entities had the opportunity to provide input in the Manual's development, including by way of reviewing and commenting on chapters as they were drafted, the drafters convened a judicial branch working group comprising representatives from the TCPJAC, CEAC, the California Appellate Court Clerks Association, and the Habeas Corpus Resource Center.

Manual Overview

The following overview describes the proposed Manual's general premise, summarizes its chapters, and provides a brief discussion where major provisions of the Manual differ from current judicial branch contracting practices.

Content and Exclusions

The Manual addresses judicial branch entity procurement of goods and services, including information technology goods and services, contracting, and contract management. The Manual does *not* address:

1. Procurement and contracting for planning, design, construction, rehabilitation, renovation, replacement, lease, or acquisition of trial court facilities, as those activities are expressly excluded from the Judicial Branch Contract Law⁷; and
2. Provisions of the PCC that do not apply to contracting or procurement by state agencies and departments because the Judicial Branch Contract Law states that those provisions are inapplicable to judicial branch entities.⁸

The Manual is drafted also to comply with PCC section 19207 of the Judicial Branch Contract Law, 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

⁷ PCC, § 19204(c).

⁸ PCC, § 19208.

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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.

Guiding Principles for Manual

The intent of the Legislature in enacting the Judicial Branch Contract Law is to achieve the objectives set forth in PCC sections 100, 101 and 102.⁹ These objectives are:

- 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;
- To eliminate favoritism, fraud, and corruption in the awarding of public contracts; and
- That public contract law be efficient and the product of the best of modern practice and research.

Manual Development

With certain exceptions,¹⁰ the Judicial Branch Contract Law requires that judicial branch entities comply with the provisions of the PCC that are applicable to state agencies and departments related to the procurement of goods and services.

In developing the proposed Manual, the drafters first determined which PCC provisions are applicable to judicial branch entities. The drafters then reviewed the SCM and SAM to determine how to make the Manual consistent with the PCC and substantially similar to the provisions contained in the SAM and SCM while taking into appropriate consideration the organization and operations of the different types of judicial branch entities. As noted previously, the SCM and SAM contain numerous provisions that are not applicable to judicial branch entities or that are intended for the DGS in furtherance of its administrative role with respect to executive branch entities. When application of a SCM or SAM provision to a judicial branch entity produced unworkable results, such provisions were not incorporated into the Manual.

Furthermore, there are areas of contracting that are not addressed by the SCM. For example, the SCM provides limited guidance in contract administration. The drafters supplemented this area by including in the Manual contract administration principles contained in the *Trial Court Financial Policies and Procedures Manual* (TCFPPM).

Current Policies Governing Judicial Branch Contracting

Currently, the TCFPPM governs contracting and procurement by the trial courts. Procurement by the AOC, which also provides contracting and procurement services for the Supreme Court

⁹ PCC §19202.

¹⁰ PCC §§ 19204(c), 19207 and 19208

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and the Courts of Appeal, is governed by an internal set of policies and procedures similar to the procurement policies contained in the TCFPPM. The TCFPPM and AOC procurement policies are required or allowed, respectively, by the California Rules of Court.¹¹ HCRC employs its own internal set of contracting and procurement policies and procedures. Accordingly, the TCFPPM is the most representative document for comparison of the status quo and changes generated by the Judicial Branch Contract Law.

Distinction between Non-IT Goods and Services and IT Goods and Services

Under the TCFPPM, one set of policies and procedures applies regardless of the type of good or service being procured. By contrast, under the PCC and the proposed Manual, procurement is divided into 3 basic categories: non-IT services, non-IT goods, and IT goods and services. Different policies and procedures govern each category. In many instances, these differences are numerous but minor. The areas of procurement most impacted by the category of procurement are (i) the selection methodology, and (ii) the dollar threshold for competitive procurement.

Selection Methodology: Best Value vs. Lowest Responsible Bidder

Under the TCFPPM and other applicable policies, judicial branch entities have the flexibility to select the vendor that provides the best value based on an evaluation of all offers according to the stated selection criteria. A judicial branch entity is not required to award a contract to the lowest bidder if another bidder provides better value to the judicial branch entity, as determined by the selection criteria. Under the proposed Manual, consistent with the PCC, SCM and SAM, judicial branch entities may employ a similar “best value” methodology for only the following types of procurements: 1) non-IT services, and 2) IT goods and services. For procurements of non-IT goods, the Manual requires that the “lowest responsible bidder” be selected. For purchases of goods valued at less than \$50,000, however, the Manual allows a “best value” selection criteria if there is a good business reason for doing so.

Dollar Thresholds

Under the TCFPPM and other applicable policies, judicial branch entities are required to employ full competitive procurement with a written solicitation document when the value of the goods or services being sought total \$25,000 or more. Under the proposed Manual, the following table sets forth the thresholds for when a judicial branch entity must employ a written solicitation document:

Type of Procurement	Dollar Threshold
Non-IT goods	\$50,000
Non-IT services	\$5,000
IT goods and services	IT goods only: \$100,000 IT services only: \$5,000 Mixed IT goods and services:

¹¹ California Rules of Court, rules 10.804(a) and 10.101(e)(2).

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| | (i) if the services portion is less than \$5,000: up to \$100,000
(ii) if the services portion is equal to or greater than \$5,000, the solicitation must be written |
|--|---|

Judicial branch entities may establish lower dollar thresholds in their local contracting manuals.

Reporting Requirements

The Manual addresses the Judicial Council’s mandatory reporting requirements under PCC section 19209 as well as the responsibility of the individual judicial branch entities to provide information for inclusion in the reports. Under the proposed Manual, the mandatory reporting requirements apply to all contracts, including contracts resulting from non-competitively bid procurements (with the exception of contracts for planning, design, construction, rehabilitation, renovation, replacement, lease, or acquisition of trial court facilities, as those contracts are expressly excluded from Part 2.5 by PCC section 19204(c)).

Under PCC section 19209, the Judicial Council is required to provide the first semiannual report to the Joint Legislative Budget Committee and the State Auditor by February 1, 2012, for the period ending December 31, 2011. Because the Judicial Branch Contract Law’s substantive provisions apply to contracts entered into or amended by judicial branch entities on or after October 1, 2011, the proposal recommends that the first Judicial Council report cover the three-month period starting October 1, 2011, and ending December 31, 2011.

PCC section 19204(a) requires judicial branch entities to notify the State Auditor of certain contracts with total costs estimated at more than one million dollars. That requirement is reflected in the proposed Manual.

Chapter Summaries

In consolidating and conforming the PCC, SAM, and SCM as applicable to judicial branch entities, the proposed Manual is organized into 12 Chapters and includes an introduction and a place-holder for a glossary.¹² A brief description of each chapter and its potential impact on judicial branch entities is set out below.

Chapter 1 - Purchasing Authority. Chapter 1 discusses the purchasing authority of each judicial branch entity, establishes the roles and responsibilities of specific judicial branch personnel who will be involved in purchasing, and sets out general ethical requirements applicable to procurement personnel. Unlike agencies in the executive branch, each judicial branch entity possesses its own purchasing authority.

¹² Work on the glossary will continue during the public comment period, an approach necessitated by the condensed timeframe for development of the proposed Manual.

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The chapter requires that each judicial branch entity designate a Procurement and Contracting Officer who ensures compliance with all applicable laws, and a Payment Officer who will be responsible for ensuring proper internal controls.

Chapter 1 also requires that each judicial branch entity adopt a local contracting manual for procurement and contracting, in accordance with PCC section 19206. The chapter includes broad guidance for judicial branch entity staff in developing the entity's local contracting manual.

Chapter 2 - Procurement Planning. Chapter 2 addresses the process of planning an individual purchase. Incorporated into this chapter is a new requirement from the Judicial Branch Contract Law that judicial branch entities must classify each procurement as one of three categories: non IT goods, non-IT services, and IT goods and services. The chapter provides guidance on making these classifications. The chapter also addresses requirements that apply to particular type of purchases, including equipment leases, blanket purchases, and term purchase contracts.

Chapter 3 - Socioeconomic and Environmental Programs. This chapter describes socioeconomic and environmental programs and considerations that affect procurement activities of judicial branch entities. The first and most extensively discussed is the California Disabled Veterans Business Enterprise program, which is intended to increase business opportunities for disabled veteran businesses. Although the Manual fully describes the program, it leaves to the judicial branch entities the discretion to develop required procedures and rules for its implementation. For its required local contracting manual,¹³ the AOC will develop a set of rules and procedures, which other judicial branch entities may adopt. The chapter continues with a brief discussion of pertinent requirements of the Americans with Disabilities Act to familiarize judicial branch entities with the importance of making all procurement activities available to all persons, including persons with disabilities. Finally, the chapter addresses California's State Agency Buy Recycled Campaign (SABRC) program requirements for promoting the purchase of products that are energy efficient and have other preferable environmental attributes.

Chapter 4 - Competitive Solicitations: Procurement of Non-IT Goods, Non-IT Services, and IT Goods and Services. Chapter 4 discusses the principles of competitive solicitation, and provides general standards that will apply to solicitations for all three categories of purchases. A general requirement is that solicitations must be competitive unless they fall into one of the categories covered in Chapter 5 (Non-Competitively Bid Contracts). The chapter discusses the principles and goals of competitive procurements.

The chapter also provides information and procedures on identifying prospective bidders, handling bids received in the procurement process, and developing a solicitation document, including provisions that are required and those that are prohibited.

¹³ PCC § 19206.

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Further, step-by-step guidance for the procurement of each category of purchases is set out in individual chapters 4A, 4B, and 4C of the Manual. Chapter 4A provides guidance for the procurement of non-IT goods, Chapter 4B provides guidance for the procurement of non-IT services, and Chapter 4C provides guidance for the procurement of IT goods and services.

Chapter 5 - Non-Competitively Bid Contracts. This chapter explains when judicial branch entities may procure goods and services without going through a competitive process (advertising, receiving bids, etc.). In these non-competitively bid procurements, a single entity is afforded the opportunity to provide the specified goods and services. Examples include very small purchases, emergency purchases, and purchases from another governmental entity.

Chapter 6 - Leveraged Procurement Agreements. This chapter discusses the benefits, risks, conditions, and processes related to leveraged procurements. Through Leveraged Procurement Agreements (LPAs), a judicial branch entity may bypass certain competitive procurement requirements by procuring goods or services through existing contracts and programs established by other public entities. This chapter identifies certain LPA programs and provides information on how to implement LPAs.

Chapter 7 - Protest and Post Award Disputes. This chapter explains the process judicial branch entities will use in handling protests related to competitive solicitations. The chapter covers both solicitation specifications protests, which allege deficiencies with the solicitation document, and award protests, which allege deficiencies in the selection of a winning bidder. In addition, this chapter provides basic guidance to judicial branch entities in handling post-award disputes with vendors.

Chapter 8 – Contracts and Related Documents. This chapter describes processes for preparing and approving contracts and related documents. It includes information on legal review and approval of contracts. It also describes special provisions required for various state and federal laws that judicial branch entities are required to follow under the Judicial Branch Contract Law. Sample contract provisions and other tools are included in the appendices to this chapter.

Chapter 9 - Disbursements and Payment Programs. This chapter describes policies and procedures for payments, including when payments should be released, what is required before making invoice payments, and what are acceptable and unacceptable payment practices. This chapter also addresses advance payments and progress payments. Also included are policies and procedures for the use of purchase cards.

Chapter 10 - Receiving, Inspection, and Acceptance or Rejection of Goods and Services. This chapter describes policies and procedures for receiving, inspecting, and accepting or rejecting goods and services. Also included in this chapter is a discussion of asset management.

Chapter 11 - Contract Administration. This chapter provides guidance and information regarding contract administration. Because neither the SCM nor the SAM addresses contract

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administration, this chapter is derived from the current edition of the *Trial Court Financial Policies and Procedures Manual*, Fin. 7.03- Contract Administration. Therefore, the concepts and procedures outlined in this chapter will be familiar to trial court personnel engaged in procurement activities.

Chapter 12 - Reporting Requirements. This chapter describes the Judicial Council's obligations under PCC section 19209 to provide reports to the Joint Legislative Budget Committee and the State Auditor relating to the procurement of contracts by judicial branch entities. In connection with these reports, this chapter describes the role of each judicial branch entity in providing information related to the judicial branch entities' contracts with vendors or contractors to be included in the reports. This chapter also describes the obligations under PCC section 19204(a) of all judicial branch entities to notify the State Auditor of certain contracts with total costs estimated at more than one million dollars.

Specific Comments Sought

In addition to comments on the entire proposed Manual, the AOC seeks comments responsive to the following questions:

- 1) Is the information presented in a clear and understandable way?
- 2) Does the content appear to work from a court operations perspective, e.g., does it conflict with any aspect of court operations or appear to make any incorrect assumptions?
- 3) Is the proposed Manual user-friendly? Does it appear to work for courts of different sizes/staffing capabilities?
- 4) Are there any material omissions?

Also, the AOC welcomes the submission of comments in multiple entries as they are completed (e.g., submissions for individual chapters) as opposed to one entry for the entire Manual.

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Judicial Branch Contracting Manual

EFFECTIVE OCTOBER 1, 2011



JUDICIAL COUNCIL
OF CALIFORNIA

Judicial Council of California
Administrative Office of the Courts
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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 REQUIREMENT FOR JUDICIAL BRANCH CONTRACTING MANUAL

On March 24, 2011, Senate Bill 78 was enacted, creating a new Part 2.5 of the Public Contract Code designated the California Judicial Branch Contract Law.¹ PCC 19206 requires the Judicial Council to adopt and publish a *Judicial Branch Contracting Manual* incorporating procurement and contracting policies and procedures that must be followed by each superior and appellate court, the Judicial Council, the Administrative Office of the Courts (AOC), and the Habeas Corpus Resource Center (judicial branch entities or JBEs).

On August 26, 2011, the Judicial Council adopted this *Judicial Branch Contracting Manual* (Manual) in compliance with PCC 19206, effective October 1, 2011.

Guiding Principles

Development of this Manual has been guided by the principles reflected in the findings and declarations of the Legislature in enacting the PCC, which are 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)

¹ 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.

2. MANUAL DESIGN REQUIREMENTS

PCC 19206 requires that the procurement and contracting policies and procedures comprising the Manual be consistent with the PCC and substantially similar to the provisions contained in the *State Administrative Manual* and the *State Contracting Manual*.

3. CONTENT AND EXCLUSIONS

The Manual addresses judicial branch entity procurement of goods and services, including information technology goods and services, contracting, and contract management. The Manual does *not* address:

1. 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); and
2. 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 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 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 IT projects of the Judicial 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:

1. 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 BSA 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 of entering the contract.
2. Contracts for administrative or infrastructure 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. That agency must consult with and provide recommendations to the Judicial Council or the court, and must submit a copy of its review and recommendations to the Joint Legislative Budget Committee. (GC 68511.9)

4. CHANGES AFFECTING PREEXISTING JUDICIAL BRANCH POLICIES AND PROCEDURES

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

- 6.0–Procurement;
- 7.01–Contracts;
- 7.02–Memorandums of Understanding (MOUs), Interagency Agreements (IAs) and Intra- Branch Agreements (IBAs); and
- 7.03–Contract Administration.

This Manual also supersedes AOC policy 7.2.1–Procurement of Goods and Services—for all procurement and contracting purposes *except* for planning, design, construction, rehabilitation, renovation, replacement, lease, or acquisition of trial court facilities.

Finally, the Manual supersedes the *Court Facilities Contracting Policies and Procedures*, adopted by the Judicial Council 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.

5. LOCAL CONTRACTING MANUAL

PCC 19206 requires the Judicial Council to include a requirement in this Manual that each judicial branch entity (JBE) adopt a Local Contracting Manual for procurement and contracting for goods and services by that JBE. The contents of these manuals are to be consistent with this Manual and the PCC, and substantially similar to the provisions contained in the *State Administrative Manual* and the *State Contracting Manual*.

1. Each JBE must adopt a manual consistent with the requirements of PCC 19206.
2. Each JBE must identify individual(s) with responsibility and authority for procurement and contracting activities as required by this Manual.
3. 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.

6. ACCESS TO THE JUDICIAL BRANCH CONTRACTING MANUAL

This Manual is available on the Internet at [link to be inserted].

7. 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.

Use of Words Signifying Requirements or Discretion			
Words→	Words signifying a mandatory duty are: “must,” “shall,” “mandatory,” or “required.”	Word signifying limited discretion: “should.”	Words signifying full discretion: “may,” “guidelines,” “recommended practices,” “examples,” or “encouraged.”
When used→	To reflect obligations under state or federal law (e.g., statutes, rules, regulations, case law) or under mandatory policies, standards, or other authority.	To urge use of highly favored but not mandated business or accounting practices.	To provide helpful guidance.
Compliance→	Must be followed unless there is an applicable legal exemption.	Should be followed unless there is a good business reason for variance.	Optional.
Documenting Noncompliance→	Documentation required.	Notation in procurement file suffices.	None required.

As discussed in this Manual, some “requirements” may be waived upon concurrence of legal counsel to the JBE as necessary or appropriate, in the best interest of the public, and as consistent with applicable law. All waivers must be kept on file in accordance with the records retention requirements set forth in this Manual at Chapter 11.5².

² 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

8. INTERPRETATION OF THE MANUAL

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

9. ABBREVIATIONS AND ACRONYMS

The following abbreviations and acronyms are used in this Manual:

A & E	Architectural and Engineering
ADA	Americans with Disabilities Act
AOC	Administrative Office of the Courts
AOC/OGC	Administrative Office of the Courts/Office of the General Counsel
BSA	Bureau of State Audits
CRC	California Rules of Court
DGS	Department of General Services
DSA/AC	Division of State Architect, Access Compliance
DVBE	Disabled Veterans Business Enterprise
GC	Government Code
HCRC	Habeas Corpus Resource Center
IA	Intra Agency
IBA	Intra-branch Agreement
IFB	Invitation for Bids
IRS	US Internal Revenue Service
IT	Information Technology
JBCL	California Judicial Branch Contract Law
JBCM	<i>Judicial Branch Contracting Manual</i>
JBE	Judicial Branch Entity
LC	Labor Code
MOU	Memorandum of Understanding
MSA	Master Services Agreement
MVC	Military and Veterans Code
NCB	Non-Competitively Bid
NLRB	National Labor Relations Board
OGC	Office of the General Counsel, AOC
ORIM	Office of Risk and Insurance Management

OSDC	Office of Small Business and DVBE Certification
PCC	Public Contract Code
PRO	Procurement and Contracting Officer
RFA	Request for Applications (Grants)
RFI	Request for Interest
RFP	Request for Proposals
RFQ	Request for Qualifications (or Request for Quote)
SAM	<i>State Administrative Manual</i>
SCM	<i>State Contracting Manual</i>
SCO	State Controller's Office
SOW	Statement of Work
UIC	Unemployment Insurance Code
U.S.	United States, or federal
USC	United States Code
WIC	Welfare and Institutions Code
2CCR	Title 2, California Code of Regulation

A Glossary of defined terms used in the Manual is included following Chapter 12.



Judicial Council of California

Judicial Branch Contracting Manual

Chapter 1
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PURCHASING AUTHORITY

CHAPTER 1

Original Release Date:
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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.

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 GC 68803 and 68807.
Courts of Appeal	Article VI, Section 3 of the California Constitution. See also GC 69141. Pursuant to Rule of Court 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 Rule of Court 10.1020(c).
Superior Courts	Article VI, Section 4 of the California Constitution. Pursuant to Rule of Court 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.
HCRC	Pursuant to GC 68664(a), responsibility for the “day-to-day operations” of HCRC 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 Rule of Court 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

The items described in the table below are outside the scope of purchasing authority for the identified JBEs:

Item	JBE Affected
Facilities	<p>Appellate courts and superior courts</p> <p>Under GC 69204 and GC 70391, the Judicial Council is responsible for the construction, acquisition, and operation of court facilities. In addition to any responsibilities delegated by the Judicial Council, GC 69206 and 70392 assign certain court facilities-related responsibilities to the AOC.</p> <p>Under GC 70392(d), 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.</p>

2. Authority to Enter into IBAs, IAs, and MOUs

JBEs may enter into intrabranch 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. See Chapter 6 for more information regarding IBAs, IAs, and MOUs.

Note: The terms “IBA,” “IA,” and “MOU” are used to refer to types of inter-governmental agreements, not to limit a JBE’s ability to enter into inter-governmental agreements. JBEs may enter into inter-governmental agreements even if the agreements are labeled or named something other than IBA, IA, or MOU.

IBAs, IAs, and MOUs do not need to be competitively bid. 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, see Chapter 5.

C. Purchasing Roles And Responsibilities**1. Roles and Responsibilities**

The following table defines the roles and responsibilities of individuals involved in a JBE’s purchasing activities. In some JBEs, especially smaller trial courts, one individual may perform several of these roles. At a minimum, however, each JBE must have two individuals involved in purchasing activities.

Assignment	Roles and Responsibilities
Procurement and Contracting Officer (PCO)	<ul style="list-style-type: none"> • Is responsible for all procurement and contracting within the JBE. • Ensures all procurement and contracting activities within the JBE comply with Applicable Procurement Laws.

