



Judicial Council of California · Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on August 31, 2012

Title	Agenda Item Type
Judicial Branch Administration: <i>Judicial Branch Contracting Manual</i>	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Revise <i>Judicial Branch Contracting Manual</i>	August 31, 2012
	Date of Report
	August 21, 2012
Recommended by	Contact
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Executive Summary

At the Judicial Council's regular business meeting on April 24, 2012, the council adopted comprehensive revisions to the *Judicial Branch Contracting Manual* and directed staff to report further to the council in August 2012 about additional revisions to the manual. With the concurrence of the *Judicial Branch Contracting Manual* Working Group, the Administrative Office of the Courts recommends the council revise the manual as proposed in this report. Adoption of the proposed revisions to the manual would make it more effective and workable for judicial branch entities' procurement and contracting.

Recommendation

The Administrative Office of the Courts (AOC) recommends that the Judicial Council, effective August 31, 2012, revise the *Judicial Branch Contracting Manual* as proposed in this report.

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

Previous Council Action

At the council's regular business meeting on August 26, 2011, the council: (1) adopted the initial version of the *Judicial Branch Contracting Manual* effective October 1, 2011, the operative date of substantive requirements of the California Judicial Branch Contract Law (Judicial Branch Contract Law); and (2) directed the AOC to report back in December 2011 and present to the council proposed revisions to the manual resulting from further consultation with the *Judicial Branch Contracting Manual Working Group*¹ as well as feedback from judicial branch entities² (JBEs). At its business meeting on December 13, 2011, the council adopted revisions to the introduction of the *Judicial Branch Contracting Manual* and, as recommended by the *Judicial Branch Contracting Manual Working Group*, directed the AOC to report further to the council in April 2012 about additional, comprehensive revisions to the manual. At its business meeting on April 24, 2012, the council adopted comprehensive revisions to the manual. Because of the substantial difference in the version of the manual that was submitted for public comment in February 2012 and the version council adopted at its April meeting, staff recommended, and council agreed, that the manual as adopted be posted for public comment following the April meeting. Because of the anticipated necessary revisions to chapter 6 of the manual (leveraged procurement) and further revisions that may be necessary or desirable as a result of public comments on the version adopted at the April meeting, the council directed the AOC to report again to the council at its regular business meeting in August 2012 about additional proposed revisions to the manual.

Rationale for Recommendation

Statutory requirement

With certain exceptions³ the Judicial Branch Contract Law, enacted March 24, 2011, requires JBEs to comply with the provisions of the Public Contract Code (PCC) applicable to state

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

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

³ PCC §§ 19204(c), 19207, and 19208.

agencies and departments related to the procurement of goods and services. The Judicial Branch Contract Law applies to all covered contracts initially entered into or amended by JBEs on or after October 1, 2011.⁴ The Judicial Branch Contract Law also requires the council to adopt a judicial branch contracting manual containing procurement and contracting policies and procedures that must be followed by all JBEs.⁵ The policies and procedures in the manual must be “consistent with” the PCC and “substantially similar” to the provisions contained in the *State Administrative Manual (SAM)* and the *State Contracting Manual (SCM)*.⁶

Need for timely adoption of the manual

The Judicial Branch Contract Law requires all JBEs to comply with the PCC, as noted above, with respect to all covered contracts initially entered into or amended by the entities on or after the October 1, 2011, operative date.⁷ This statutory requirement is separate from the council’s obligation to adopt, by January 1, 2012, a judicial branch contracting manual that must be followed by all JBEs.⁸ Although the statutory deadline for council adoption of the manual was January 1, 2012, if the council had not adopted a manual by the October 1, 2011, operative date, JBEs would have been required to follow applicable policies and procedures in the *SAM* and *SCM* in addition to being subject to certain provisions of the PCC as of October 1, 2011, without the benefit of a statewide manual to clarify applicable requirements.⁹

The *SAM* and *SCM* collectively consist of four volumes and thousands of pages.¹⁰ Those manuals were developed specifically for use by executive branch entities and reflect the overarching, pervasive assumption of DGS’s authority and role in executive branch contracting. The *SAM* and *SCM* could not, therefore, be applied wholesale to the judicial branch, but instead needed to be reviewed carefully to segregate applicable provisions from those that are not reasonably applicable to JBEs. Due to the voluminous nature of the *SAM* and *SCM*, JBEs would have been affected immediately by the need to devote significant staff resources to determine which provisions of the *SAM* and *SCM* were reasonably applicable to them, if the council had not adopted the manual affective October 1, 2011.