	<ul style="list-style-type: none"> Provides the necessary resources to ensure all staff are properly qualified and trained in all aspects of the procurement process. Oversees development of the Local Contracting Manual.
<p>Buyer</p> <p>Note: A JBE may elect not to designate a Buyer. If the JBE does not do so, then the Buyer role reverts to the PCO.</p>	<ul style="list-style-type: none"> Performs day-to-day purchasing and contracting activities. Is knowledgeable of Applicable Procurement Laws and best practices. Ensures the needs of customers are met within Applicable Procurement Laws. Maintains the procurement file and related documentation.
Payment Officer	<ul style="list-style-type: none"> Ensures timely payment of invoices. Ensures proper internal approvals have been secured before processing payment.
<p>ADA Coordinator</p> <p>Note: A JBE may elect not to designate an ADA Coordinator. If the JBE does not do so, then the ADA Coordinator role reverts to the PCO.</p>	<ul style="list-style-type: none"> Assists and responds to questions or concerns regarding procurement-related reasonable accommodation needs.

<p>CAL-Card Coordinator</p> <p>Note: A JBE may elect not to designate a CAL-Card Coordinator. If the JBE does not do so, then the CAL-Card Coordinator role reverts to the PCO.</p>	<ul style="list-style-type: none"> • Ensures compliance with relevant CAL-Card procedures and contract terms. • Adds, deletes, and alters card restrictions/limits. • Reviews billing reports to monitor payments and disputes.
<p>Receiving Staff</p> <p>Note: A JBE may elect not to designate Receiving Staff. If the JBE does not do so, then the Receiving Staff role reverts to the PCO.</p>	<ul style="list-style-type: none"> • Receives or acknowledges deliveries. • Inspects goods. • Completes required reports, as required by the Local Contracting Manual or another JBE policy.
<p>Protest Hearing Officer</p> <p>Note: If a Protest Hearing Officer is not designated by a JBE, the Buyer will act as the Protest Hearing Officer.</p>	<ul style="list-style-type: none"> • Evaluates protests. • Issues written determinations regarding protests.
<p>Protest Appeals Officer</p> <p>Note: If a Protest Appeals Officer is not designated by a JBE, the Approving Authority will act as the Protest Appeals Officer.</p>	<ul style="list-style-type: none"> • Evaluates protest-related appeals. • Issues written determinations regarding appeals of protests.

2. Ethics

a. Separation of duties

JBEs should maintain sufficient separation of duties in order to reduce the risk of error or fraud in the JBE's purchasing program.¹ The following key duties and responsibilities should be segregated:

- Conducting the procurement (generally, the activities in Chapter 4);
- Approving and signing purchase documents;
- Acknowledging and receiving goods and services;
- Approving invoices; and
- Preparing payments.

Note: No one person should control more than one of these key aspects of a procurement activity, resources permitting. At a minimum, the person approving invoices and the person preparing payments must be different people.

b. Ethics training

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

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

c. 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;
- Be aware that perceptions can override reality; and
- Involve the JBE's procurement and legal staff or, alternatively, the AOC/OGC Office of the General Counsel, when questions arise regarding

¹ The term "should" is used here in recognition of the fact that smaller JBEs may not have enough procurement (or other) personnel to separate completely the specified duties. However, JBEs should separate duties as much as possible given their staffing constraints.

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;
- Personnel involved in the procurement process 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 personnel involved and the judicial branch.

Note: For restrictions on contracting with current and former JBE employees, see Rules of Court 10.103 and 10.104.

d. 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 courteously refused.

Evaluation Teams: GC 1090 is applicable to members of Evaluation Teams, whose members 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 willfully violates GC 1090 is punishable by a fine of not more than one thousand dollars (\$1,000) or by imprisonment in state prison, and is 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. All expenditures must support the JBE's mission (function and purpose) and benefit the Judicial Branch to not be considered gifts of public funds.

Accordingly, advance payments or pre-payments made to a Vendor before work has been performed or before all goods have been received are prohibited. Except in specific circumstances. Refer to Chapter XXX for additional information.

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

Before accepting any goods and services offered at no cost or obligation to the JBE, the JBE must 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 Purchase Document must 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 is designed to provide 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 JBE business needs.

Statutory requirement: Each JBE must adopt a Local Contracting Manual for procurement and contracting for goods or services by that JBE (PCC 19206)

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 upon and supplements this Manual.

Contents: The Local Contracting Manual must be consistent with all applicable law, as well as with this Manual. The contents of the Local Contracting Manual are determined by the individual JBE. However, each JBE should consider addressing topics such as:

- Normal lead times for different types of purchases;
- The JBE's organizational structure; for example, who fills the roles identified in Section 1.B1.0;
- Signature authorization listing (who can sign what and when);
- Required approvals, both internal and external;
- Certification of availability of funds;
- Approval and payment of invoices;
- Receiving; and
- Setting up and maintaining official procurement files.

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



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Judicial Branch Contracting Manual

Chapter 2
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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

The following defined terms are used in this Chapter. For definitions of the defined terms, please see the glossary.

Applicable Procurement Laws

Bid

Bidder

Buyer

Solicitation Document

Evaluation Team

Prospective Bidders

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 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 entity;
- Legal services;
- Certain LPAs;

- Purchases from a business entity operating a Community Rehabilitation Program (CRP);and
- Sole source.

For more information on these types of procurements, see Chapter 5. For more information on determining whether a purchase qualifies as an emergency purchase, see Section F below.

B. Classifying the Purchase

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;
- Disputes, protests, or lawsuits; and
- Illegal contracts.

Purchase classification: The two steps in classifying a purchase are 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, furniture, or office supplies, the purchase is a non-IT goods purchase. If the purchase involves only the purchase of legal, consulting, or other 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.

Mixed purchases: Classifying a mixed purchase begins by determining the main value or the major objective of the entire purchase.

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

The dollar value associated with the services provided and the dollar value of the goods being supplied are factors that should be considered.

Classifying mixed purchases

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.

Non-IT vs. IT: SAM section 4819.2 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:

- 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 including work process:
 - Magnetic Ink Character Recognition (MICR)
 - 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 network (LAN)
 - 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 converters (COM)
 - 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, contractor supplied systems documentation and educational or training manuals;
- Equipment supplies, i.e. printer forms, disk packs, floppy disks, magnetic tape and printer ribbons or cartridges; and
- Furniture (IT-related, such as desktop station tables and printer stands).

The following consumable items must be acquired as IT goods:

- PC keyboards
- mice
- zip drives
- memory cards
- personal digital assistants (PDA)
- software
- scanners

IT services. IT services are services that have someone performing IT-related services, 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).

IT vs. non-IT classification

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. These services must be acquired as IT services.

Example: A JBE buys ten personal computer keyboards for replacement stock to issue when an existing keyboard fails. 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.

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's Business Services Unit or the AOC's 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 upon 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.

Internal review and approvals: Does the purchase require JBE review and approvals?
If "yes":

- Have the proper approval signatures been obtained?
- 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.?

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?

External notices and reviews: Are any external notices or reviews required? (Refer to Section C of this chapter for additional details.)

Seeking legal participation: Buyers should seek JBE legal participation as necessary. 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 have a history of litigation;
- IT warranty issues; and

- Conflict of interest issues.

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 or Master Agreement)?
- 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

Requests for reasonable accommodation purchases: A purchase made in response to a request for reasonable accommodation is not exempt from Applicable Procurement Laws. However, when conducting a procurement to fulfill a reasonable accommodation request, Buyers must be mindful of the need to expedite the purchase.

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 wishes not to purchase equipment that will soon be obsolete or outdated.

Prior to initiating an equipment lease, a JBE must complete a "lease versus purchase analysis" as described in Appendix A. Lease vs. purchase analysis documentation must be retained within the procurement file.

Shipping charges: JBEs conducting competitive solicitations should determine shipping terms during the procurement-planning phase. 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.

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

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.

Buyers conducting a competitive solicitation for a term purchase must adhere to the following:

- A competitive bid must be conducted whenever the dollar amount of the term purchase is \$5,000.00 or greater;
- The solicitation must identify contract start and end dates;
- The solicitation must state the aggregate amount of the contract; and
- The solicitation must state a maximum number of units that may be purchased.

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

Note: Evaluation and award are based upon 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.

Purchases from Community-Based Rehabilitation Programs (CRPs):

JBEs may consider purchasing products and services from rehabilitative or sheltered workshops pursuant to Welfare and Institutions Code (WIC) 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 Community Rehabilitation Program (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 must document its procurement file to support that the price offered by a community rehabilitation program 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.

E. Statement of Work (SOW)

Determining the need for a SOW: A JBE must include a SOW for all services transactions, and all goods transactions that has a services component. A SOW protects the JBE and the Vendor by identifying and documenting the details of the work to be performed.

What to include in a 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 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 deliverable to be delivered (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;
- The Vendor's work hours required to accomplish the purpose, objective, or goals;
- The Vendor's billing rates per work hour (as provided in the contract documentation);
- Cost per deliverable; and
- Total cost.

For goods:

- Specifications for goods; and
- Description of when, where, and how goods are to be delivered.

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.

An emergency as defined by PCC 1102 is "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 for supplies to clean up the water.

Example of a non-emergency: A JBE wants to purchase used copy machines for office use at a 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. Negotiation Process

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 who 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 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.
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’ rankings following 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;
or

- The JBE may negotiate with all responsive responsible Bidders following Bid evaluations.

7. JBEs must notify Bidders in writing:

- That the JBE is initiating a negotiation process;
- The general purpose and scope of the negotiations;
- The anticipated schedule for the negotiations; and
- 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 rule 10.620

CRC rule 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% of the total trial court budget; and
- The execution of a contract that exceeds the greater of \$400,000 or 10% of the total trial court budget.

For detailed requirements regarding this notice, see CRC rule 10.620.

B. Information technology (IT) Procurements over \$5,000,000

CTA Review

All administrative and infrastructure information technology projects of the Judicial Council or the courts with total costs estimated at more than \$5,000,000 are subject to the review and recommendations of the California Technology Agency, as specified in GC 68511.9.

C. Other Procurements over \$1,000,000

BSA Review

If the total cost of the purchase is estimated at more than \$1,000,000, 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 ten (10) days of execution of the Purchase Document. BSA may review the Purchase Document 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., contracts for administrative and infrastructure IT projects over \$5,000,000).

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.

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.

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 to 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 keeping in mind that most procurement records (including notes) are subject to disclosure under CRC rule 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.]



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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 JBEs. The first and most extensively discussed is the California Disabled Veterans Business Enterprise (DVBE) program, which is intended to increase business opportunities for disabled veteran businesses. Next is a brief discussion of pertinent requirements of the Americans with Disabilities Act to familiarize JBEs with the importance of making all procurement activities available to all persons, including persons with disabilities. Finally, California's State Agency Buy Recycled Campaign (SABRC) program requirements for promoting the purchase of products that are energy efficient and have other preferable environmental attributes are addressed.

DEFINED TERMS

The following defined terms are introduced in this Chapter. For definitions of the defined terms, please see the Glossary.

ADA Coordinator
Business Utilization Plan
Commercially Useful Function
DVBE Incentive

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 veteran 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.

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% of \$10 million—that would go to certified DVBEs that are contractors, subcontractors, or 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 who 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 based upon “lowest responsible bidder” or the addition of a prescribed number of points to the DVBE bidder’s bid score where the JBE is basing its selection on the highest scoring bidder.

B. Administration

The MVC and PCC establish the Department of General Services (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 vendors or vendors that have DGS approved Business Utilization Plans to meet their DVBE goals.

C. Outline of Principle 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 M&VC 999 et seq. 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 vendor 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 vendor and 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 contractor 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.

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, which 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, with the assistance of the AOC/OGC 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.

Bid 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

- Marking information regarding pending solicitations available to and considering offers from certified DVBE firms capable of meeting the JBE's business need. (M&VC 999.12).

F. Waiver of a DVBE Incentive

Although all competitively bid contracts are subject to the DVBE incentive, JBEs, through its PCO or designee, has the discretion to waive inclusion of DVBE participation in individual solicitations. Note, however, that the overall DVBE participation goal of 3% 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 by the JBE's PCO or designee.

G. General Requirements for DVBE Procurements

1. Verifying Vendor Status as a DVBE

Verifying certification status: For contracts 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 located on the DGS/PD web page. [Click here](#). If this database printout is used in support of a DVBE certification, a copy of the printout can simply be placed in the procurement file.

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

A Plan is a vendor's written commitment to contract with certified DVBEs for at least 3% 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% applies to all business done by the vendor in California, not just contracts with the State of California. The DGS procurement division provides approval of these Plans. A Plan

is considered approved by the DGS on the date of submission provided the Plan meets requirements set forth in PCC 10115.15. In order to qualify as a DVBE by use of a Plan, a vendor 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% 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, 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 in order 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 contract through which funds are passed in order 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 Veteran Affairs, the DGS Office of Small Business and DVBE Services (OSDS) in implementing the DVBE program (PCC 10115.4 and MVC 999.6).

Suspended contractors and vendors: A JBE may not award any contract to a vendor or vendor utilizing a subcontractor suspended for violating PCC 10115.10 for the period of the applicable suspension.

Contractor violations of PCC 10115.10: In the event a JBE suspects that a contractor is in violation of PCC 10115.10, the JBE must notify the DGS 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 moneys 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 post–contract 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 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 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.¹

3.2 AMERICANS WITH DISABILITIES ACT CONSIDERATIONS

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

In compliance with the Americans with Disabilities Act (ADA) and parallel 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 accommodations 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 accommodations” does not include actions which would fundamentally alter the nature of the procurement process or which would impose undue financial or administrative burden upon a JBE.

JBEs should designate an individual who is available to respond to questions or concerns regarding reasonable accommodation of disability in the procurement process (ADA Coordinator). Requests for proposals and other contracting documents should advise the public that the JBE complies with the ADA and parallel California statutes and that requests for accommodation of disability should be directed to the ADA Coordinator.

3.3 STATE AGENCY BUY RECYCLED CAMPAIGN PROGRAM

The State Agency Buy Recycled Campaign (SABRC) is a joint effort between the California Department of Resources Recycling and Recovery (CalRecycle) and the Department of General Services (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 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% of reportable purchases are recycled products. This requirement applies to purchases in each of the targeted categories identified in PCC 12207, which include 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).

Example: A JBE is purchasing \$20,000 worth of paper for its copy machines. At least \$10,000 of the paper must have 30% recycled content by weight. The other \$10,000 may be any mix of recycled or non-recycled products. Click here for additional information at the CalRecycle's website.

Note: CRC rule 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 the businesses with which it contracts to use recycled content products (PCC 12203(d)). Contact Resources Recycling and Recovery (CalRecycle) at (916) 341-6199 or 341-6524 or SABRC@CalRecycle.ca.gov for information on qualifying SABRC reusable and recycled content products.

C. Supplier Certification

JBEs must require all businesses 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. Click here to access the Post-Consumer Recycled-Content Certification form (CIWMB 74). This certification can be waived if the post-consumer recycled content can be verified by other written means such as product label, packaging, catalog, manufacturer/vendor website, product advertisement. Click here or additional information regarding the SABRC Program.

D. Recycled Product Reporting

Each JBE must report annually, by October 31 of each year, to the Integrated Waste Management Board regarding its progress in meeting the recycled purchasing requirements. Reports must identify the total dollar amounts of all products purchased

within the eleven reportable categories and the total amount spent on recycled content products in each reportable category. SABRC reports are to be completed electronically using CalRecycle's SABRC Annual reporting system. The website requires a secure webpass account. JBEs may contact CalRecycle's SABRC team at SABRC@CalRecycle.ca.gov to obtain an account. (See PCC 12211 for specific reporting requirements.)

E. 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 bid packages, or in some other noticeable place in the bid packet, notifying all 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).



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COMPETITIVE SOLICITATION OVERVIEW

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INTRODUCTION

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

DEFINED TERMS

The following defined terms are introduced in this Chapter. For definitions of the defined terms, please see the Glossary.

Bid Closing Time
Invitation for Bid (IFB)
Phone Script
Request for Interest (RFI)
Request for Proposals (RFP)
Leveraged Procurement Agreement (LPA)
Purchase Document

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

JBEs must conduct competitive procurements in a manner that promotes open, fair, and equal competition among Prospective Bidders. Generally speaking, a solicitation must be competitive unless it falls into one of the categories covered in Chapter 5 (Non-Competitively Bid Procurements).

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 and emphasizing the elimination of favoritism, fraud, and corruption in awarding contracts.

Supplier recrimination is prohibited: JBEs must not engage in recriminations against Bidders who request information regarding a Bid or the specifications required in any Purchase Document.

B. Developing Prospective Bidder Resources

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
- LPA databases
- Certified DVBE database
- Internet searches
- Telephone directories

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

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 contact name, address, telephone number, and submittal date, and
- Include where and how to submit the response to the RFI.

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

An RFI may also be used to “survey” the marketplace to understand what goods or services may be available and to approximate the amount of money that may be needed for procurement.

C. Confidentiality

During the solicitation development, information regarding the solicitation is confidential. This is to prevent any Potential Bidder from obtaining an unfair advantage. Before the public opening of written Bids, any Bids received must remain confidential. Before the award of a contract using a Phone Script, the Bids received must remain confidential.

Although a Bid may have pages marked “confidential” or “proprietary,” the Bid is a record subject to release in response to a CRC rule 10.500 request. See Chapter 11 for further discussion.

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 requiring these personnel to 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 anyone 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;
- Agree that no gift, benefit, gratuity, or consideration will be accepted from any Prospective Bidder; and
- Certify that he/she has no personal or financial interest in a Prospective Bidder.

D. Advertising

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

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.

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

- posting a notice on its own website;
- placing an ad in print media;

- submitting the procurement to the California State Contracts Register (CSCR) via DGS's BidSync system; or
- other methods the Buyer determines are reasonably likely to reach Prospective Bidders.

Timing of advertising: Solicitations 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.

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

Re-solicitations: A JBE conducting a re-solicitation does not need to re-advertise the solicitation if:

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

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, there is only one Prospective Bidder who can supply the required goods or services such that advertising would not produce more Prospective Bidders.

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

A JBE may submit an advertisement to CSCR by using DGS Procurement Division's Internet Web page (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). 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 pre-purchase testing, the Solicitation Document should:

- Explain that sample goods are required for demonstration or pre-purchase 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 Purchase Document requirements. It is the guiding document which ensures Bidders are able to submit responsive Bids and that the procurement is successful.

A. Developing the Solicitation Document

Each Solicitation Document, regardless of format (Phone Script, IFB, RFP), must clearly state the needs or business requirements of the JBE in order for a Prospective Bidder to weigh associated risks and price the purchase.

Avoid writing restrictive requirements: JBEs must not include requirements in competitive solicitations 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 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 a feature of a product 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

Bidder Instructions: Each Solicitation Document must 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.

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 Purchase Document including available appendices.

Common elements of written solicitations: 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 which are required to be returned by Bidders, such as administrative or technical requirements;
- 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);
- Antitrust claims (see GC 4552 - 4554); and
- Loss leader prohibition.

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 must include the signature of an authorized representative of the Bidder.

Faxed signatures are acceptable if allowed by the Solicitation Document. Of course, a faxed 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 as a phone quote, although the Buyer must document the name of the Bidder representative who provides the Bid.

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. Any limit on faxed bids should be included in the JBE's Local Contracting Manual.

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:

- RFOs for acquisitions from Leveraged Procurement Agreements ; and
- Procurements under \$5,000.

DVBE Participation: JBEs are reminded to include DVBE language in their solicitations, as applicable. Refer to Chapter 3 for further information.

With proper approval, JBEs may waive the DVBE requirement from any individual competitive solicitation. When this occurs, the Solicitation Document must 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 must document the procurement file to support the approval of the waiver.

Tie bids: JBEs should put 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. Such event must be observed by witnesses and the affected Bidders should be invited to observe.

C. Amending a Solicitation Document

Clarifications or changes to a Solicitation Document: Clarifications or changes to a Solicitation Document are made by an addendum. An addendum must 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. 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 a solicitation is conducted by phone then the addendum may be communicated by phone or in writing, at the Buyer's discretion. If the addendum is communicated by phone, the addendum information must be documented as part of the Phone Script 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 then 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.

Evaluation criteria revisions: Evaluation criteria may not be changed once Bids have been submitted.

4.3 BID HANDLING

Bid submissions: Generally, Bids must be handled as follows:

- When sealed Bids are required, each Bid must be separately sealed inside an envelope, signed, 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 non-responsive and must not be considered for award.

Submission of bids by fax: JBEs that receive and accept faxed bids must adhere to the following:

Faxed bids will only be accepted when:

- The Solicitation Document specifically states they will be allowed; and
- Received on the fax machine at the phone 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 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;
- Be a JBE officer or employee ; and
- 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 only be used to provide clarification or subject matter expertise to the Evaluation Team.

B. Adequate Competition

Fewer than three bids received: The Buyer must make reasonable efforts to obtain at least three Bids when running a competitive procurement. If fewer than three Bids are received, the JBE must justify the appropriateness or reasonableness of the cost of the selected Bid. The names and addresses of Prospective Bidders solicited must be documented in the procurement file.

No bids received: If no Bids are received, the solicitation may be cancelled and re-issued. If the solicitation is re-issued, the Buyer should consider methods to broaden the number of Prospective Bidders, such as modifying any possible restrictive requirements.

Note: Nothing in this section is intended to suggest that a JBE's ability to cancel a solicitation is limited to situations when no Bids are received. Before the Bid Closing Date, a JBE may cancel a solicitation for any or no reason. After the Bid Closing Date, all Bids may be rejected if the JBE determines that:

- The Bids received are not really competitive;
- 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 awarded to 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.

Plastic Trash Bag Law: JBEs cannot contract with manufacturers and wholesalers who are non-compliant with the Plastic Trash Bag Law,¹ 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.

A listing of compliant and noncompliant trash bag manufacturers and wholesalers is available on the CalRecycle website at:

<http://www.calrecycle.ca.gov/BuyRecycled/TrashBags/ComplyList/>.

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 vendors to certify whether they are a “scrutinized company.” This applies regardless of the procurement approach used including, but not limited to: Phone Scripts, RFPs, IFBs, and non-competitively bid procurements (except as specified below). The JBE may use the certification form contained in Appendix A, or develop its own form.

The only exception to JBEs obtaining this information is for contracts awarded using Leveraged Procurement Agreements (LPAs), or for intergovernmental agreements.

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.

¹ Public Resources Code section 42290 and following.

Timing of checks: JBEs should check for ineligible businesses:

- When creating contact lists or before soliciting Bids;
- During the evaluation of Bids; and
- Before creation of amendments or other Purchase Documents.

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

D. Material Deviations

Material deviations cannot be waived. The JBE may reject any or all Bids 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.

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 on the cost to the JBE.

Waiving mandatory requirements is prohibited: Mandatory requirements are those required by applicable law. Material deviations of mandatory requirements cannot be waived, and the Bid must be rejected. All such deviations must be documented in the procurement file to support the rejection.

Examples of deviation types

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.

Material Deviation: A deviation in the Bid that affects the amount of the Bid, or provides an advantage or benefit not allowed other Bidders. A deviation that 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.

4.5 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. The procurement summary should be included in the procurement file.

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

Procurement summary information includes but is not limited to:

- Documenting the prices offered by the Bidders;
- 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

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 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.

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

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



Judicial Council of California

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Chapter 4A
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STEP-BY-STEP GUIDE FOR THE PROCUREMENT OF NON-IT GOODS

CHAPTER 4A

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INTRODUCTION

The most significant change to JBE procurement required by the California Judicial Branch Contract Law is that JBEs must procure non-IT goods valued at \$50,000 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 \$50,000 or above. (See PCC 10301)

This Chapter sets forth a step-by-step guide that Buyers can use when competitively soliciting non-IT goods. For non-competitive solicitation of non-IT goods, see Chapter 5 of the JCBM.

DEFINED TERMS

The following defined terms are used in this Chapter. For definitions of the defined terms, please see the glossary.

Approving Authority

Bid

Bidder

Buyer

Evaluation Team

IFB

JBE

Phone Script

Potential Bidder

Purchase Document

Responsible Bidder

Responsive Bid

Solicitation Document

Vendor

STEP 1 – DETERMINE THE PROCUREMENT VALUE

The value of the procurement directly affects the processes that must be used in the procurement. The Buyer 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 B 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 POTENTIAL BIDDERS

The Buyer should develop a list of Potential Bidders. See Chapter 4, Section 4.1.B for additional information on developing a list of Potential Bidders.

The Buyer should consider verifying whether any of the Potential 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 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 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 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 for additional information on confidentiality/conflict statements.

STEP 4 – SELECT SOLICITATION DOCUMENT TYPE

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

- Phone Scripts; and
- IFBs.

For procurements valued less than \$50,000, the Buyer may use a Phone Script or IFB. For procurements valued more than \$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
Phone Script	Up to \$50,000*	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 B in the Selected Topics Relevant to Solicitations of Goods section below for additional information.</i>
IFB	Any size procurement	Used for more complicated, higher risk, and higher value procurements.

* A JBE may adopt a lower threshold on the use of phone scripts. Any lower threshold should be included in the JBE's local contracting manual.

STEP 5 – DRAFT SOLICITATION DOCUMENT

The Buyer should draft the Solicitation Document. The Solicitation Document must 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 to the required provisions identified in Chapter 4, a Solicitation Document for non-IT goods must comply with the following requirements:

- The Bidder must submit a California seller permit certification (see Section C 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. Phone Scripts

A Phone Script is used for straightforward procurements where Bids are solicited by phone or other electronic communication. The Buyer must prepare and use a Phone Script (a narrative of the Bid requirements) so that each Prospective Bidder receives the same information and Bids may be evaluated fairly.

The Phone Script must:

- 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 phone, email, 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.

The Buyer must document all Bids received. Both the Phone Script and the documentation regarding Bids must be retained in the procurement file.

B. IFBs

The IFB must include the JBE's standard terms and conditions for the acquisition of non-IT goods. To the extent practicable, 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 exception to the JBE's terms and conditions will render a Bid non-responsive.

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 advertise any solicitation of non-IT goods **in excess of \$50,000**, by posting an announcement:

- In print media (such as relevant trade journals),
- On DGS's BidSync, or
- In any other place reasonably likely to be seen by Potential Bidders.

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 B in the Selected Topics Relevant to Solicitations of Goods section below for information regarding exemptions to this requirement.

For more information regarding advertising, see Chapter 4, Section 4.1.D.

STEP 7 – RECEIVE BIDS

Bids must be received and handled as described in Chapter 4, Section 4.3. Some aspects of receiving Bids depend on the type of Solicitation Document used.

A. Phone Scripts

Bids must be submitted as specified in the Phone Script. The Buyer must document any Bids received. Both the Phone Script and the documentation regarding Bids must be retained in the procurement file.

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 time/date stamp Bids as they are received.

STEP 8 – OPEN BIDS

All Bids must be publicly opened at the time and place specified in the 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 Phone Scripts do not involve sealed Bids, this step is inapplicable to solicitations using Phone Scripts

STEP 9 – BID CLARIFICATION

If the JBE requires clarification regarding a Bid, the JBE may contact the Bidder who submitted the affected Bid.

STEP 10 – 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.

If the Bidder has taken exception to any of the JBE's terms and conditions, the JBE should deem the Bid to be non-responsive.

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 contract.
- **Responsive Bid** means a Bid that indicates compliance without *material deviation* from the requirements of the Solicitation Document and the terms and conditions of the proposed Purchase Document. See Chapter 4, Section 4.4.D for guidance on determining whether a deviation is material.

See Chapter 3 for more information regarding the application of preference programs.

Note: For purposes of determining the lowest Bid, the amount of sales tax must be excluded from the total amount of the Bid.

A. Phone Scripts

The JBE should award the contract to the **Responsible Bidder** who submitted the lowest **Responsive Bid** after application of any preference, incentives, or discounts, if applicable. (PCC 10301 requires contracts of \$50,000 or more to be awarded to the lowest responsible bidder. Because Phone Scripts 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.)

B. IFBs

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

STEP 11 –NOTICE OF INTENT TO AWARD**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.

Notification

If the contract will be awarded to a Bidder who did not submit the lowest Bid (because, e.g., the lowest Bid was not a Responsive Bid, or the Bidder who 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 protest, the JBE must not make an award until either the protest has been withdrawn or the JBE 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.

STEP 12 – CREATE THE PURCHASE DOCUMENT

The Buyer should memorialize the purchase using a Purchase Document. Negotiations should be limited to finalizing the form of agreement and non-substantive terms. The Purchase Document must be signed by an authorized representative of the Bidder who can bind the Bidder contractually.

STEP 13 – 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 4.5.

STEP 14 – NOTIFY BSA OF LARGE CONTRACTS

If the total cost of the purchase is \$1,000,000 or higher, the Buyer must notify the Bureau of State Audits (BSA) in writing of the existence of such contract. The JBE must make this notification within 10 days of execution of the Purchase Document. BSA may review the Purchase Document to ensure compliance with the California Judicial Branch Contract Law.

SELECTED TOPICS RELEVANT TO SOLICITATIONS OF GOODS**A. Samples**

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

- Samples are required for demonstration or pre-purchase testing;
- The JBE is not obligated to pay the cost of the samples or their return; and
- What quantity of sample non-IT goods is required.

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

B. Incidental Services

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

- May not exceed \$4,999.99, and
- Must be directly related to the purchase of the non-IT goods, such as set up 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 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.

C. California Seller's Permit

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 Purchase Document 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.

D. 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.

E. 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.



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

CHAPTER 4B

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INTRODUCTION

The PCC is more flexible in the procurement of non-IT services than in the procurement of non-IT goods. When procuring non-IT services, 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. For non-competitive solicitation of non-IT services, see Chapter 5 of this manual.

DEFINED TERMS

The following defined terms are used in this Chapter. For definitions of the defined terms, please see the glossary.

Bid
Bid Closing Time
Bidder
Buyer
Evaluation Team
IFB
JBE
Phone Script
Potential Bidder
Purchase Document
Responsible Bidder
Repsonsive Bid
RFP
Solicitation Document
Vendor

STEP 1 – DETERMINE THE PROCUREMENT VALUE

The value of the procurement directly affects the processes that must be used in the procurement. The Buyer should estimate the total value of the procurement, including:

- value of the non-IT services to be procured
- taxes
- other associated costs, as applicable.

JBE personnel 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 Purchase Document 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.

STEP 3 – DEVELOP LIST OF POTENTIAL BIDDERS

The Buyer should develop a list of Potential Bidders. See Chapter 4, Section 4.1.B for additional information on developing a list of Potential Bidders.

The Buyer should consider verifying whether any of the Potential 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 4 – ASSEMBLE PROCUREMENT TEAM

The Buyer 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
- Legal counsel, if applicable (see 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 for additional information on confidentiality/conflict statements.

STEP 5 – SELECT SOLICITATION DOCUMENT TYPE

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

- Phone Scripts
- IFBs
- RFPs

For procurements valued less than \$5,000, the Buyer may use a Phone Script, 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:
Phone Script	Less than \$5,000	Used for very small purchases.	Lowest Responsible Bidder
IFB	Any size procurement	Used 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.	Lowest Responsible Bidder
RFP	Any size procurement	Used for very 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 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 be solicited using an IFB, not an RFP.

STEP 6 – DRAFT SOLICITATION DOCUMENT

The Solicitation Document must comply with the applicable requirements set forth in Chapter 4, Section 4.2. In particular, it must include all provisions identified as required. 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 three types of Solicitation Documents.

A. Phone Scripts

A Phone Script is used for straightforward procurements where Bids are solicited by phone or other method of electronic communication. The Buyer must prepare and use a Phone Script (a narrative of the Bid requirements) so that each Prospective Bidder receives the same information and Bids may be evaluated fairly.

The Phone Script must:

- 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 phone, email, fax, etc.)
- Include a reference to the web page containing the current bidder instructions and applicable general provisions associated with the purchase, if applicable.

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 (as applicable);
 - Bid Closing Time ;
 - Timetable the JBE will follow 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.

Description of Services: The IFB or RFP must contain a description of the desired non-IT services. The description must 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;
- 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 deliverable to be delivered (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 withholds;
- 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).

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

1. A description of the Bidder's qualifications, 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 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. Résumés for each major contract participant who will exercise a major policy, administrative, or consultative role in carrying out the non-IT services (**Note:** résumés 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. For cost-plus contracts with consultants, an estimate of time and manpower to be expended and the equipment and facilities to be utilized, if applicable.
 9. 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;
 - resumes of each major subcontract participant; and
 - description of how subcontracted work will be controlled, monitored, and evaluated.
 10. 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 exception to the JBE’s terms and conditions will render a Bid non-responsive.

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 must identify any **minimum terms** in the JBE’s terms and conditions. Minimum terms are the terms so important that a proposed exception will render a Bid non-responsive. The RFP must require that Bidders identify all

proposed exceptions (if any) to the JBE's terms and conditions. The RFP must state that a Bid that takes exception to a minimum term will be deemed non-responsive. 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 may be included with the remainder of the Bid.

Evaluation Plan: Although not part of the RFP itself, the Buyer must 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
- criteria for assigning cost points (see Step 13 regarding assignment of cost points)

The evaluation plan must ensure that 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% of the total points.
- Exceptions to the JBE's terms and conditions are evaluated and given substantial weight in the score assigned to the Bid.
- If a material exception is taken to a minimum term, the Bid will be deemed non-responsive.

JBEs may disclose details of the evaluation plan in the RFP, but they are not required to do so. Often, JBEs will disclose the categories that will be evaluated (price, experience, etc), but not the specific percentages assigned to each category.

Other Procurement-Related Information: The RFP must state the date of oral interviews, if any. 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**, by posting an announcement:

- On its own website;
- In print media (such as relevant trade journals);
- On DGS's BidSync system; or
- In any other place reasonably likely to be seen by Potential Bidders

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.

For more information regarding advertising, see Chapter 4, Section 4.1.D.

STEP 8 – OPTIONAL: HOLD BIDDERS' CONFERENCE

Bidders' conferences provide Potential 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 Phone Script solicitations.

STEP 9 – RECEIVE BIDS

Bids must be received and handled as described in Chapter 4, Section 4.3. In addition to those general requirements, this Step sets forth additional requirements applicable to solicitations of non-IT services using different Solicitation Documents.

A. Phone Scripts

Bids must be submitted as specified in the Phone Script. The Buyer must document any Bids received. Both the Phone Script and the documentation regarding Bids must be retained in the procurement file.

B. IFBs and RFPs

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

STEP 10 – OPEN BIDS

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

A. IFBs

All Bids must be publicly opened at the time and place specified in the IFB.

A JBE staff member must 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.

A JBE staff member must read the cost information for each Bid that meets the format requirements and standards.

Once opened, the Bids must be made available for public inspection.

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

When determining whether competition has been achieved, there is one method for Phone Scripts and another method for IFBs and RFPs.

A. Phone Scripts

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 (via DGS's BidSync system) and has solicited all known Potential Bidders, but still received fewer than three Bids;
- The contract will be awarded to a Community Based Rehabilitation Program entity (see Welfare and Institutions Code section 19404);
- The JBE could have completed the transaction without a competitive solicitation (e.g., procurements of legal services); or
- 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 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 must document in the procurement file the names and addresses of the firms or individuals who were solicited for Bids

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 are fulfilled.

STEP 13 – 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 Phone Script or IFB solicitations. If the JBE otherwise requires clarification regarding a Bid, the JBE may contact the Bidder who submitted the affected Bid.

STEP 14 – EVALUATE BIDS

The JBE must 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. However, there is no requirement to award a contract 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. Phone Scripts and IFBs

The JBE must evaluate the Bids and award the contract to the **Responsible Bidder** who 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, financial resources and is fully capable of performing the contract.

- **Responsive Bid** means a Bid that indicates compliance without *material deviation* from the requirements of the Solicitation Document and the terms and conditions of the proposed Purchase Document. See Chapter 4, Section 4.4.D for guidance on determining whether a deviation is material.

See Chapter 3 for more information regarding the application of preference programs.

B. RFPs

A JBE staff member must review all Bids to determine which 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 sheets available for public inspection at the conclusion of the scoring process.

The JBE must award the contract 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 Non-Cost 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 to the terms and conditions which 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?
- Has the Bidder had 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 that 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 cost points set forth in Appendix A. Alternately, JBEs may adopt their own processes for awarding cost points.

STEP 15 – 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: This step is inapplicable to solicitations using Phone Scripts.

A. 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 who did not submit the lowest Bid (because, e.g., the lowest Bid was not a Responsive Bid, or the Bidder who submitted the lowest Bid was not a Responsible Bidder), the JBE must notify the lowest 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 email or fax.

If any Bidder submits a protest before awarding 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 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.

B. 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 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.

STEP 16 – CREATE THE PURCHASE DOCUMENT

The Buyer should memorialize the purchase using a Purchase Document. Negotiations should be limited to finalizing the form of agreement and non-substantive terms. The Purchase Document must be signed by an authorized representative of the Bidder who 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 4.5.

STEP 18 – NOTIFY BSA OF LARGE CONTRACTS

If the total cost of the purchase is \$1,000,000 or higher, the Buyer must notify the Bureau of State Audits (BSA) in writing of the existence of such contract. The JBE must make this notification within 10 days of execution of the Purchase Document. BSA may review the Purchase Document 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 JBE programs, the PCC allows for a flexible and expeditious approach to IT procurements. The most significant difference with 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

The following defined terms are used in this Chapter. For definitions of the defined terms, please see the glossary.

Approving Authority

Bid

Bid Closing Time

Bidder

Buyer

Evaluation Team

JBE

Notice of Intent to Award

Phone Script

Potential Bidder

Purchase Document

Responsible Bidder

Responsive Bid

RFP

Solicitation Document

Vendor

STEP 1 – PERFORM PRELIMINARY ANALYSIS

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

A. Procurement Value

The value of the procurement directly affects the processes that must be used in the procurement. The Buyer 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; and
- Other associated costs, as applicable.

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

B. IT-Specific Issues

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

- 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 come 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
- How to meet the JBE's anticipated IT life cycle requirements

STEP 2 – DEVELOP LIST OF POTENTIAL BIDDERS

The Buyer should develop a list of Potential Bidders. See Chapter 4, Section 4.1.B for additional information on developing a list of Potential Bidders. The Buyer should consider verifying whether any of the Potential 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 should identify additional JBE personnel who will be involved in the procurement. This may include:

- Technical experts;
- Personnel to help develop the Solicitation Document;
- Evaluation Team members; and
- Legal counsel, if applicable (see 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 for additional information on confidentiality/conflict statements.

STEP 4 – SELECT SOLICITATION DOCUMENT TYPE

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

- Phone Scripts
- RFPs

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

Solicitation Document	Procurement Size	Type of Procurement
Phone Script	Up to \$100,000*	IT goods
	Up to \$5,000	IT services
RFP	Any size procurement	IT goods, IT services, and any combination of IT goods and services

*A JBE may adopt a lower threshold on the use of Phone Scripts. Any lower threshold should be included in the JBE's local contracting manual.

STEP 5 – CONSIDER PHASED APPROACH

Note: This step is applicable to RFP-based procurements, but is inapplicable to Phone Script 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
- 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 which, 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 Solicitation Document. The Solicitation Document must comply with the applicable requirements set forth in Chapter 4, Section 4.2. In particular, it must include all provisions identified as required. 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. Phone Scripts

A Phone Script is used for straightforward procurements where Bids are solicited by phone or other method of electronic communication. The Buyer must prepare and use

a Phone Script (a narrative of the Bid requirements) so that each Prospective Bidder receives the same information informed and Bids may be evaluated fairly.

The Phone Script must:

- 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 phone, email, fax, etc.)
- 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 the JBE will follow 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 (this

- 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 must include:

- Product specifications;
- Description of when and where the IT goods are to be delivered; and
- Support and maintenance requirements.

Description of IT Services: The RFP must contain a description of the desired IT services (if any). The description must include:

- A clear, precise description of the work to be performed, services to be provided, problem to be solved, questions to be answered, issued to be addressed, or the goals and objectives to be met;
- An explanation of any desired approach to the problem, if any;
- 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 deliverable to be delivered (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 must identify any **minimum terms** in the JBE's terms

and conditions. Minimum terms are the terms so important that a proposed exception will render a Bid non-responsive. The RFP must require that Bidders identify all proposed exceptions (if any) to the JBE's terms and conditions. The RFP must state that a Bid that takes exception to a minimum term will be deemed non-responsive.

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 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: If a contract will provide for progress payments for IT goods or services to be manufactured or performed especially for the JBE and not suitable for sale to others in the ordinary course of the Vendor's business, the JBE must withhold a portion of the contract price until final delivery and acceptance of the IT goods or services. The amount withheld should normally be 10% of the contract price. If the JBE determines, after conducting a risk analysis, that the contract is low risk, the JBE may withhold a lesser amount. However, the JBE must withhold at least 5% of the contract price for contracts equal to or greater than \$10,000,000, and at least 3% of the contract price for contracts under \$10,000,000.

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, 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;
 - Resumes 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;
- Résumés 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;
- For cost-plus contracts with consultants, an estimate of time and manpower to be expended and the equipment and facilities to be utilized, if applicable; 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 must 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 must 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 are evaluated and given substantial weight in the score assigned to the Bid.
- If a material exception is taken to a minimum term, the Bid will be deemed non-responsive.

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% and cost should equal 50%.

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% 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% of the total points to cost. In other words, the JBE can award such contracts to the Responsible Bidder who submitted the lowest Responsive Bid after application of any preference, incentives, or discounts, if applicable.

JBEs may disclose details of the evaluation plan in the RFP, but they are not required to do so. Often, JBEs will disclose the categories that will be evaluated (price, experience, etc), but not the specific percentages assigned to each category.

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 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 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, OEM agreements, remarketing agreements) that may foreseeably allow the bidder 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:

Procurement for	Advertising required
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 or the services portion of the procurement is \$5,000 or more

A JBE may advertise any solicitation by posting an announcement:

- On its own website;
- In print media (such as relevant trade journals),
- On DGS’s BidSync system; or
- In any other place reasonably likely to be seen by Potential Bidders

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.

For more information regarding advertising, see Chapter 4, Section 4.1.D.

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 Potential 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 Phone Script 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 Phone Script solicitations.

A. 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 non-responsive 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.

B. Confidential Discussions with Bidder

Based on its review of the proposal(s), the Evaluation Team will prepare an agenda of items to be discussed 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 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 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 Step B ("Confidential Discussions with Bidder") will be repeated. The JBE may require the re-submission 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 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.

C. Evaluate Draft Bids

The Evaluation Team will 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 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 non responsive on a technicality.

STEP 10 – RECEIVE BIDS

Bids must be received and handled as described in Chapter 4, Section 4.3. 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. Phone Scripts

Bids must be submitted as specified in the Phone Script. The Buyer must document any Bids received. Both the Phone Script and the documentation regarding Bids must be retained in the procurement file.

Bids received pursuant to a Phone Script solicitation remain confidential until a Purchase Document is executed.

B. RFPs

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

Bids received pursuant to a RFP solicitation remain confidential until an intent to award notice is posted.

STEP 11 – OPEN BIDS

The JBE must first open the non-cost 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 non-cost portion of all Bids.

The sealed cost portion of a Bid will not be opened if the non-cost 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 Phone Scripts, which do not use sealed Bids.

STEP 12 – DETERMINE IF COMPETITION HAS BEEN ACHIEVED

When determining whether competition has been achieved, there is one method for Phone Scripts and another method for RFPs.

A. Phone Scripts

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 three 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 must 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 are fulfilled.

STEP 14 – 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 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 Phone Script solicitations. If the JBE otherwise requires clarification regarding a Bid, the JBE may contact the Bidder who submitted the

affected Bid.

STEP 15 – EVALUATE BIDS

The process of evaluating Bids differs significantly for Phone Scripts and RFPs. The JBE must evaluate the Bids in accordance with Chapter 4, Section 4.4, the Solicitation Document, and this Step. There is no requirement to award a contract 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.

See Chapter 3 for more information regarding the application of preference programs.

A. Phone Scripts

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.

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 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 its non-cost portion).
5. The Evaluation Team must evaluate the cost portion of the Bids opened in number 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.

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, or their technical competency.
- 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 which may be detrimental to the JBE.
- Professional qualifications of the personnel that 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 cost points set forth in Appendix A. Alternately, JBEs may adopt their own processes for awarding cost points.

Note: There are additional cost evaluation requirements for solicitations which 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 a Bidder's best financing alternative (including lease or purchase alternatives) if any Bidder so requests at least thirty 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.

Demonstration: The evaluation may also include a demonstration of some aspect of a Bid. 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 be determined by the 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 passed.

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.

STEP 16 – NOTICE OF INTENT TO AWARD

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. The JBE may, as a courtesy to Bidders, send a copy of the Notice of Intent to Award to each Bidder by email 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 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.

STEP 17 – CREATE THE PURCHASE DOCUMENT

The Buyer should memorialize the purchase using a Purchase Document. Negotiations should be limited to finalizing the form of agreement and non-substantive terms. The Purchase Document must be signed by an authorized representative of the Bidder who can bind the Bidder contractually.

STEP 18 – 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 4.5.

STEP 19 – MANDATORY REPORTING

There are two types of reports that may be required, depending on the dollar value of the procurement, discussed below.

A. CTA reporting

All administrative and infrastructure IT projects of the Judicial Council or the courts with total costs estimated at more than \$5,000,000 are subject to the review and recommendations of the California Technology Agency, as specified in GC 68511.9.

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B. BSA reporting

If the total cost of the purchase is \$1,000,000 or higher, the Buyer must notify the Bureau of State Audits (BSA) in writing of the existence of such contract. The JBE must make this notification within ten 10 days of execution of the Purchase Document. BSA may review the Purchase Document 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 projects of the Judicial Council and courts with total costs estimated at more than \$5 million.

SELECTED TOPICS RELEVANT TO THE SOLICITATION OF IT GOODS AND SERVICES

A. 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. 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, for example, when the JBE contracts with a Vendor to create a feasibility study. No Vendor (or subsidiary thereof) who makes such a recommendation may submit a Bid or be awarded a contract to provide those goods or services to the JBE. This “follow-on” prohibition does not extend to Vendors who were awarded a subcontract of the original consulting services contract that amounted to no more than ten percent of the total monetary value of the consulting services contract. To determine whether a follow-on situation exists, the initial and subsequent contracts must be examined.

Analysis of the initial contract: If the initial contract is not for consulting services, the prohibitions above do not apply. The following are examples of what are typically or not typically considered consulting services:

1. IT contracts typically considered a consulting services contract:
 - 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 a consulting services contract:
 - 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 it is a consulting services contract or not:
 - Acquisition specialist.

Note: While the examples above are typically characterized as indicated, contracts must be analyzed on a case-by-case basis. The essential issue is what the Vendor delivers, not how it is labeled.

In evaluating contracts on a case-by-case basis, 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 transmit information or analysis related to the governmental functions of a JBE?

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 Potential Bidder or withhold the award of a contract. Before determining to either reject a Potential Bidder or withhold an award of a contract, consultation with legal counsel is recommended.

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.

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

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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:

Bidder	Bid Amount
A	\$90,000
B	\$98,000
C	\$80,000

In this scenario, Bidder C submitted the lowest Bid and is awarded the maximum 60 cost points.

Bidder A is awarded 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 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



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Chapter 5
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NON-COMPETITIVELY BID (NCB) PROCUREMENTS

CHAPTER 5

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INTRODUCTION

In certain circumstances, 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 entity;
- Legal services;
- Certain LPAs;
- Purchases from a business entity operating a Community Rehabilitation Program (CRP); and
- Sole source.

This Chapter explains when NCB procurements are allowed and the processes required in conducting an NCB procurement.

DEFINED TERMS

The following defined terms are introduced in this Chapter. For definitions of the defined terms, please see the Glossary.

Approving Authority

Bid

Buyer

JBE

LPA

Phone Script

Sole Source Approver

Vendor

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 regarding fair and reasonable pricing in the procurement file. Unless otherwise required by the JBE's , no other documentation or approval is required.

Note: JBE personnel 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. A Phone Script is usually used for such procurements.

5.2 EMERGENCY PURCHASES

JBEs may purchase non-IT goods, non-IT services, or IT goods and services of any value in the event of an emergency without conducting a competitive procurement.

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.”

An emergency procurement must be approved in writing by the Approving Authority or his or her delegee. The Approving Authority (or delegee) should approve an emergency procurement only if he or she determines that an emergency (as defined in PCC 1102) exists.

When completing an emergency purchase, the Buyer must 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 price;
- 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 where 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 the purchase is being made from a governmental entity. Unless otherwise required by the JBE's , no other documentation or approval is required.

Note: Contracts with governmental entities cannot be used to circumvent bidding requirements. (PCC 10340(b)(3))

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 expert witnesses in connection with litigation.

The Buyer should note in the procurement file that the purchase is for legal services. Unless otherwise required by the JBE's , no other documentation or approval is required.

5.5 CERTAIN LPAs

JBEs must 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 purchase non-IT goods, non-IT services, or IT goods and services up to the maximum amount allowed under the LPA.

The Buyer should note in the procurement file the purchase is made through an LPA. Unless otherwise required by the JBE's , no other documentation or approval is required.

See Chapter 6 for further information on LPAs.

5.6 COMMUNITY REHABILITATION PROGRAMS

JBEs may purchase non-IT goods, non-IT services, and IT goods and services of any value from a business entity operating a Community Rehabilitation Program (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 WIC 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 must document its procurement file to support that the price offered by a CRP is fair and reasonable.

5.7 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 the non-IT goods, non-IT services, or IT goods and services are the only non-IT goods, non-IT services, or IT goods and services that meet the JBE's need.

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

The Buyer must submit a sole source request to the Sole Source Approver.

The sole source request must 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 .

The Sole Source Approver should approve 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 conduct the procurement as proposed. If the Sole Source Approver denies the sole source request, the Buyer must 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 , place restrictions on the use of sole source procurements or specify a form for sole source requests. If no form is specified in the , 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
- Competition 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 , 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 , 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 must place a copy of the repeat sole source authorization in the procurement file of any procurement of the affected non-IT goods, non-IT services, or IT goods and services.

5.8 TRIAL COURTS: PUBLIC INPUT REQUIREMENT

A trial court must seek input from the public at least 15 court days before execution of a NCB contract in an amount that exceeds the greater of \$400,000 or 10% of the 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 rule 10.620.



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Chapter 6
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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 public benefit entity. This chapter also addresses how a JBE may allow another government entity or not-for-profit public benefit entity to leverage a procurement undertaken by the JBE.

DEFINED TERMS

The following defined terms are used in this Chapter. For definitions, see the Glossary.

Leveraged Procurement Agreement (LPA)

Request for Offer (RFO)

6.1 BASICS

A. What is Leveraged Procurement?

“Leveraged procurement” is an alternative to competitive or NCB procurement and refers to undertaking and documenting a purchase of goods or services through:

- Collaboration with one or more other entities; or
- By “piggybacking” (not involving actual collaboration) on a procurement undertaken by another entity.

Typically, the purpose of leveraged procurement is to:

- Combine buying power, for example, to reduce pricing or improve terms and conditions; or
- Reduce administrative expense or delay.

An ancillary benefit of leveraged procurement is that non-IT goods valued at \$25,000 or more are awarded based on a “best value” (also known as “value effectiveness”) basis, instead of the “lowest responsible bidder” basis required under Chapter 4A (Step-by-Step Guide for the Procurement of Non-IT Goods).

A leveraged procurement arrangement is established when a purchaser of goods or services and a vendor enter into an agreement providing for another purchaser to purchase the goods or services on terms and conditions in the agreement. Leveraged

procurement agreements and arrangements are individually referred to in this chapter as an “LPA.”

B. When Is Leveraged Procurement Permitted?

A JBE may procure goods or services under the LPA of another purchaser only if the JBE determines that doing so is 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

LPA Pricing and Terms. As stated above, in connection with each procurement, 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 particular vendor may wish to promote its goods by making them available under a California Multiple Award Schedule (CMAS) agreement. The vendor may, however, offer better *prices* to customers that assure the vendor of a certain purchase volume (e.g., under a contract providing for a fixed purchase volume) or enter into a requirements contract. The vendor may also offer its other customers better *terms and conditions*, for example, to include acceptance testing by the customer. In fact, the vendor 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.

Administrative Fees. 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

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 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 Program. A JBE may undertake its own procurement and establish by agreement with the vendor that the vendor must extend the same pricing and terms to other JBEs.

To calculate the procurement amount for purposes of determining what procurement requirements apply (e.g., competitive or non-competitive solicitation, etc.) to establishing an LPA, a JBE uses only its own total estimated payments. 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 amount must not exceed the maximum dollar ceiling permitted by this Manual for the procurement method used to establish the LPA.

2. *DGS LPA Programs.*

JBEs may procure goods and services under a DGS LPA *if the vendor 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 vendors identified on the website. For reference, DGS LPA programs as of the time of publication are summarized below.

- a. LPAs that are not treated as competitively procured by DGS. The programs discussed below extend to multiple state departments and agencies 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 vendors 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 process.
 - **CMAS (California Multiple Award Schedules).** A multiple award contract is one that is awarded to multiple vendors 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 General Services Administration (GSA) multiple award schedule program. With agreement of the contractor, 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. LPAAs 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 vendors 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 vendors 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 maximums¹ in the chart below apply to use of the LPA:

Leveraged Procurement Agreement	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

¹DGS dollar maximums are exclusive of sales and use taxes, finance charges and costs, postage, handling, and shipping charges.

Software Licensing Program	N/A	N/A	\$2,000,000*
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*May be exceeded if the JBE’s Chief Procurement Officer and the particular LPA’s user instructions specify a higher maximum.

- 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.² JBEs are cautioned that a vendor’s published LPA pricing may already incorporate LPA administrative fees that the vendor 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 or not-for-profit public benefit entities may also have established LPAs. References in this manual to specific programs are not intended to preclude procuring off of LPAs of counties or other government entities, or not-for-profit public benefit entities 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:

Leveraged Procurement Agreement	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*

² Administrative fees are waived for CMAS purchase orders issued to California certified small businesses.

*May be exceeded if the JBE's Chief Procurement Officer 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 vendor will not agree to the JBE's certification requirements, or 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

Click [here](#) to link to AOC LPAs and related materials as of the time of publication.

Click [here](#) to link to DGS LPAs and related materials as if the time of publication.

B. Step-By-Step Guide to Procurement of IT and non-IT Goods and Services

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.

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 purchase document 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.

Note If Using DGS LPAs: The NSP provision is not included in contracts that are only for services or software.

Step 2—Estimate in good faith the projected total cost of what is to be procured.

Step 3—Identify by reasonable means, including reviewing AOC and DGS websites, at least three relevant LPAs, including at least one that includes a certified DVBE,³ and list them for comparison against one another. The listed LPAs must be similar enough that work, pricing, and terms and conditions are subject to reasonable comparison.

Special Rules if Using Certain 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 6.3) of DGS LPAs because, under DGS LPAs:

- Offers from different categories of DGS LPA programs may not be mixed when executing a single order;
- LPA types (e.g., CMAS or master agreement) may not be combined to obtain offers and select a vendor; and
- If purchasing off of a Statewide Contract or a WSCA Cooperative Agreements Program contract, it is not necessary to list or obtain offers from three vendors or to document best value.

If three relevant LPAs cannot be identified, the JBE must undertake an independent procurement (refer to chapters 2, 4, and 5), unless either:

1. (i) The JBE procures off an LPA that was originally procured using a competitive evaluation method, (ii) the JBE determines that pricing is fair and reasonable, (iii) documentation that supports the JBE's conclusion is retained in the procurement file, and (iv) either:
 - The procurement is for goods or services estimated to cost less than \$5,000;
 - 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 established by a JBE; or

³ The DVBE must perform a commercially useful function to be considered.

- The procurement is off an LPA established by a JBE or DGS, and the LPA or user instructions provides that multiple offers are not required to be compared.
2. (i) The JBE determines that pricing is fair and reasonable, (ii) documentation that supports the JBE's conclusion is retained in the procurement file, and (iii) applicable law (e.g., statute or rule of court) provides an independent basis for the exemption, for example, that availability may be limited under patent or copyright law.

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.⁴

Step 4—Obtain LPA documentation⁵ for the listed LPAs, and review it for applicable terms and conditions of use, including pricing⁶ and the term of the LPA. Using the documentation:

- 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 vendor 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;

⁴ Most DGS user instructions provide JBEs with a means to claim certain expenditures towards meeting DVBE goals or requirements, whether the vendor 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.

⁵ Documentation may include user instructions, contract terms and conditions, order documents, specifications, certifications, payee data records, registration and permits, references, etc.

⁶ Pricing may be fixed, or based on a discount to published prices. Be aware of cost of living or other adjustments.

- Confirm whether the vendor is a California certified DVBE, if applicable;⁷ and
- Obtain the vendor's signed Payee Data Record.

Step 5— If there are multiple LPAs vendors, determine what factors the JBE will use to compare the listed vendors against one another to determine “best value.” The “best value” comparison must include a comparison of pricing offered by the vendors 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 an LPA vendor's willingness to accept an order from the JBE, the JBE should first solicit specific offers from the listed LPA vendors by use of a Request for Offer (RFO)⁸ or similar document. An RFO may be formal or informal (e.g., a telephone script). The RFO must describe the JBE's business requirements (e.g., through a statement of work for services). To save the time and expense of negotiations after award, a written RFO and 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:

- 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.

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 vendors whose LPAs are not in the same type and category.

⁷ If documentation of a DVBE vendor from a DGS LPA is being reviewed and considered, the JBE must confirm the vendor's DVBE status through DGS's database.

⁸ An RFO is a document sent to LPA vendors to specify requirements for a specific transaction. The RFO requests a specific response or offer from the vendor based on the RFO.

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 LPA vendors 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—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 explanation⁹ as to why at least three vendors did not respond with offers. Even if a procurement is exempt from the comparative evaluation process (see step 2), conducting price comparisons among multiple vendors, if available, is encouraged.

Step 9—Determine what form of purchase document (e.g., a document similar to STD-65, or another document) the JBE will use to execute its purchase off of the LPA. Prepare the document, considering the LPA user instructions, any RFO, and any service provider offer. List all NSP items separately from the principal items. Finalize the purchase document, including separately and notify the vendor selected by the JBE that the JBE intends to award the contract to the vendor under the contract provided. After consulting with the vendor, make any mutually acceptable final revisions to the purchase document.

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.

⁹ Contact vendors as necessary to find out why they did not respond.

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 purchase document, and deliver it to the vendor.

Note: If using a contract requiring a mutual signature of the parties, the JBE should instead deliver an **unsigned** contract to the LPA vendor and countersign the contract upon its return.¹⁰

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 LPA vendors 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.

If the order or other purchase document is for a total cost of more than \$1 million, notify the State Auditor, in writing, of the existence of the purchase document within 10 business days of entering the contract. (PCC 19204(a))

C. Amendment of an LPA Purchase Document

An NCB process is required to amend an LPA order or other purchase document except to correct incidental errors or omissions, unless:

- A JBE may amend purchase documents executed under the terms of any option in the purchase document that provided 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.

¹⁰ A contract (instead of a PO) must be used to obtain the vendor’s commitment to deliver the goods or perform the service.

If amending a DGS CMAS purchase document: If the original purchase document permitted amendments, a JBE may amend the purchase document regardless of whether it specifies the changes permitted, subject, however, to the following limitations:

- This exception applies only to the first amendment;
- The purchase document may not be extended for more than one year;
- The amendment must not add more than 30 percent of the original order amount and may not exceed \$250,000.

If a JBE's purchase document leverages off an LPA that is substantially similar to a DGS CMAS contract, the rules and exceptions above for amending a CMAS purchase document apply to a JBE amending a purchase document under the LPA.



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PROTEST AND POST-AWARD DISPUTES

CHAPTER 7

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INTRODUCTION

There are two types of protests in JBE procurement: solicitation specifications protests and award protests. This chapter provides information on these types of protest and how they are handled by JBEs. This chapter also provides basic information for handling post-award disputes with Vendors.

DEFINED TERMS

The following defined terms are introduced in this Chapter. For definitions of the defined terms, please see the glossary.

Protest Hearing Officer
Protest Appeals Officer

7.1 DESIGNATION OF JBE PROTEST PERSONNEL

Each JBE must designate a Protest Hearing Officer to evaluate and issue written determinations regarding protests. Each JBE must 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 will act as the Protest Hearing Officer. If a JBE does not designate a Protest Appeals Officer, the Approving Authority will act as the Protest Appeals Officer.

7.2 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 Potential 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 due 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 Potential Bidder is solely responsible for ensuring that a solicitation specifications protest is received by the JBE by the deadline. The failure of a Potential Bidder to submit a timely solicitation specifications protest constitutes a waiver of the Potential 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 Potential Bidder or its representative (this must include name, address, and telephone number, and should include email address and facsimile 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 Potential 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 Potential 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 will not consider the new grounds or new evidence.

D. Submission of the Protest

The Potential 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 Potential Bidder must send the solicitation specifications protest by certified mail, registered mail, or overnight courier.

If allowed by the Solicitation Document, the Potential Bidder may also deliver the solicitation specifications protest personally to the JBE. If the solicitation specifications protest is personally delivered, a receipt must be provided to the Potential 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 Potential 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 Potential 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 Potential Bidders to respond, the addendum should extend the Bid Closing Date 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 Potential Bidder submits an appeal to the Protest Appeals Officer within two court days of the issuance of the Protest Hearing Officer's written determination.

See section 7.4 for the handling of appeals.

7.3 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% of a Bid's total score would be cost points, but the JBE instead made cost points only 30% 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 an award protest.

In no event will a JBE consider a protest if the JBE rejected all Bids or the solicitation was cancelled for any reason.

B. Deadline for Receipt of Protest

For any solicitation using a Phone Script, the deadline for the JBE to receive an award protest is before the contract is awarded. For solicitations using a written Solicitation Document, 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
<p>The JBE must receive the award protest within 24 hours after the JBE issues the intent to award.</p> <p>The Bidder will have 10 calendar days after the JBE receives the protest to submit all information in Section C below to the JBE.</p>	<p>The JBE must receive the award protest within 5 court days after the JBE issues the intent to award.</p> <p>The Bidder will have 5 calendar days after the JBE receives the protest to submit all information in Section C below to the JBE.*</p>	<p>The JBE must receive the award protest within 5 court days after the JBE issues the intent to award.</p> <p>The Bidder will have 10 calendar days after the JBE receives the protest to submit all information in Section C below to the JBE.</p>

* 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:

- Contact information of the Bidder or its representative (this must include name, address, and telephone number, and should include email address and facsimile 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 will 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.

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. If the materials are personally delivered, a receipt must be provided to the Potential 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 ten 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 must 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 5 calendar days of the issuance of the Protest Hearing Officer's written determination.

See section 7.4 for the handling of appeals.

The JBE may, at its sole discretion, delay the contract award until the appeal is resolved or proceed with the award and implementation of the contract.

7.4 APPEALS

The Protestor must send the appeal to the Protest Appeals Officer by certified mail, registered mail, or overnight courier. If allowed by the Solicitation Document, the Potential Bidder may also deliver the appeal personally to the JBE. If the appeal is personally delivered, a receipt must be provided to the Potential Bidder 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 Protestor 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 Protestor or its representative (this must include name, address, and telephone number, and should include email address and facsimile 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 Protestor wants the Protest Appeals Officer to consider.

The Protestor 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 will review the appeal and issue a written determination. 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 Purchase Document has been executed. Most often, post-award disputes arise due to contract performance issues on the part of either the Vendor or the JBE.

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 Purchase Document 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 Purchase Document, 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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CONTRACTS AND CONTRACT-RELATED DOCUMENTS

CHAPTER 8

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8.1 INTRODUCTION

This chapter identifies processes applicable to preparing and approving contracts, typical contracts and contract-related documents, and terms and conditions to be included in contracts and contract-related documents.

8.2 TERMINOLOGY

California law provides that a “contract” is “an agreement to do or not to do a certain thing.”¹ The basic elements of a contract are:

- There must be two or more parties to the contract;²
- Each of the parties must promise something of value to the other; and
- The promised value must be legal, and not involve an illegal or fraudulent act.

Other terms that describe contract-related documents are identified in the charts that are included in this chapter.

DEFINED TERMS

The following defined terms are used in this Chapter. For definitions of the defined terms, please see the Glossary.

Amendment
Certificate of Insurance
Certificate of Participation
Contract Certification Clauses (CCC)
Inter-governmental Contract (IGC)
Intra-branch Agreement (IBA)
Joint Powers Authority Agreement (JPA)
Leveraged Procurement
Memorandum of Understanding (MOU)
Payee Data Record
Purchase Order (PO)
Revenue Contract

¹ CCP 1549.

² In the case of a purchase order (PO) that is signed by just one party, the terms and conditions of the PO become binding when the other party accepts the terms and conditions by performing some action, for example, by delivering the goods referenced in the PO.

Scope of Work (SOW)
Short Form Agreement
Standard Agreement

8.3 PREPARATION, APPROVAL, AND EXECUTION OF CONTRACTS

To protect the public, California law does not recognize oral agreements by a state entity. All contracts entered into by JBEs must be in writing.

A. Review and Approval of Commercial Terms

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 must be prepared, negotiated, and amended in the best interests of the JBE by persons with appropriate skill and experience who are free from prohibited conflicts of interest.

Each Local Contracting Manual must establish processes and levels of approval authority to ensure responsible stewardship of public funds and guard against prohibited conflicts of interest. Consideration must be given to applicable legal requirements, financial and accounting standards, and best practices associated with contracting and procurement responsibility. Within these requirements, each JBE should consider its size and resources in establishing processes and levels of approval authority applicable when the JBE enters into, extends, terminates, amends, or transfers an existing contract.

B. Legal Review and Approval

All contracts to which a JBE is a party must conform to requirements of applicable law and this Manual. Sources of applicable law may include the U.S. and state constitutions; international treaties (and tribal law); the U.S. Code and federal regulations; the Commercial Code, the California Judicial Branch Contract Law (JBCL); the Government Code and other state codes; judge-made (common) law; and rules of court (ROC).

Contracts entered into by JBEs are not subject to review or approval by DGS.³ It is customary to provide for legal review and approval of contracts as a matter of risk management, however, and each JBE must establish criteria under which legal review and approval of contracts are required, which address at least the following items:

Dollar Value of Contract. Legal review and approval are required before executing a contract whenever the dollar value of the contract is above a certain dollar threshold. The applicable threshold should not be higher than the threshold set forth in the table attached as Appendix A to this chapter.

Performance of High-Risk Activities. Legal review and approval are required before the JBE executes a contract providing for the performance of high-risk activities, for example:

- Operating heavy equipment;
- Applying chemicals;
- Transporting, holding, or incarcerating a person;
- Treating, removing, storing, or any other handling of 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.

Certain Substantive Provisions Affecting Legal Risk. Legal review and approval are required before the JBE incorporates into a contract terms or conditions not previously approved by an attorney, or substitutes a contractor's terms or conditions for the JBE's own, if the proposed terms or conditions involve:

- Assuming a risk or contingent liability not under the direct control of the JBE;
- Indemnifying any contractor or third party;
- Narrowing any limitation of liability that favors the JBE as set forth in the JBE's standard terms and conditions;
- 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.

³ See PCC 19207.

Revenue Contracts. Revenue contracts include revenue, reimbursable, and 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 public or private entity, under which the JBE provides services and receives payment for the services.

Modification of Contracts. If a JBE extends, terminates, amends, or transfers a contract because of any failure of performance by a contractor, or that was required to be approved by an attorney, legal review and approval are required.

Contract Templates. If a JBE adopts contract templates, which are form contracts intended to be used on multiple occasions or with multiple contractors, legal review of those templates is required.

Sufficient time must be allowed for legal review. The actual amount of time required for legal review will depend on factors such as the nature and complexity of the transaction and contract, and how soon the work is required. When total costs under a contract are expected to be \$1,000,000 or more (or such lower threshold as may be established in any Local Contracting Manual), early involvement by counsel is required so that counsel can effectively advise procurement staff during the contracting process, including the drafting of solicitation documents and contract terms and conditions, negotiations with potential contractors, and evaluation of proposals. When applicable, contracts should include space on the signature page for counsel to indicate approval as to legal form.

JBEs may arrange for legal review by their in-house legal staff, retained counsel, or through the AOC/OGC.

C. Review of Certain IT Contracts

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 review and recommendations of the California Technology Agency, as specified in GC 68511.9. (PCC 19204(a))

D. Execution of Contracts

Contracts may be executed only by persons authorized to do so and in accordance with levels of authority established in each JBE's Local Contracting Manual. Contracts executed by persons without authority are void.

Contracts and contract documents must be complete before they are executed. Two or more originally signed counterparts of each contract are required, one for the JBE and one for each contractor. Other than purchase orders, contracts should when possible first be provided to the other party for signature and then delivered back to the JBE for countersignature and return to the contractor. Contracts may be executed in multiple counterparts if the contract so provides.

All 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 be paid for that work only if the effective date of the contract is no later than the date work begins.

8.4 TYPES OF CONTRACTS; TYPICAL CONTRACT DOCUMENTS

Contract documents have various labels that identify in a shorthand way what the particular document accomplishes and whether its use is appropriate in a particular circumstance. Labels typically used in state government for contracts and contract documents are described in the table below. The table does not list specific types of solicitation documents (covered in chapters 2-4), LPAs (covered in chapter 6), contract administration documents (covered in chapter 11), or reporting documents (covered in chapter 12).

1. Contracts Used with *Private Entities*. The contracts identified in the chart below are used primarily when contracting with private entities, including non-profit organizations (NPOs).⁴

⁴ An NPO is a privately chartered organization that does not distribute its profits or other surplus funds to owners or shareholders, but instead uses them to help pursue its stated goals. Examples of NPOs include charitable organizations, trade associations, and special purpose vehicles created to issue tax-exempt debt to build or maintain public infrastructure.

Name of Contract Document	Subject Matter of Contract Document	Description and Comment
Standard Agreement	Should be used to procure goods, software, and services, and to secure funding. Exceptions: (i) certain routine and low risk procurements for which a Short Form Agreement or PO may be used, and (ii) contracts between JBEs.	<p>A Standard Agreement may consist of a single “coversheet” executed by the parties and identified appendices incorporated by reference. Examples of typical appendices include: (i) “Statement of Work,” or “Description of Goods” or “Description of Software,” or “Scope of Agreement”; (ii) “Pricing and Payment” or “Cost of Work”; (iii) “General Terms and Conditions”; and (iv) “Special Terms and Conditions” applicable only to specific programs or services. For efficiency, General Terms and Conditions and Special Terms and Conditions may be incorporated into a contract by reference to terms and conditions a JBE publishes on a website.</p> <p>An alternative to the coversheet and appendices approach to a Standard Agreement is a single, fully integrated agreement.</p>
Short Form Agreement	May be used, when appropriate, for contracts under \$5,000 for routine and low-risk goods, services, software, and funding.	A Short Form Agreement uses less inclusive terms and conditions than those in the Standard Agreement. A Short Form Agreement should not be used, even if it may seem easier or faster to do so, in <i>any</i> of the following circumstances: (i) when there is any significant risk of non-performance or liability; (ii) for customized goods, services, or software; or (iii) when any “Special Provisions” are required (as described below).
Purchase Order (PO)	May be used, when appropriate, for purchases under \$5,000 of routine and low-risk goods and software	A PO is typically used to purchase commodity items. A PO is not signed by the vendor and the terms and conditions of a PO are less inclusive than those in a Standard

		<p>Agreement. A PO should not be used, even when it may seem easier or faster to do so, in any of the following circumstances: (i) when there is any significant risk of non-performance or liability, (ii) for customized goods or software, (iii) when any “Special Provisions” are required (as described below); or (iv) when the JBE requires an advance commitment from the vendor. When a PO is appropriate, a Blanket Purchase Order (BPO) can be used instead to authorize multiple orders over a specified period of time, as long as the total dollars on the BPO are not exceeded.</p> <p>POs may occasionally include routine, low-risk services that are ancillary to the goods that are purchased.</p>
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2. Contracts Used with *Public Entities*. The contracts listed below are used primarily when contracting with public entities, including public benefit organizations (PBOs).⁵

Name of Contract Document	Subject Matter of Contract Document	Description and Comment
Leveraged Procurement Agreement (LPA)	Goods, services, and software	A contract developed with the intent that other entities will purchase off of it. See Chapter 6.
Intergovernmental Contract (IGC); Memorandum of Understanding (MOU); Joint	Goods, services, software, and funding	The term IGC is used to describe contracts among public entities or between a JBE and an NPO, ⁶ but not contracts between JBEs only (which are referred to as Intra-branch Agreements, or IBAs). An IGC is a variation

⁵ A PBO is an organization chartered by a public entity and designed to perform some public benefit such as building or maintaining public infrastructure, or raising bond money for those purposes, for example, certain local transportation authorities.

⁶ A JBE may elect to use a Standard Agreement when contracting with other non-JBE public entities or NPOs when circumstances warrant doing so.

Powers Authority Agreement (JPA)		<p>of a Standard Agreement tailored for use with public entities and NPOs.</p> <p>Note: Executive branch entities use the term “inter-governmental contract or agreement” (IA) in narrower circumstances.⁷</p> <p>The term MOU is often used to describe contracts for county services and other contracts with public entities and NPOs.</p> <p>A JPA is a contract between two or more public entities for the purpose of jointly exercising any power common to them.</p>
Intra-branch Agreement (IBA)	Goods, services, software, and funding	<p>An IBA is a contract between judicial branch entities. IBAs generally involve the movement of previously appropriated funds from one entity to another as permitted by the applicable Budget Act for programs or services to be performed by a JBE.</p> <p>Note: Even though JBEs are in the same branch of government, if ownership of goods is transferred or licenses of intellectual property are granted, care must be taken to ensure appropriate provisions are included.</p>

3. Amendments. The document identified below is used when amending a contract with a private or public entity.

Name of Contract Document	Subject Matter of Contract Document	Description and Comment
Amendment	Should be used for changes made to a contract after it is executed	Before contracts are executed, they should be carefully planned and structured to control both project cost and scope without amendment. Amendments should be used, however, when appropriate and in the best interests of the JBE. ⁸

⁷ The SCM uses the term “IA” solely to refer to contracts among state entities specified in GC 11270.

⁸ If a contract contains an option, the exercise of that option is not an amendment of the contract but should nevertheless be in writing.

4. Contract-related documents. Below are examples of commonly used contract-related documents.

Name of Document	Use in What Types of Contract Documents	Description and Comment
Contractor Certification Clauses (CCC)	All	Used to document contractor's legal status and compliance with applicable law. When used as a separate document, the contractor must complete the CCC as part of the standard contract package. Alternatively, the substance of CCC may be included as "representations and warranties" in the contract document.
Certificate of Insurance	Applicable if a contract requires coverage for which insurance certificates are issued by insurers (see section 8.6, below)	Often required of private entities. JBEs typically do not maintain insurance for various risks. In lieu of a Certificate of Insurance, JBEs (other than HCRC) can provide a Certificate of Participation in the Judicial Council's Litigation Management Program. ⁹
Certificate of Participation (Judicial Council's Litigation Management Program)	Applicable if requested by the contractor	See "Certificate of Insurance," above.
Payee Data Record	All contracts with private entities. (Not applicable to contracts with public entities.)	Used primarily in connection with tax withholding. Must be completed and signed by private entity contractors as part of the standard contract package.

⁹ A duly signed certificate may be obtained by contacting AOC/OGC, or a person who has responsibility for judicial branch risk management. Alternatively, any JBE may prepare and execute its own Certificate of Participation if that arrangement is acceptable to the receiving party.

8.5 SUBSTANCE OF CONTRACTS

Substantive requirements and recommendations vary according to the type of contract used by the JBE. Considering the following questions can help inform decisions about the provisions to include in a particular contract:

- Is the object of the contract goods, services, information technology, or funding?
- Does the contract require the JBE to undertake large or small legal risks (e.g., low versus high risk activities) and commercial risks (e.g., the expenditure of small or large sums of public money)?
- Is the other party a private entity, which has a basic legal duty to maximize profits, or another public entity, which shares with the JBE a duty to maximize public benefits? If a public entity, does that entity share the JBE's primary mission or source of funding?
- To what extent do legal requirements apply equally to the JBE and the contractor, regardless of the substance of specific contract terms and conditions?

A. All Contracts

1. Overview of Substantive Provisions. Provisions typically fit within one or more of the following subject matter categories found in a contract:
 - Statement of Work, which is a detailed description or reference to the object of the contract (e.g., goods, services, information technology, funding);
 - Pricing and Payment Provisions;
 - General Terms and Conditions;
 - Special Terms and Conditions, which are provisions applicable specifically to the particular object of, or parties to, a contract and may be expressed separately or as part of a Statement of Work; and
 - Definitions of terms used in the contract.
2. Types of Contract Provisions. The types of provisions typically found in all contracts are:
 - Recitals (aka background): These provisions, though not necessarily expressed as terms and conditions of a contract, may be used to provide context and are given legal effect under California law. (Use past tense verbs or words expressing purpose, such as "intent.")

- **Conditions:** These provisions provide for an event to take place before a promise must be performed. (Use words such as “if.”)
- **Covenants (aka promises):** These provisions establish the contractors’ promises to be performed during the term or, if contained in a “survival” clause, following expiration of the contract. (Use “shall” or “must” to impose an obligation on the subject of the sentence.)
- **Certifications (aka representations and warranties) and acknowledgments:** Because these provisions are effective only as of the time the contract initially takes effect, a covenant is also necessary to assure that they remain true during the term of the contract. (Use present tense verbs, e.g. “complies.”)
- **Product warranties (aka service level agreements):** These provisions provide assurances of the quality of the goods or work product and are accompanied by remedies for nonconformance. Consequently, they should be included as appropriate in any “survival” clause.

JBEs should draft contract provisions so it is clear which type of provision is intended.

B. Standard Agreements

Standard agreements should include the following provisions, as applicable:

1. Scope of Work (SOW).

a. The following provisions may be part of the SOW, as applicable:

- Overview and purpose of goods, services, information technology, or funding to be provided;
- Detailed description of goods, information technology, services to be performed, funding to be provided, and other objects of the contract, for example:
 - Specifications, requirements;
 - Results, deliverables;
 - Optional items, if any;
 - Timelines, progress reports;
- Personnel and staffing (e.g., making reference to attached resumes of contractor personnel);
- Location for performance;

- Coordination;
- Terms of shipping, packaging requirements;
- Delivery, inspection, evaluation, acceptance;
- Product warranties, detailed service level agreements or performance criteria;
- Performance bonds;
- Term and any option period;
- Identification of the parties' representatives;
- Where notices should be directed.

b. Related Policies and Recommendations:

- The contract must specifically describe services to be performed, deliverables to be completed, and other related contract obligations. Any inclusions or exclusions should be listed. Details such as supervision, labor, equipment, or materials to be supplied by either party should also be specified. Additional descriptive information may be attached to the contract as an exhibit to help define the scope of work and the terms and conditions by which services are to be performed.
- The term of the IGC must be clearly stated. The contract must also state the start date and end date for the work to be performed. If applicable, dates for the completion of contract milestones should also be set forth.

2. Pricing and Payment

- a. The following provisions may be part of the Pricing and Payment provisions, as applicable:
- Invoicing and payment provisions, for example:
 - Not to exceed amount of fees, prices, and costs;
 - Basis of pricing such as fee schedules;
 - Allowable and unallowable expenses;
 - Cost substantiation, as applicable;
 - Payment frequency, progress payments, as applicable;
 - Retentions, withholding;

- Budget contingency clauses;
- Entire compensation clause.

b. Related Policies and Recommendations:

- Any cost payable may be expressed as a lump sum (i.e., one-time payment), firm fixed price, unit price, labor rate, or other specific basis for establishing and/or allocating costs. The contract must state the basis on which costs are to be determined. For example, 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 stated.
- Lump sum and firm fixed price contracts should include a schedule of billing rates if the schedule will be used to establish the price of authorized work.
- The schedule and procedure to be followed in making payments under the contract should be stated. Payments may be made based on delivery, or on completion of specified milestones. Payments may also be withheld (“retention”) until particular disputes are resolved, or specified goods or services that are acceptable to the receiving party are provided.
- Respecting IGCs only, JBEs must assure that all administrative fees are reasonable considering the services being provided. JBEs may only pay overhead charges on the first \$25,000 for each subcontract.

3. General Terms and Conditions:¹⁰

a. The following provisions may be part of the General Terms and Conditions, as applicable:

- Representations and warranties (or incorporation by reference of contractor certification clauses). (See section 8.6 A and Appendix B.) Also add a covenant that requires representations and warranties to remain true during the term, as applicable;
- Non-discrimination clause;*
- Loss leader;*
- Antitrust claims, if applicable;*

¹⁰ Sample language for provisions with asterisks (*) is included in Appendix C to this chapter.

- Recycling;*
- Priority hiring considerations;*
- DVBE (if a DVBE or a DVBE prime (see chapter 3));*
- Union activities;*
- Indemnity of judicial branch entities and judicial branch persons, as defined, against negligence or breach by contractor;
- Contractor insurance (employer's liability insurance or self-insurance to the extent required under Labor Code section 3700, plus any other required insurance, see section 8.6B, below);
- Default and remedies provisions (including, contractor continuation of performance during dispute);
- Termination for default, non-appropriation, or convenience of JBE;
- Effect of expiration or termination; survival clauses;
- Prohibition on assignment and subcontracting; Successors;
- Independent contractor clause;
- Personnel and background checks;
- Audit and records provisions;
- Ownership of results, rights in work product;
- Confidentiality; publicity;
- Choice of law;
- Amendment and waiver;
- Authority and binding effect;
- Unenforceable provisions (aka severability clause);
- Construction of Agreement (aka, negotiated agreement and headings clause);
- Time of the essence;
- Entire agreement;
- Counterparts.

b. Related Policies and Recommendations

- Audit and records provisions must 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.

4. Special Terms and Conditions: Certain contracts, listed below, require the addition of “special terms and conditions.” Special terms and conditions can be included in a separate “Special Terms and Conditions” appendix or section, or an existing appendix or section, as appropriate, such as “Scope of Work,” “Pricing and Payment,” or “General Terms and Conditions.” If a single contract fits into more than one category of contract below, then it must contain special terms and conditions applicable to each of them. The substance of special terms and conditions is set forth in Appendix D.

- Credit Card Issuer Contracts
- Consulting Services Contracts
- IGCs with California Public Entities (Excludes IBAs)
- IGCs with Local Public Entities
- IGCs with Local Public Entities For County Services
- IGCs (with All Public Entities)
- Legal Services Contracts
- Amendments
- Federally Funded Contracts
- Contracts Requiring Insurance
- Janitorial/Building Maintenance Contracts: Additional Requirements
- Subvention And Local Assistance Contracts
- Contracting For Students
- Commercial Office Moving Services
- Elevator Maintenance Contracts
- Information Technology Contracts

5. Definitions: Capitalized terms should be defined in the contract. JBEs may attach a glossary of capitalized terms for easy reference.

Note: A fundamental rule of drafting is that definitions should not contain promises or make representations.

Note: The above list of provisions 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.

C. Short Form Agreement

The Short Form Agreement may omit provisions inapplicable to contracts of \$5,000 or more, as set forth in this chapter. Other provisions that may be excluded or considered for exclusion, except as otherwise required by applicable law, include:

- Certain representations and warranties that are specified in Exhibit B as not applicable to contracts of less than \$5,000, or not applicable to the subject matter;
- Antitrust claims;*
- Priority hiring considerations;*
- Detailed insurance requirements (except employer's liability insurance or self-insurance to the extent required under Labor Code section 3700);
- Termination for default;
- Confidentiality; and
- Counterparts.

Consideration may be given to drafting remaining provisions with less detail or combining them to the extent the particular language or detail is not expressly required by law or included for policy reasons.

D. Purchase Orders

See Short Form Agreement, above, for a description of provisions that may be shortened or omitted. Similar considerations may be given to preparing POs.

E. Leveraged Procurement Agreements

See chapter 6 for a description of the various types of LPAs. When a JBE establishes an LPA, the terms and conditions of the Standard Agreement should be used.

F. IGCs

IGCs need not include provisions that are inapplicable to public entities, as set forth in this chapter. Other provisions may be excluded or considered for exclusion appropriately, except as required by applicable law or included for policy reasons, for example:

- Representations and warranties that are specified in Appendix B as not being applicable to public entities;
- Indemnity;
- Insurance;
- Default and remedies provisions, except provisions requiring contractor continuation of performance during disputes;
- Termination for default or convenience;
- Successors;
- Independent contractor clause;
- Publicity; and
- Counterparts, if the contract is not executed in counterparts.

Consideration may be given to drafting remaining provisions with less detail or combining them to the extent the particular language or detail is not expressly required by law or included for policy reasons.

G. IBAs

IBAs typically serve as funding agreements for programs or other uses approved by the Judicial Council. It is essential to describe the permitted uses of funds and any conditions associated with their use, and to prohibit other uses. Most Standard Terms and Conditions and Special Terms and Conditions may be omitted, however, unless desired for policy reasons.¹¹ Provisions that should not be omitted, even if not required, are:

- Prohibition on assignment and subcontracting;
- Audit and records provisions;
- Ownership of results, rights in work product;
- Amendment and waiver;
- Authority and binding effect; and
- Entire Agreement.

The following provision may be added:

- Dispute Resolution by Informal Means

¹¹ IBAs generally involve the movement of previously appropriated funds from one entity to another as permitted by the applicable Budget Act for programs or services to be performed by an IBA.

H. Amendments

An amendment to original contracts is necessary when there is any change or modification to the original. Examples of when amendments are required include:

- A change in shipping terms;
- An assignment of rights or duties;
- A substitution of permitted subcontractors;
- The addition or subtraction of work or goods, or a change in specifications;
- An increase or decrease in pricing, allowable costs, or change to other payment provisions;
- An extension of the contract except upon exercise of options in the original; and
- A mutually agreed cancellation or termination of the contract.

Contract changes must be formally documented in a mutually executed written amendment. Emails, letter correspondence, and oral notification between parties is insufficient to amend a contract. Certain additional requirements apply to amendments, as follows:

- An amendment must be within the original scope of the contract solicitation. If it is not, it must be analyzed as an NCB procurement and treated as such if permitted. Changes to quantity, pricing, products, etc. are treated as scope changes;
- An amendment must be effective as of a date before the time for performance or delivery of the affected goods or services; and
- An amendment to extend a contract must be processed before the contract expiration date and retain the same start date.

8.6 ANCILLARY CONTRACT DOCUMENTS

A. Contractor Certification Clauses

Contractor certification clauses are set forth in Appendix B. As required, the clauses may be attached as an appendix to a contract or posted on a public website and incorporated by reference into general Terms and Conditions, or they may be included as representations and warranties directly in the contract.

B. Certificates of Insurance

Contractors must agree to purchase and maintain insurance, naming the JBE and “judicial branch persons” (as defined) as additional insureds, in any contract that involves high-risk activities, and the following contracts:

1. Any contract with a provision whereby the JBE agrees to indemnify or save harmless any party to the contract or any third person against or on account of any claim, liability, or matter arising out of, or connected with the contract.
2. Any contract with a provision with a provision whereby the JBE agrees to assume responsibility for matters beyond its control (e.g., in rental contracts, a promise to assume full responsibility for damage to rented equipment, regardless of the cause of damage).
3. Any contract with a provision calling for payment of rental or other services in advance.
4. Any contract with a provision creating a contingent liability against the state (e.g., vendors’ printed rental contracts frequently contain clauses obligating the user of rented equipment to serious contingent liabilities).
5. Any contract with a provision for rental of equipment imposing any financial obligation or liability on a JBE other than the payment of rent, transportation costs, and costs of maintenance and repairs.
6. Contracts for micrographics (any type of microform such as microfilm, microfiche, etc.) and/or optical disk services, storage, or hardware rental that have not been certified by the state Office of Information Services (OIS) as complying with applicable micrographics requirements.

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If a contractor is required to purchase and maintain insurance, the contractor must submit to the JBE a Certificate of Insurance before starting work under the contract. This requirement does not apply to Employer’s Liability Insurance.

C. Certificates of Participation (Judicial Council Litigation Management Program)

A contractor may appropriately request a certificate of insurance from a JBE under circumstances similar to those when a JBE would request one of a contractor. For example, a request is sometimes made when a JBE rents a room for an event. Because JBEs do not typically maintain commercial general liability insurance, AOC/OGC makes available a certificate stating that the JBE participates in the Judicial Council Litigation Management Program in lieu of maintaining insurance.¹² AOC/OGC or the JBE can complete and deliver the certificate.

Note: Participation in the Judicial Council Litigation Management Program is not the same as maintaining self-insurance, which typically involves accruing funds for risk management purposes. JBEs should not certify that they are self-insured.

D. Payee Data Record

This form must be completed by all private entity contractors.

¹² Not applicable to HCRC.

APPENDIX A

CONTRACT DOLLAR THRESHOLDS ABOVE WHICH LEGAL REVIEW AND APPROVAL ARE REQUIRED

All contracts are subject to legal review when the contract value is at or above the dollar thresholds identified below. “Contract value” refers to the total amount anticipated under the contract, including amendments, not merely the initial award.

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)
Approved Form Contract (model contracts pre-approved for specific types of procurements)	\$500,000	\$500,000	\$500,000	\$500,000	\$500,000	\$500,000
General Form (contracts comprised of pre-approved terms/conditions)	\$300,000	\$300,000	\$300,000	\$300,000	\$300,000	\$300,000
Vendor Contract Terms (contracts proposed by the vendor and not containing provisions requiring legal review under section B)	\$200,000	\$200,000	\$200,000	\$200,000	\$200,000	\$200,000

APPENDIX B**STANDARD CONTRACTOR CERTIFICATION CLAUSES**

Contractors must represent and warrant that the following statements, as applicable, are true; however, any exceptions may be set forth in an appendix, and the JBE may enter into the contract if doing so is in the best interests of the JBE and the exceptions do not render all or any substantial part of the contract void, voidable, or otherwise unenforceable by the JBE.

- A. No Gratuities.** Contractor has not directly or indirectly offered or given any gratuities (in the form of entertainment, gifts, or otherwise), to any JBE personnel with a view toward securing this Agreement or securing favorable treatment with respect to any determinations concerning the performance of this Agreement.
- B. No Conflict of Interest.** Contractor has no interest that would constitute a conflict of interest under California Public Contract Code sections 10365.5, 10410 or 10411, Government Code sections 1090 et seq. or 87100 et seq., or under California Rules of Court 10.103 or 10.104, which restrict employees and former employees from contracting with JBEs.
- C. Authority.** Contractor has authority to enter into and perform its obligations under this Agreement, and Contractor's signatory has authority to bind Contractor to this Agreement. This Agreement constitutes a valid and binding obligation of Contractor, enforceable in accordance with its terms.

FOR PRIVATE ENTITIES ONLY, ADD: Contractor is qualified to do business and in good standing in the State of California.

FOR PUBLIC ENTITIES ONLY, ADD: Attached is a true copy of the code, rule, resolution, order, motion, or ordinance authorizing Contractor to enter into or execute this Agreement.¹³

- D. No Interference with Other Agreements.** This Agreement does not constitute a conflict of interest or default under any other of Contractor's other agreements.
- E. No Litigation.** No suit, action, arbitration, or legal, administrative, or other proceeding or governmental investigation is pending or threatened against or

¹³ When performance by a local government entity will be completed before any payment by the JBE (e.g., for room rental or one-time event), a resolution or other authority is not required to be attached. (See also SCM 3.06)

affecting Contractor, or Contractor's business, financial condition, or ability to perform this Agreement.

- F. Compliance with Laws.** Contractor is in compliance in all material respects with all laws, rules, and regulations applicable to Contractor's business and services, and pays all undisputed debts when they come due.
- G. Work Eligibility.** All personnel assigned to perform this Agreement are able to work legally in the United States and possess valid proof of work eligibility.
- H. Drug Free Workplace.** Contractor provides a drug-free workplace as required by California Government Code sections 8355 through 8357.
- I. No Harassment.** Contractor does not engage in unlawful harassment, including sexual harassment, with respect to any persons with whom Contractor may interact in the performance of this Agreement, and Contractor takes all reasonable steps to prevent harassment from occurring.
- J. Employment Laws.** Contractor complies with the federal Americans with Disabilities Act (42 U.S.C. 12101, et seq.), and California's Fair Employment and Housing Act (California Government Code sections 12990 et seq.) and associated regulations (California Code of Regulations, title 2, sections 7285 et seq.).
- K. Non-discrimination.** Contractor does not unlawfully discriminate against any employee or applicant for employment because of age (40 and over), ancestry, color, creed, disability (mental or physical) including HIV and AIDS, marital or domestic partner status, medical condition (including cancer and genetic characteristics), national origin, race, religion, request for family and medical care leave, sex (including gender and gender identity), and sexual orientation. Each subcontract authorizing work under this Agreement contains this provision.
- L. National Labor Relations Board** [not applicable to public entities]. No more than one, final unappealable finding of contempt of court by a federal court has been issued against Contractor within the immediately preceding two-year period because of Contractor's failure to comply with an order of a federal court that orders Contractor to comply with an order of the National Labor Relations Board. (PCC 10296)
- M. Sweatfree Code of Conduct** [applicable only to Contractors contracting for the procurement or laundering of apparel, garments or corresponding accessories, or the procurement of equipment, materials, or supplies, other than procurement related to a public works contract].

1. No apparel, garments or corresponding accessories, equipment, materials, or supplies furnished to the judicial branch under this Agreement have been laundered or produced in whole or in part by sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor, or with the benefit of sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor. Contractor further declares under penalty of perjury that it adheres to the Sweatfree Code of Conduct as set forth on the California Department of Industrial Relations website located at www.dir.ca.gov, and Public Contract Code Section 6108. This declaration is made under penalty of perjury.
 2. Contractor agrees to cooperate fully in providing reasonable access to the contractor's records, documents, agents or employees, or premises if reasonably required by authorized officials of the contracting agency, the Department of Industrial Relations, or the Department of Justice to determine Contractor's compliance with the requirements under paragraph (a).
- N. Child Support Compliance Act** [not applicable to public entities; not applicable to contracts of \$100,000 or less].
1. Contractor recognizes the importance of child and family support obligations and shall fully comply with all applicable state and federal laws relating to child and family support enforcement, including, but not limited to, disclosure of information and compliance with earnings assignment orders, as provided in Chapter 8 (commencing with section 5200) of Part 5 of Division 9 of the Family Code; and
 2. Contractor, to the best of its knowledge, is fully complying with the earnings assignment orders of all employees and is providing the names of all new employees to the New Hire Registry maintained by the California Employment Development Department.
- o. Discharge Violation** [not applicable to public entities]. Contractor is not in violation of any order or resolution not subject to review promulgated by the State Air Resources Board or an air pollution control district; or subject to any cease and desist order not subject to review issued pursuant to Section 13301 of the Water Code for violation of waste discharge requirements or discharge prohibitions. Contractor has not been finally determined to be in violation of provisions of federal law relating to air or water pollution.

- P. Electronic Waste Recycling Act of 2003** [applicable only to contracts for the purchase or lease of covered electronic devices]. Contractor complies with the requirements of the Electronic Waste Recycling Act of 2003, Public Resources Code section 42460 et seq., relating to hazardous and solid waste. Contractor maintains documentation and provides reasonable access to its records and documents that evidence compliance. (PRC 42480)

APPENDIX C**CERTAIN GENERAL TERMS AND CONDITIONS**

Loss Leader. If this Agreement involves the furnishing of equipment, materials, or supplies, Contractor shall comply with the Public Contract Code section set out below.

Contractor shall not sell or use any article or product as a “loss leader” as defined in Section 17030 of the Business and Professions Code. (Public Contract Code section 10344(e).)

Antitrust Claims. If services or goods under this Agreement were obtained by means of a competitive bid, Contractor shall comply with the requirements of the Government Codes sections set out below.

a. The Government Code chapter on antitrust claims contains the following definitions:

- "Public purchase" means a purchase by means of competitive bids of goods, services, or materials by the state or any of its political subdivisions or public JBEs on whose behalf the Attorney General may bring an action pursuant to subdivision (c) of Section 16750 of the Business and Professions Code.
- "Public purchasing body" means the state or the subdivision or agency making a public purchase. (GC 4550)

b. Contractor shall assign to the purchasing body all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, materials, or services by Contractor for sale to the purchasing body pursuant to the bid. Such assignment shall be made and become effective at the time the purchasing body tenders final payment to the bidder. (GC 4552)

- c. If an awarding body or public purchasing body receives, either through judgment or settlement, a monetary recovery for a cause of action assigned under this chapter, the assignor shall be entitled to receive reimbursement for actual legal costs incurred and may, upon demand, recover from the public body any portion of the recovery, including treble damages, attributable to overcharges that were paid by the assignor but were not paid by the public body as part of the bid price, less the expenses incurred in obtaining that portion of the recovery. (GC 4553).
- d. Upon demand in writing by the assignor, the assignee shall, within one year from such demand, reassign the cause of action assigned under this part if the assignor has been or may have been injured by the violation of law for which the cause of action arose and (a) the assignee has not been injured thereby, or (b) the assignee declines to file a court action for the cause of action. (See GC 4554.)

Recycling Certification. If products, materials, goods, or supplies are offered or sold to the judicial branch entity under this Agreement, Contractor shall comply with the requirements of the Public Contract Code sections set out below.

Upon request, Contractor shall certify in writing under penalty of perjury, the minimum, if not exact, percentage of post consumer material as defined in the Public Contract Code section 12200, in products, materials, goods, or supplies offered or sold to the judicial branch entity regardless of whether the product meets the requirements of Public Contract Code Section 12209. With respect to printer or duplication cartridges that comply with the requirements of section 12156(e), the certification required by this subdivision shall specify that the cartridges so comply. (Public Contract Code section 12205)

Priority Hiring Considerations. If this Agreement includes services in excess of \$200,000, Contractor shall give priority consideration in filling vacancies in positions funded by this Agreement to qualified recipients of aid under Welfare and Institutions Code section 11200 in accordance with Public Contract Code section 10353.

DVBE Participation Certification. If for this Agreement Contractor made a commitment to achieve disabled veteran business enterprise (DVBE) participation, then Contractor must within 60 days of receiving final payment under this Agreement (or within such other time period as may be specified elsewhere in this Agreement) certify in a report to the judicial branch entity: (1) the total amount the prime Contractor received under the Agreement; (2) the name and address of the DVBE(s) that participated in the performance of the Agreement; (3) the amount each DVBE

received from the prime Contractor; (4) that all payments under the Agreement have been made to the DVBE; and (5) the actual percentage of DVBE participation that was achieved. A person or entity that knowingly provides false information shall be subject to a civil penalty for each violation. (Military & Veterans Code section 999.5(d); Government Code section 14841.)

Union Activities. As required under Government Code sections 16645-16649, Contractor shall:

- a) Include with any request for cost reimbursement from state funds a certification that the Contractor is not seeking reimbursement for costs incurred to assist, promote, or deter union organizing;
- b) Not assist, promote, or deter union organizing by employees performing work under state contracts;
- c) Not use state funds received under this Agreement to assist, promote or deter union organizing;
- d) Not, for any business conducted under this Agreement, use any state property to hold meetings with employees or supervisors, if the purpose of such meetings is to assist, promote, or deter union organizing, unless the state property is equally available to the general public for holding meetings; and
- e) If Contractor incurs costs, or makes expenditures to assist, promote, or deter union organizing, maintain records sufficient to show that no reimbursement from state funds has been sought for these costs, and provide those records to the Attorney General upon request.

APPENDIX D**SPECIAL TERMS AND CONDITIONS**

Refer to section 8.5 B.4 for an explanation of this appendix. Contracts with the contractors listed below should include the substance of the provisions set forth in this appendix.

1. Credit Card Issuer Contracts
2. Consulting Services Contracts
3. IGCs with California Public Entities (Excludes IBAs)
5. IGCs with Local Public Entities
6. IGCs with Local Public Entities for County Services
7. IGCs (with all Public Entities)
8. Legal Services Contracts
9. Amendments
10. Federally Funded Contracts
11. Contracts Requiring Insurance
13. Janitorial/Building Maintenance Contracts: Additional Requirements
14. Subvention and Local Assistance Contracts
15. Contracting for Students
16. Commercial Office Moving Services
17. Elevator Maintenance Contracts
18. Information Technology Contracts

1. CREDIT CARD ISSUER CONTRACTS

GC 6159 (c) establishes the minimum requirements that must be met when a JBE enters into a contract with a credit card issuer allowing the court to accept payments by credit card. These contracts must define:

- The respective rights and duties of the trial court 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.
- Other matters that may be agreed upon by the parties.

For trial courts: additional information regarding credit card payments is set forth in the *Trial Court Financial Policies and Procedures Manual*, Policy Nos. FIN 10.01 Revenue Collection and Distribution, and FIN 10.02 Cash Handling.

2. CONSULTING SERVICES CONTRACTS

a. Definition. A consulting services contract (aka “consultant services contract”) is a services contract of an advisory nature that provides a recommended course of action or personal expertise, for example if the contract calls for a product of the mind rather than the rendition of mechanical or physical skills. The product may include anything from answers to specific questions to the design of a system or 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 do not include:

- Contracts between JBEs and the federal government (PCC 10335.5);
- 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).

b. Contract Provisions.

- **REQUIREMENTS.** The following are requirements:
 - The contract must require the contractor to provide a detailed analysis of the costs of performance of the contract.

- Consulting services contracts of \$1,000 or more must contain detailed performance criteria and a schedule for performance. The contract must also require progress reports or meetings on a regular basis to allow the JBE to determine whether the consultant is on the right track and the project is on schedule, to provide communication of interim findings, and to afford opportunities for airing difficulties or special problems encountered so that remedies can be developed quickly.
- Consulting services contracts of \$5,000 or more must:
 - Have attached as part of the contract a completed resume for each “contract participant who will exercise a major administrative role or major policy or consultant role, as identified by the contractor”; and
 - State that the JBE shall evaluate the contractor’s performance.¹⁴ (PCC 10367, 10369)
- **RECOMMENDATIONS.** A consulting services contract should contain:
 - A clear description of the work to be done or the problem to be solved;
 - What the consultant 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 consultant 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;
 - A dispute resolution clause that outlines the steps to be taken by each party in the event a dispute arises; (PCC 10381)

¹⁴ Evaluations and any contractor responses on file with a JBE are not public records and should be maintained in a separate file.

- Final meeting requirements between the contractor and JBE management (only if the contractor is to present findings, conclusions, or recommendations);
- Final report requirements that require the contractor to submit a comprehensive final report (only if applicable);
- The identity of the project coordinator or manager.

3. IGCs WITH CALIFORNIA PUBLIC ENTITIES (excludes IBAs)

JBEs should include the following provision, or a similar waiver that is 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.

4. INTERAGENCY AGREEMENTS

A contract with a state agency, defined for purposes of this section consistent with GC 11256 as a state agency, department, California State University campus, or University of California campus (UC) (excluding campus foundations) must follow the requirements for whichever type of contract the agency uses. The agency may choose to use an Interagency Agreement.

- IAs must include a provision that the charges have been or will be computed in accordance with state requirements as noted in SAM 8752, and 8752.1 unless there is a legal reason for not doing so. Such a reason might be the transfer of federal funds. The reason should be noted.
- IAs involving the expenditure of public funds in excess of \$10,000 must contain a provision that the contract is subject to examination and audit by the State Auditor for a period of three years after final payment under the agreement (GC 8546.7).

5. IGCs WITH LOCAL PUBLIC ENTITIES

When a JBE contracts with a county, city, district, or other local public entity, the JBE should receive, together with the signed contract, a copy of the resolution or other document authorizing 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, such as a room rental or a one-time event, the JBE does not have to obtain this document.

6. IGCs WITH LOCAL PUBLIC ENTITIES FOR COUNTY SERVICES¹⁵

If a trial court and its respective county or a city agree that the county or city will provide or continue to provide services to the court that were provided in 1997, GC 77212 requires the trial court and county or city to enter into a contract regarding the services. The parties must cooperate in developing and implementing the contract. An MOU is frequently used to document this agreement.

- A court-county/city agreement under GC 77212 must be executed by the Presiding Judge.
- 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 California Rule of Court rule 10.805, if the trial 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/city 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/city agreement for services should also contain appropriate provisions applicable to other IGCs under this chapter.
- In addition to the general requirements on costs, GC 77212 includes further specific requirements related to costs:
 - Costs charged to the court may not exceed the costs of providing similar services to county departments or special districts (GC 77212(a).)

¹⁵ These contracts may include all county or city-provided services, or certain services may be covered by individual contracts. For example, trial courts frequently enter into “general” services agreements, and into contracts with counties for specific services (e.g., collections).

- The Board of Supervisors or equivalent governing bodies of counties and other local government entities periodically approve countywide (or other applicable) “cost allocation plans.” The cost allocation plan details the actual expenditures of departments that provide indirect services to county departments, and identifies the specific cost allocation methods that are used to distribute those costs. The cost allocation plan follows the requirements for charging direct and indirect costs (among other items) from the Office of Management and Budget (OMB) Circular A-87. The trial court should be permitted to review the specific charges in the cost allocation plan including the data elements provided by each county department that were used to complete the plan.
- For trial court-county/city agreements entered into after January 1, 2002, GC 77212 (d) requires that the amount of any indirect or overhead costs be individually stated, together with the method of calculation of the indirect or overhead costs.
- The Judicial Council may audit the county or city figures to ensure compliance with this requirement and determine the reasonableness of the indirect or overhead costs charged to the trial court.
- CRC rule 10.810 defines the division of responsibility between the state and county for funding the trial court. Costs payable by a trial court under any IGC, including agreements covered by GC 77212, may not contain items that are not otherwise allowable court operations.
- County loans to cover temporary cash flow shortages – On occasion, a trial court may experience cash flow shortages. With approval by the Judicial Council, a trial court may arrange with the county for short-term loans to cover temporary cash flow needs so that it may meet its financial obligations in a timely manner. The trial court must comply with GC 77009.1 with respect to such a loan.

7. IGCs (with all public entities¹⁶)

The contract must contain the substance of the following provisions:

- a. Services and Work under this Agreement.** All services and work must be performed primarily by the staff of Contractor, or in the case of educational institutions, auxiliaries or foundations, by faculty, staff, or students associated with the educational institution.
- b. Restrictions on Subcontracting** (applicable only if subcontracting is otherwise permitted under the contract). Contractor shall not use a subcontract or purchase goods for sale to the JBE unless this Agreement is a subvention agreement or any of the following apply:
 - Contractor, as prime contractor, certifies that the subcontractor or vendor has been selected by Contractor under a bidding process requiring at least three bids from responsible bidders;
 - The subcontract or purchase order is with a public entity or foundations or auxiliary organization that supports it, and the subcontractor is subject to the same restrictions on subcontracting as Contractor is subject to under this Agreement;
 - The subcontract or purchase order would be exempt from competitive procurement requirements applicable to the JBE if the JBE were contracting with the subcontractor;
 - The total of all subcontracts and purchase orders does not exceed \$50,000 or 25% of the total amount under this Agreement (excluding amounts subcontracted to or purchased from public entities or foundations or auxiliary organizations that support them), whichever is less, and subcontracting or third-party purchasing is not done for the purpose of circumventing competitive bidding requirements; or
 - The JBE's highest executive officer has certified that the selection of the subcontractor or vendor without competitive bidding was necessary to promote the JBE's program needs and was not done for the purpose of circumventing competitive bidding requirements.

¹⁶ Including an auxiliary organization of the CSU or a California community college of the Student Aid Commission established under Education Code 69522, or; a foundation organized to support the Board of Governors of the California Community Colleges. (See PCC 10340)

8. LEGAL SERVICES CONTRACTS

Legal services contracts must contain the following provisions. The contractor shall:

- a. Agree to adhere to legal cost and billing guidelines designated by the JBE;
- b. Adhere to litigation plans designated by the JBE;
- c. Adhere to case phasing of activities designated by the JBE;
- 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;
- 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.
- g. Comply with the requirements of Section 6072 of the Business and Professions Code, effective January 1, 2003. Contractor agrees to make a good faith effort to provide a minimum number of hours of pro bono legal services during each year of the contract equal to the lesser of 30 multiplied by the number of full time attorneys in the firm's offices in the State, with the number of hours prorated on an actual day basis for any contract period of less than a full year or 10 percent of this Agreement. Failure to make a good faith effort may be cause for non-renewal 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 the a judicial branch entity for legal services.

Note: The contractor may be required to submit to a legal cost and utilization review as determined by the JBE (PCC 10353.5).

9. AMENDMENTS

- a. When an amendment changes or corrects contract terms by "striking" out contract terms, both parties signing the agreement must initial the "strikeout".
- b. When an amendment changes the contract amount, the amount changed by the amendment must be stated, along with the new total contract amount. Example: "This amendment adds \$1,000 to the contract. The total amount of the contract will not exceed \$(new contract total)."
- c. Extension of the contract cannot be used to circumvent the termination of availability of funds. (See GC 16304)

10. 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 clause and the following provisions:

- a. It is mutually 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.
- b. This contract is valid and enforceable only if sufficient funds are made available to the state by the United State Government for the fiscal year ____ for the purpose of this program. In addition, this Agreement is subject to any additional restrictions, limitations, or conditions enacted by the Congress or to any statute enacted by the Congress that may affect the provisions, terms, or funding of this contract in any manner.
- c. The parties mutually agree that if the Congress does not appropriate sufficient funds for the program, this Agreement shall be amended to reflect any reduction in funds.
- d. The parties may invalidate this Agreement under the 30-day termination for convenience or cancellation clause or amend the contract to reflect any reduction in funds.

Exemptions from these requirements may be granted if the JBE' can certify in writing that federal funds are available for the term of the contract.

11. CONTRACTS REQUIRING INSURANCE

Contracts with required insurance provisions (other than Employers' Liability Insurance) must contain, in substance, the following:

- a. Contractor shall furnish to the JBE before commencement of work a certificate of insurance stating that liability insurance of not less than \$1,000,000 per occurrence for bodily injury and property damage liability combined is presently in effect for Contractor.

[Adjust the amount in the contract language if higher insurance is required.]

- b. Contractor agrees that the bodily injury liability insurance herein provided for shall be in effect at all times during the term of this Agreement. If the insurance coverage expires at any time during the time of this Agreement, Contractor shall provide, at least 30 days before said expiration date, a new certificate of insurance evidencing insurance coverage as provided for herein for not less than the remainder of the term of this Agreement or for a period of not less than one year. New certificates of insurance are subject to the approval of the JBE, and, without prejudice to the JBE, Contractor shall not perform work before such approval. The JBE may, in addition to any other remedies it may have, terminate this Agreement should Contractor fail to comply with these provisions.

12. JANITORIAL/BUILDING MAINTENANCE CONTRACTS: ADDITIONAL REQUIREMENTS

The contract must provide that contractor or any subcontractor providing janitorial or building maintenance services in California, which is awarded a contract to provide such services at a new site must retain for 60 days the current employees employed at that site by the previous contractor/subcontractor. The JBE must obtain from the previous contractor information as to employees and provide the same information to the new contractor in order for the new contractor to make the necessary notifications as required by Labor Code section 1060 et seq.

13. 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.¹⁷ Because subvention aid or local assistance contracts are generally not awarded to a low bidder through competitive bidding, these contracts must contain adequate control language and should address the necessity and reasonableness of the cost.

- a. **SUBVENTION AID OR LOCAL ASSISTANCE CONTRACT FISCAL CONTROL PROVISIONS**

¹⁷ The JBE's budget would have to allow for this assistance.

Payment provisions in subvention aid contracts should be on a cost-reimbursement basis with a ceiling specifying the maximum dollar amount payable by the agency. Contracts must 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:

- 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 must specify that the rates of reimbursement for necessary traveling expenses and per diem 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 agency.

Subvention aid contracts must specifically reserve title to the JBE for JBE-purchased or JBE-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 must include a detailed inventory of any JBE-furnished property, and the JBE must comply with the policies and procedures regarding state-owned property accounting set forth in SAM 8600, et seq. Provisions must be included regarding the usage, care, maintenance, protection, and return to the agency 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 state agency 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 are not 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. The contractor should be required to acknowledge the support of the JBE when publicizing the work under the contract in any media.
- e. The contract must 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 or state for three years.

14. CONTRACTING FOR STUDENTS

When contracting for students, the contract must require that:

- work must be related to the student's field of study
- students cannot accrue civil service status
- students cannot be employed for more than 194 days in the 365 days beginning with the day of initial employment
- use of students cannot cause displacement of civil service employees

(See GC 19133)

15. COMMERCIAL OFFICE MOVING SERVICES

Contracts exceeding \$2,500 with a carrier for commercial office moving services must conform to the requirements contained in SAM 3810, which provides for such contracts

to be with a carrier whose drivers and supporting personnel are operating under current collective bargaining agreements or who are maintaining the prevailing wages, standards, and conditions of employment for its driver and supporting personnel. (See GC 14920.) JBEs must include such requirements in contracts.

16. ELEVATOR MAINTENANCE CONTRACTS

Contracts for elevator maintenance must include the following provision:

Commencement and termination of contract. The service to be performed under this contract shall begin on the date specified and continue for a period of five years. The State may terminate this contract at any time by giving the contractor at least 30 days written notice of its intention to do so.

17. INFORMATION TECHNOLOGY CONTRACTS

The contract must be strictly for IT services or in instances where the IT goods being purchased are subordinate to the value of the IT service. The executive branch has prepared the following, which may assist the JBE in the development of appropriate contracts:

- Information Technology Maintenance Special Provisions
- Information Technology Personal Services Special Terms and Conditions
- Information Technology Software Special Provisions

At the time of publication, it is not known, however, how or whether the executive branch maintains these documents, and they are identified for reference only.



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

The following defined terms are introduced in this chapter. All defined terms are listed in the Glossary.

Advance Payments
Progress Payments
Periodic Payments
Payee Data Record

9.1 DISBURSEMENTS**A. Payment Fundamentals**

Payments should not be processed or released by a JBE to a contractor for any goods or services unless the JBE possesses all of the following:

- A properly authorized purchase agreement;
- Documentation verifying the goods/services were satisfactorily received and/or performed; and
- An accurate, properly submitted contractor invoice.

Advance Payments

Advance payments are payments made to a contractor before the contractor performs its obligations under the agreement. Advance payments should only be made in special circumstances when necessary and may only be made under the following types of agreements:

- Contracts for basic software support/maintenance services (such as uncustomized software upgrades, or access to a customer technical support phone line to resolve software issues, but does not include, for example, services to develop or assist in correcting customized software programs);
- 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 \$400,000¹ and provided that the advance payment does not exceed 25%² of the annual allocation to be made under the contract;
- MOUs with counties with a population of 150,000 or less as of January 1, 1983, 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.

Except as set forth above, advance payments may not be made under time and materials service contracts or under contracts for the purchase of goods.

B. Progress Payments

A progress payment is a partial payment following completion of steps or phases towards the completion of a contract for goods and/or services.

¹ This amount may be increased by the Department of Finance; any future increases will be posted on Serranus.

² Advance payments in excess of 25% may be made on such contracts financed by a federal program when the advances are not prohibited by federal guidelines.

When Progress Payments are Allowed

Non-IT Services

PCC 10346 requires that for a progress payment under a contract for non-IT services:

- At least 10% 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: These requirements do not apply to contracts: (i) for the construction, alteration, improvement, repair, or maintenance of real or personal property; (ii) less than \$5000 in amount (including contracts less than \$5000 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

Under PCC 10314, progress payments for non-IT goods may be made for work performed and costs incurred at the contractor's shop or plant if:

- The goods are specially manufactured for the state, and not suitable for sale to others in the ordinary course of the contractor's business;
- The progress payments are made under terms and conditions that protect the state's interests;
- At least 10% of the contract price is withheld until final delivery and acceptance of the goods, and
- The contractor provides a faithful performance bond, acceptable to the JBE, of at least one-half of the total amount payable under the contract.

IT Goods and Services

Under PCC 12112(a), progress payments for IT goods or services may be made for work performed and costs incurred at the contractor's shop or plant if:

- The goods or services are especially manufactured or performed by the contractor for the State, not suitable for sale to others in the ordinary course of the contractor's business;
- The payments are made under terms and conditions that the JBE deems necessary to protect the State's interests; and
- At least 10% of the contract price is withheld until final delivery and acceptance of the goods or services. **Note:** If, however, the JBE determines that lesser 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 contractor's breach), then: (i) if the contract price is \$10,000,000 or more, the JBE must withhold at least 5% of the contract price until final delivery and acceptance of the goods or services; and (ii) if the contract price is less than \$10,000,000, the JBE must withhold at least 3% 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 contractor, JBEs should carefully evaluate whether progress payments are warranted and reconfirm the JBE's contract administrator has the expertise to properly monitor the contractor'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 less than 3 months;

- If progress payments are to be made, they should be described in the agreement with the contractor and made at clearly identifiable stages of progress or not more frequently than monthly in arrears, based upon written progress reports submitted with the contractor's invoices;
- Progress payments should not be made before goods or services are provided;
- Purchase agreements 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 purchase agreement for release of the amount withheld; and
- A written statement of work or scope of work should be developed to clearly define the tasks that when completed would permit a progress payment to be made.

C. 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 complex, so JBEs are encouraged to consult with the AOC/OGC.

D. Payee Data Record

A completed Payee Data Record should be obtained from a contractor before executing any purchase document if the contractor is not a government entity and before any payment is released. (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 supplier'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 contractor's Payee Data Record is maintained at the JBE's business services or accounting office, a contractor only needs to submit one Payee Data Record to the JBE. If any information changes, the Payee Data Record should be updated.

E. Payment of Invoices

Accurate, properly submitted invoices: JBEs should instruct contractors to submit accurate and correct invoices to ensure timely payment for goods or services received. JBEs must not pay for anything that is not in the purchase agreement (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 purchase agreement;
- Invoice number;
- Invoice date;
- Contractor name and remittance address;
- Submission of the invoice to the JBE address as identified in the purchase agreement as “billed to” or “invoice submitted to” for payment; and
- The invoice is undisputed (see Chapter 10).

Invoice tracking: To accurately track invoices so they are paid in a timely manner, all invoices:

- Should be promptly forwarded 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 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 contractor. Buyers and contract administrators 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.

Prompt payment discounts: Some contractors 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 contractor performance factors.

Separation of duties: JBEs should maintain sufficient separation of duties in order to reduce the risk of error or fraud in the JBE's contracting and procurement programs. The following key duties and responsibilities should be segregated:

- conducting the procurement (generally, the activities in Chapter 4);
- approving and signing purchase documents;
- acknowledging and receiving goods and services;
- approving invoices; and
- preparing payments.

Note: No one person should control more than one of these key aspects of a procurement activity. Smaller JBEs may not have enough procurement (or other) personnel to completely separate the specified duties. However, JBEs should separate duties as much as possible given their staffing constraints.

F. Additional Payment and Invoice Considerations

Invoice Processing by Trial Courts: Please 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 must be related to official state business. Reimbursement for such expenses should only be permitted if provided for in the purchase agreement.

Travel rates paid to contractors should be set in accordance with the Judicial Branch Travel Guidelines, as set forth in FIN. 7.01, Section 7.0 of the *Trial Court Financial Policies and Procedures Manual* (or as otherwise updated from time to time). The purchase agreement should include appropriate travel-related provisions. Buyers should verify that all travel expenses are authorized within Leveraged Purchase Agreement (LPA) contract provisions.

Payments for travel and expenses of \$25 or more should be supported by receipts.

Training vouchers: JBEs may contract for training vouchers (e.g., for IT-related training sessions) in advance of the training being provided if the contractor 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 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. The AOC's Business Services Procurement Supervisor can be contacted at (415) 865-7978 for assistance.
2. Purchase cards may be 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. If the court uses a purchase card to pay for services (e.g., emergency repairs, towing services, etc.) the court must comply with Internal Revenue Service regulations and maintain a Vendor Data Record or W-9 on file for each service supplier. The court is required to track credit card expenditures for services and, unless the court's credit card provider accepts the 1099 processing responsibilities, the court may be required to report such expenditures per IRS (Form 1099 – MISC.) reporting requirements. The trial court 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.

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. Consistent with the prior policy under Section 6.14 of FIN 6.01 in the *Trial Court Financial Policies and Procedures Manual*, 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. If purchase cardholders receive a monthly statement of card activity, they are responsible for providing documentation in the form of requisitions and receipts for purchases made using the purchase card. 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 expenses may be reimbursed, or purchased with 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 be used by these JBEs in accordance with the AOC's CAL-Card, State of California VISA Purchasing Card procedures.



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RECEIVING, INSPECTION, AND ACCEPTANCE OR REJECTION OF GOODS AND SERVICES

CHAPTER 10

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INTRODUCTION

This chapter discusses the process for JBEs to receive, inspect, and accept or reject goods and services that they have purchased. It also includes information about asset management.

DEFINED TERMS

The following defined terms are introduced in this chapter. All defined terms are listed in the Glossary.

- Receiving
- Inspecting
- Acceptance Testing
- Acceptance

10.1 GENERAL PROCESS FOR RECEIVING GOODS AND SERVICES

A. Receiving Process

Each JBE should determine whether or not the goods and/or services received are acceptable and conform to all of the terms and conditions of the purchase document. The receiving process is set forth in the table below:

Term	Definition	Example
Receiving	The act of taking possession of goods or receiving services. Caution: 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.
Inspecting	The act of examining goods/services to determine conformance to the purchase document.	A JBE inspects a delivery of office supplies and confirms that the delivery conforms to what was ordered in the purchase document.

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Acceptance Testing	After inspection, acceptance testing may be required for certain goods or services to determine compliance with contract requirements (e.g., acceptance criteria, specifications).	A JBE purchases a network printer. The purchase document 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 supplier the acceptance of goods and/or services. Note: 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 supplier 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 the purchase document.

A supplier 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.

C. Timely Release of Purchasing Documents

Buyers should promptly provide fully executed and properly approved purchase documents 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 purchase document (including technical specifications) to compare goods/services received to what was ordered.

D. 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 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 identifying a purchase document?

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 purchase document?
- Are specialized skills or expertise required for inspecting the goods?
- Have all the terms listed on the purchase document been met and properly documented?

Receiving staff 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 receiving staff should notify the buyer if the purchase document did not state whether or not partial deliveries are acceptable. The receiving staff should provide partial delivery documentation to the buyer on a timely basis to facilitate any necessary communications with the supplier.

B. Packing slip

Packing slips should be included in all shipments received by a JBE. So that the JBE's receiving staff can verify receipt of goods, the supplier should provide at least the following information on the packing slip:

- Purchase document number as issued by the JBE;
- Description of the goods;
- Quantity and unit of measure; and
- Item/part number.

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C. 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 receiving staff at such locations of their responsibilities, which should be consistent with the policies and procedures in this chapter. Buyers should provide receiving staff with purchase documents in a timely manner. Receiving staff should review JBE policies and procedures to facilitate accurate and efficient receiving of goods.

D. Documentation

After determining that goods received and inspected are either in conformance with the terms of the purchase document or are to be rejected, receiving staff 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 purchase document; and
- Documentation by receiving staff on the delivery (e.g., confirmation that the delivery is in accordance with the purchase document).

Failure to provide documentation and follow related policies and procedures could delay payments to the supplier.

Receiving staff should keep purchase documents on file at least until suppliers have met all obligations. This is particularly important when accepting any partial deliveries or staggered deliveries over a period of time.

10.3 INSPECTION OF GOODS

Inspections should be completed within a reasonable amount of time or as specified in the purchase document. The JBE's receiving staff should confirm the following:

- What was delivered conforms to the purchase document (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 supplier personnel in attendance, when and where the inspection occurred, and the inspection results. The documentation should be retained in the procurement file.

10.4 ACCEPTANCE TESTING

To the extent necessary to protect the JBE's interests and comply with applicable policies, purchase documents 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/OGC regarding appropriate contract terms for purchase documents on acceptance testing, acceptance criteria, and related matters.

10.5 REJECTING NON-CONFORMING GOODS

If the goods do not conform to the requirements of the purchase document (including technical specifications) and the JBE decides to reject the goods, then the JBE should promptly notify the supplier in writing. The notice should describe the non-conformity to the purchase document (including any applicable acceptance criteria).

The JBE must notify the supplier of the rejection within a reasonable time after delivery or tender of the goods.

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Note: in addition to this general requirement, there may be a specific deadline to reject the goods under the purchase document.

The JBE must make arrangements to hold the rejected goods, protect them from damage, and take reasonable care of rejected goods until the supplier 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.

10.6 ASSET MANAGEMENT

Superior courts should also refer to FIN 9.01 of the *Trial Court Financial Policies and Procedures Manual* regarding asset management by the superior courts.

A. Controls Over Assets

JBEs should implement policies and procedures to secure and safeguard their assets. JBEs 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:

- 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;

- Rate of depreciation (or depreciation schedule), if applicable; and
- Purchase order number.

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 SERVICE DELIVERABLES

A. Accepting or Rejecting Services

When preparing purchase documents for services, JBEs should develop clear, concise, and detailed descriptions of the services to be performed. Appropriate JBE personnel should be assigned to monitor supplier performance. Please also refer to Chapter 11 (Contract Administration) for information on monitoring of supplier 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;

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- 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.



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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 and addresses the documentation and actions required to protect each judicial branch entity's interests and ensure supplier and contractor performance.

DEFINED TERMS

The following defined terms are used in this Chapter. For definitions of the defined terms, please see the Glossary.

Contract Administrator
Contract Modification
Contract Amendment
Contract/Contractor Evaluation
Change Order
Cure Notice
Evergreen Clause
Suspension of Work
Termination for Cause
Termination for Convenience
Warranty

11.1 PRINCIPLES

Contract administration focuses on the relationship between the JBE and the contractor from contract award to closeout to ensure the contractor delivers the product and/or service in conformance with contract requirements.

Contract administration is the communication between the JBE and its suppliers and contractors that conveys the JBE's expectations specified in a purchase order or 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, which 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 ADMINISTRATOR

Contract Administrators are those JBE staff who perform contract administration functions. Each Contract Administrator must understand all aspects of the purchase document.

Contract Administrators must ensure that:

- The procurement of goods and services is appropriately documented;
- Suppliers and contractors comply with the terms of their purchase orders or 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 contractor and JBE compliance with the terms of the contract;
- Safeguarding the JBE's interests in its contractual relationships; and
- Ensuring that contractors receive impartial, fair, and equitable treatment.

11.4 ETHICAL DECISION MAKING 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/OGC, when questions arise regarding acceptable or unacceptable behavior when dealing with contractors.

No Contract Administrator may accept, directly or indirectly, any gift, loan of money or equipment, meal, lodging, transportation, 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 any official action performed by the Contract Administrator. Favors must be courteously refused. Other ethical issues include the following:

- Contract Administrators must not purchase materials 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. Supplier/Contractor Lists

The JBE may develop and actively maintain a list of potential suppliers and contractors that have expressed an interest in receiving solicitations. The JBE must ensure that a supplier or contractor is qualified before including it on a bidder's list or making a contract award.

For every firm on the JBE's supplier/contractor list, the following information should be included:

- Firm name;
- Tax identification number;
- Firm address;
- Point of contact information including telephone and fax numbers, email addresses, etc.;
- The firm's valid Seller's Permit Number, if applicable;
- The firm's 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 (DVBE);
- Year the firm was established; and
- Annual gross receipts of the firm.

The JBE should maintain an up-to-date file and mailing list of contractors as follows:

- Files must contain each firm's data and any other information submitted, and JBE evaluation reports on delivered goods or completed work; and

- The pool of firms should be reviewed, updated, and/or renewed at least once each year.

B. File Integrity

Files must be established and maintained for every procurement action. This requirement applies to the supplier or contractor selection process (pre-award) and to post-award 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 ensure that contractors perform according to the terms, conditions, and specifications of their contracts or purchase orders;
- **Two:** Sound business judgment must be 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, changes, 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.

C. Filing Practices

The initial file set-up 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;¹
- 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;
- 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 sub-sections for contractor [incoming], and JBE [outgoing]);
- Pre-Award/Solicitation (includes bid RFP/IFB package, an abstract of all responses, etc.);
- Selection and Award (includes all management input and approvals, notice of award, etc.);
- Contract (with sub-sections for Amendments, Change Orders, and Notices, as appropriate);
- Reports, Progress Reviews, Schedules and Payment Requests/Invoices and contractor evaluation;

¹ 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.

- Internal Documents (memos, emails, 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.

11.6 SUPPLIER AND CONTRACTOR LICENSES, INSURANCE AND PERFORMANCE/PAYMENT BONDS

Contractors that provide services must have furnished the JBE certificates of insurance to evidence their compliance with the insurance requirements of the JBE's contract before commencing work.

Where the contract calls for performance or payment bonds, Contractors must have furnished the JBE evidence of their compliance with contract bonding requirements before commencing work.

Any contractor license required for the contractor to perform the contracted service must be in place before commencing that service.

Insurance certificates must be of a form and content that meet the requirements of the JBE's contract.

Contractors that have current contracts with the JBE should provide a new insurance certificate on or before the expiration date of any required certificate.

The Contract Administrator must assure that all required contractor 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.

11.7 CONTRACTOR PERFORMANCE AND PAYMENT

A. Performance and Delivery Control

The JBE must monitor contractor performance to assure 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, with feedback from the employee who requested the goods or services, must ensure that the contractor's delivery or performance meets the JBE's contract requirements. See Section 11.6, Contract Modifications and Disputes, and Section 11.9, Contract Termination for procedures related to unacceptable contractor performance.

The Contract Administrator 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 contractor performance, quality, and warranty obligations when appropriate and necessary to protect the JBE's interests; and
- Ensuring that nonconforming supplies or services are rejected.

Monitoring contractor performance can be facilitated by the following best practices:

- Conducting status reviews of contractor compliance at regularly scheduled project meetings;
- Requiring written monthly or quarterly reviews of the contractor's performance in meeting goals;
- Requiring the contractor to propose and implement plans to cure unsatisfactory performance when contract goals are not met; and
- Performing a contractor evaluation at the conclusion of the contract and retaining the evaluation for future reference.

B. Contractor Payment

Invoices must be paid according to the terms and conditions set forth in the contract (e.g., net 30 days and subject to funding) as long as the supplier or contractor's performance meets contract requirements. Some contracts may call for payments at the completion of certain tasks or milestone events. It is the responsibility of the Contract Administrator to assure that invoices are:

- Processed properly;

- Not for duplicate payment;
- For true obligations of the JBE; and
- For work that has been satisfactorily completed.

Some suppliers and contractors may offer discounts for prompt payment. The JBE may elect to accept these payment terms when it is in the best interests of the JBE, all financial and contractor performance factors considered.

Every effort should be made to pay suppliers and contractors in a timely manner according to the terms of the purchase order or contract for goods provided and services rendered. Unresolved payment problems can put the JBE in breach of contract, or may damage contractor 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. Contractors should be kept aware of the effort to remedy the payment issue until a final resolution is reached.

In no case should an undisputed portion of an invoice be withheld pending resolution of a disputed amount. 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 should be kept in the procurement file including a description of the problem and efforts made toward resolution.

11.8 CONTRACT MODIFICATIONS AND DISPUTES

A. Contract Options and Modifications

1. Contract Options

- a. An option is a party's right to elect to exercise a privilege without the agreement of the other party.
- b. Sometimes, 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 term if a party does not issue a notice of

- termination of the agreement by a certain time prior to the end of the then existing term. This is known as an “evergreen clause.” Because a JBE could become unintentionally bound to perform for an extended term due to inaction, the use of evergreen clauses is discouraged. Instead, options should require written election to be exercised.
- c. A contract may provide the JBE the option of issuing a unilateral change amendment affecting fundamental terms such as those affecting the scope of work 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 contractor’s rights to make claims or appeal disputes under other provisions of the contract. The JBE should issue a unilateral amendment after review and consultation with legal counsel.
 - d. Trial courts should notify AOC Trial Court Administration Services Division (TCAS) and the AOC and appellate courts should notify the appropriate person in the AOC Finance Division upon the exercise of a contract option 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 communication, the court’s notice to TCAS and the AOC and appellate courts notice to the AOC Finance Division should contain a copy of the notice of exercise of option or communication.

2. Modification of Contract Terms

- a. A modification of contract terms is a change to the original contract terms altering delivery point, date of delivery, contract period, price, quantity, or other provision of the contract that requires the written agreement of both the JBE and the Contractor.
- b. Contract Modifications include Contract Amendments and Change Orders and must be executed by an authorized JBE member acting within applicable law and the requirements of this Manual.

- c. Most Contract Modifications are issued in the form of Contract Amendments. Contract Amendments must be mutually agreed to by the JBE and the contractor. Contract 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.
- d. A request for a Contract Amendment may be initiated by the JBE or the contractor. A contractor that requests a Contract Amendment should do so in writing on a timely basis according to the terms of the contract. The contractor should be able to support its entitlement to the Contract Amendment by documenting the factors that merit the change. Amendments must be executed on behalf of the contractor by a duly authorized officer.
- e. Failure by the JBE and the contractor to agree to the terms and conditions of a requested Contract Amendment should be resolved according to the terms of the contract and/or the procedures for disputes and claims; see 11.6, C and D.

3. Communication

All correspondence regarding Contract Modifications and Amendments, 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 or claims under the contract terms and conditions.

B. Contract Amendment and Option Administration

1. Amendment to Contract

The JBE may issue a written amendment when a change can be accomplished within the provisions and scope of the underlying contract.

2. Change Orders

A Change Order is a specialized type of option which may take the form of a unilateral written order by the JBE directing the contractor to change contract amount, requirements, or time. Such changes must be within the scope of the contract and in accordance with the contract's Changes clause to be legally implemented without the consent of the contractor. Except in the context of the construction or renovation of appellate court facilities, they should be limited to minor changes to the contract terms.

3. Changes Clause

The JBE should include a “Changes” clause in each solicitation and contract to accomplish the following:

- a. Specify the types of contract changes that may be made within the scope of the contract by written contract amendment and those that are immaterial and may be made by written change order. A dispute may arise over whether certain changes are material or immaterial, so use of change orders should be minimized;
- b. Include provisions for adjustments in contract price, delivery schedules, and other contract terms that are appropriate to the type of contract; and
- c. Identify the person or persons who are authorized to approve Contract Modifications (i.e., the JBE member authorized to sign Contract Amendments and the project manager authorized to sign contract Change Orders).

4. Contractor Requested Changes

- a. If the contractor requests a change, the contractor should be required to support its requested entitlement 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);
 - Contract Amendments for consulting services are sometimes based on the contractor'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 contractor. The JBE must exercise its judgment and discretion in determining when a proposal from the contractor is needed.
- b. The contractor should submit a request for a change to a contract within the time frame specified in the contract, or within a mutually agreed upon time if the contract does not specify a time.

5. *Negotiation of Changes*

Some of the following steps may be applicable to the negotiation of changes in the contract cost, schedule, and/or other contract terms:

- a. **Written Pre-negotiation Objectives:** The JBE should develop written pre-negotiation objectives for Contract Modifications, for internal JBE use only. This useful step establishes the JBE's goals and any limitations associated with the upcoming negotiation and assures that the negotiations are conducted 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).

- c. The memorandum should explain the differences, if any, between the negotiated price adjustment and the pre-negotiation position. When there are numerous differences involving significant sums, use a tabular format 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.
- d. Lock in the Resolution or Change: To avoid subsequent controversies that may result from an amendment:
- Ensure that all elements of the modification have been presented and resolved; and
 - JBEs should consult with counsel as to whether to include a release statement in the modification, in which the contractor releases the JBE from any liability for further modifications attributable to the facts or claims giving rise to the contractor's proposal for adjustment, unless specific exceptions are expressly set forth in the release statement.

No modification requested by the contractor 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, the modification should serve the public interest.

Failure of the JBE and any supplier or contractor to agree on the terms of a change modification should be resolved according to the terms of the contract and/or the procedures for disputes and claims.

C. Contract Disputes

Contract disputes generally arise when the JBE and the supplier or contractor disagree about the interpretation of contract language, scope of work, specifications, schedule, price, or other issues that impact performance, completion, payment, amendments, claims, 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 and claims that can disrupt operations and overrun budgets. The

JBE should work with its contractors and suppliers 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 significant contractor request for a modification or has expressed 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 contractor-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 documents. However, there is often a middle ground that is fair and equitable to both parties.

Contracts should contain contract dispute resolution provisions carefully defining the dispute resolution process.

D. Contract Claims

1. Contractor Claims

- a. If a dispute cannot be resolved to the satisfaction of the parties informally as discussed above in C, the contractor can submit a formal written claim. A claim is a written demand that may result from the JBE's denial of the contractor's modification request or invoice, unilateral contract amendment, rejection of work, or the failure of good faith efforts to resolve disputed issues through informal communication or meetings. Claims seek the payment of money, a time extension, adjustment or interpretation of the contract terms, or other relief. A claim may or may not be allowed, 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).
- b. Contractor claims should be submitted to the JBE on or before the date of final payment. All claims must be submitted in writing, follow the general format established by the contract, and include the narrative description and documents necessary to substantiate the contractor's position. Contractors

should always consult the contract, follow the specific guidelines, and use the referenced forms provided therein (if any).

- c. The processing, review, and research of contractor claims, along with participation in the dispute resolution process, are primarily the responsibilities of the JBE employee to whom contract administration duties are assigned.
- d. The JBE must respond in writing to all properly filed contractor claims within the time limits established by contract or as mutually agreed by the JBE and contractor.
- e. The JBE must seek to resolve all claims in a fair and equitable manner by the most expeditious and cost-effective means possible. The JBE must first seek a remedy by reviewing the contract and all applicable documents to find an equitable solution within the scope of the contract. If the claim has merit, the Contract Administrator should prepare a negotiation settlement memorandum. The authorization process is the same as for a contract modification (i.e., a Contract Amendment is issued). Proper approvals are required before a formal written response can be made offering the contractor a monetary settlement or other remedy.
- f. The JBE must make a written determination as to the merit and entitlement of the contractor's claim and submit the response to the contractor within the time specified in the contract or as mutually agreed.
- g. Unless otherwise noted in the contract, if the contractor disputes the JBE's written response, the JBE (with guidance from legal counsel) must inform the contractor that it may petition the JBE.
- h. Any settlement of a claim will include a release statement in which the contractor releases the JBE from any liability with respect to the settled claim unless specific exceptions are expressly set forth in the release statement.

2. JBE Claims Against Contractor

The JBE may have reason and contractual rights, either during contract performance or the warranty period, to initiate claims against a contractor. The JBE must attempt to settle informally all claims against the contractor. If informal efforts are unsuccessful, the JBE must give the contractor written notice of its complaint and an opportunity to take corrective action, as follows (unless otherwise directed in the contract):

- a. Give notice: The written notice to the contractor detailing the complaint and asking the contractor to comply with the contract is called a Cure Notice. The Cure Notice informs the contractor that it is deficient with respect to one or more contractual obligations. The contractor 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.
- b. Inform the AOC/OGC: A court must inform the AOC/OGC in a timely manner of the existence of a claim and provide counsel with requested information and documents including the Cure Notice. (See CRC rule 10.201, Claim and Litigation Procedure.)
- c. Take Corrective Action: If the contractor fails to meet the demands of the Cure Notice after a reasonable time, or take corrective steps leading to the necessary corrections, the JBE must take appropriate action.
- d. Reclaim Expenses of Corrective action: If the JBE takes action to correct the failures of the contractor, appropriate back-charges must be assessed against the contractor. If available, offsets against amounts owed to the contractor should be taken from pending payments.
- e. Claim Assessment by AOC/OGC: The AOC/OGC will evaluate the claim. After consultation with the court, 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 in accordance with the process required by Rules of Court regarding the Litigation Management Program.

Most contracts should include warranty provisions that give the JBE the right, after giving the contractor due notice of a defect and reasonable time to correct it, to replace, repair, or otherwise remedy the defect at the contractor's expense. All demands against the contractor must be in compliance with the applicable contract terms and the contractor's contractual obligations.

11.9 CONTRACT TERMINATION

Each JBE 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 (see JBE Claims Against Contractor, above).

A. Termination for Convenience

All JBE contracts should contain provisions that allow the JBE to terminate the contractor's performance for the convenience of the JBE. A contract's "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 be terminated for convenience only when such a termination is in the JBE's best interests.

JBE contracts should set forth the method for compensating the contractor for work already performed upon termination for convenience.

Written notice to the contractor 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 of the contract, the effective date of the termination, the extent of termination, and instructions to the contractor to stop performance under the contract.

JBE contracts should not allow a Termination for Convenience by a contractor.

B. Termination Due to Non-Availability of Funds

All JBE contracts must contain a clause allowing termination *in the case of non-availability of funds* if the contract does not contain a Termination for Convenience clause as these clauses are defined in A.1 above.

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. The contractor must be provided written notice of such a termination.

In the event of a termination in whole or in part due to the non-availability of funds, the contractor will be paid for services satisfactorily rendered up to the effective date of termination. The contractor will also be released from any further obligation under the contract with respect to the cancelled portion of the contract.

Contracts that extend beyond the current fiscal year should specify that the contract 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 contractor or supplier default.

Contractors must be provided with a reasonable written notice of any Termination for Cause. The contractor 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 contractor must be notified by a written Cure Notice of the cause or causes of the deficiency and advised that if the deficiency is not “cured” within the time prescribed in the contract, the JBE must immediately initiate the contract termination process and hold the contractor and its sureties liable for associated costs and liquidated damages (if applicable).

If a contractor fails to:

- Respond in a timely manner; or
- Satisfactorily cure the default,

the JBE must issue a notice of default to the contractor.

If included as a provision to the contract, and a contractor'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 JBE's contract should specify that the contractor is liable to the JBE for any increased costs incurred by the JBE associated with completing the work. In addition, the contractor 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 supplier or contractor to suspend, delay, or interrupt all or any part of the work for the period of time that the JBE determines appropriate.²

If the performance of all or any part of the work of the contract 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), 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 contractor's loss of anticipated profits in the event of a suspension of work.

² Suspensions should include a time limit, after which the provisions of the suspension clause should be clear that the work will either resume or one of the termination clauses will go into effect.

11.10 WARRANTIES

A Warranty is a contractual obligation that protects the JBE from product defects and poor quality services. The JBE should obtain Warranties for the goods and services it procures in most circumstances.

The JBE should take advantage of commercial Warranties where appropriate and in the JBE's best interests for the repair and/or replacement of commercial items.

When acquiring a Warranty, the JBE should consider the following factors:

1. The nature and use of the supplies and services 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 item is defective.
2. Warranties for durations in excess of a standard period are sometimes offered at additional cost.
3. Administration and enforcement: 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. Trade practice: 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 product or services that the contractor warrants;
- The extent of the contractor's Warranty, including the specific duration; and
- The specific remedies available to the JBE in the event of a defect.

11.11 CONTRACT CLOSEOUT

The JBE must properly close out all purchase order and contract files.

Closing out routine purchase orders and contracts for commodities and other commercial products should be straightforward. The JBE employee responsible for contract administration must ensure that goods and services have been accepted and conform to the purchase order or contract specifications. Delivery and acceptance should be documented in the file, which 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, contract files may be closed out. Closing out contract 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 contractor performance evaluation, and sending the file for appropriate storage and retention. Files should be maintained onsite for six months after contract closeout, after which they may be sent for offsite storage and retention.

Contract Evaluation (PCC 10369)

Any consultant services contract of \$5,000 or more requires completion of a Contract/Contractor Evaluation within 60 days after completion of the contract.

The JBE must evaluate the performance of the contractor in doing the work or delivering the services for which the contract was awarded. The JBE must report on all of 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 contractor fulfilled all the requirements of the contract and if not, in what ways the contractor did not fulfill the contract;
- Factors outside the control of the contractor that caused difficulties in contractor performance; and
- How the contract results and findings will be utilized to meet JBE goals.

The post-evaluation must be prepared within 60 days of the completion of the contract.

Post-evaluations must remain on file at the offices of the JBE for a period of 36 months following contract completion. If the contractor did not satisfactorily perform the work or service specified in the contract, the JBE conducting the evaluation shall place one copy of the evaluation form in the contract file.

The JBE must notify and send a copy of the evaluation to the contractor within 15 days. The contractor must have the right, within 30 days after receipt, to submit to the awarding JBE a written response statement that must be filed with the evaluation in the JBE's contract file.

11.12 DISCLOSURE OF CONTRACT DOCUMENTATION

Records created for the purpose of procuring goods and services are generally "judicial administrative records" subject to CRC rule 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 judicial branch entities, 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.

Legal counsel should be consulted regarding questions about disclosure requirements under rule 10.500 or this Manual.



Judicial Council of California

Judicial Branch Contracting Manual

Chapter 12
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REPORTING REQUIREMENTS

CHAPTER 12

Original Release Date:
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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 JBEs. In connection with these reports, this chapter describes the role of each JBE in providing information related to the JBE's contracts with vendors or contractors 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 \$1million.

DEFINED TERMS

The following defined terms are used in this Chapter. For definitions of the defined terms, please see the Glossary.

Joint Legislative Budget Committee
Phoenix Statewide Financial System
State Auditor

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 and contractors 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 or contractor 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 or contractor:

- The JBE that contracted for the good or service;
- The amount of each 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 or contractor for each distinct contract that was amended:

- The name of the vendor or contractor;
- 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 Supreme Court is responsible for providing to the AOC Finance Division the information relating to payments to, and contracts with, the Supreme Court's vendors and contractors in the form and format as required by the AOC Finance Division for Judicial Council reporting purposes.

Courts of Appeal: Each Court of Appeal is responsible for providing to the AOC Finance Division the information relating to payments to, and contracts with, vendors and contractors 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 contractors and relating to contracts between vendors or contractors and each Superior Court. Each Superior Court is responsible for inputting into Phoenix the information relating to payments to, and contracts with, that Superior Court's vendors and contractors as required for Judicial Council reporting purposes.

Habeas Corpus Resource Center (HCRC): The HCRC is responsible for providing to the AOC Finance Division the information relating to payments to, and contracts with, the HCRC's vendors and contractors 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 information relating to payments to, and contracts with, vendors and contractors 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 must have the appropriate training, experience, level of responsibility, and accountability as is necessary to ensure the accuracy, completeness, and consistency of the information 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 \$1,000,000 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 of entering into the contract.

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 \$5,000,000. (Under GC 68511.9, these contracts are subject to the review and recommendations of the California Technology Agency.)

Item SP11-12 Response Form

Title: Judicial Branch Contracting Manual (JBCM)

- Agree with proposed manual
- Agree with proposed manual **if modified**
- Do not agree** with proposed manual

Comments: _____

Name: _____ Title: _____

Organization: _____

- Commenting on behalf of an organization

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

Internet: <http://www.courtinfo.ca.gov/invitationstocomment/>

Email: invitations@jud.ca.gov

Mail: Ms. Camilla Kieliger
455 Golden Gate Avenue, 5th Floor
San Francisco, CA 94102

Fax: (415) 865-7664, Attn: Camilla Kieliger

DEADLINE FOR COMMENT: 5:00 p.m., Friday, July 29, 2011