Determining which provisions of the *SAM* and *SCM* are reasonably applicable to JBEs is complex and complicated. Although *SAM* and *SCM* were not intended to apply to judicial branch procurement and contracting, many portions are intertwined with concepts that are made applicable to JBEs by the new law. JBEs would have been understandably uncertain as to which *SAM* and *SCM* provisions apply to their own contracting and procurement activities. Further confusion and inconsistency

⁴ *Id.*, § 19203.

⁵ *Id.*, § 19206.

⁶ *Ibid.*

⁷ PCC, §§ 19203 and 19204(a).

⁸ PCC, § 19206.

⁹ PCC, § 19204(d).

¹⁰ The *SCM* alone comprises over 850 pages.

would have resulted if each JBE attempted to determine on its own which *SAM* and *SCM* provisions should appropriately be part of its procurement and contracting processes.

Staff recommended and the council agreed that early adoption of the manual was preferable to the alternative of being governed by the *SAM* and *SCM* beginning October 1, 2011, without clear guidance as to which provisions were applicable. Also, having a manual in place as of the operative date of the new law provided initial guidance to JBEs on the provisions of the PCC that apply to them regardless of the adoption of a manual. To have a manual in place by the operative date of the Judicial Branch Contract Law, the time period for development of the manual—including its review by JBE personnel and the public—was extremely compressed. As a result, application of the manual in the first several months since its adoption revealed an ongoing—and now receding—need to revise it.

Evolution of the manual

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

Development of the manual was complicated by the inapplicability of the *SAM* and *SCM* to the organization and operations of JBEs. The *SAM* and *SCM* were developed for use by executive branch agencies, with the Department of General Services (DGS) as the entity charged with administering those agencies’ procurement and contracting activities. In contrast, procurement in the judicial branch is decentralized; for the superior courts, by way of example, the presiding judge of each court is responsible for approving procurements and contracts and the court executive officer is responsible for contract negotiations.¹¹ In addition, PCC section 19207 acknowledges that neither DGS nor any other state entity is involved in approval or review of judicial branch procurement, except as specifically required by law. As a result, much of the material in the *SAM* and *SCM* either does not apply to JBEs or is incompatible with judicial branch organization and operations.

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

¹¹ Cal. Rules of Court, rules 10.603(c)(6)(D) and 10.610(c)(3).

Because the timeframe for development of the manual was extremely compressed, application of the manual since its adoption revealed the need to revise it. The council adopted revisions to the introduction of the manual in December 2011. More comprehensive revisions were circulated for public comment in February 2012. Based on the volume and content of feedback that staff received about the manual and the revisions that were circulated for public comment in February 2012, staff made extensive substantive revisions to the manual, which were presented to the council in April 2012. Underlying all the revisions is a more informed and less literal interpretation of what it means to have a judicial branch contracting manual contain provisions that are “substantially similar” to those in manuals that are applicable to the executive branch. Specifically, this more informed and less literal interpretation: (1) places more emphasis on the legislative intent expressed in the Judicial Branch Contract Law to promote efficiency while still providing for robust competition in public contracting, but with greater sensitivity to judicial branch organization and operations; and (2) provides for more discretion to be exercised by JBEs, consistent with the decentralized management structure of judicial branch as a whole, and the superior courts in particular, as reflected in rules of court.

In applying this more informed and less literal interpretation of “substantially similar,” when a *SAM* or *SCM* provision did not implement a specific PCC requirement, but rather a DGS policy or process, the drafters considered, based on feedback from JBEs, whether a *SAM* or *SCM* provision was compatible for literal adoption in the context of judicial branch organization and operations. If the drafters determined that a *SAM* or *SCM* provision was not appropriate for literal adoption, the provision was distilled to its essential objective and processes and procedures were then developed to achieve the same objective in a manner compatible with judicial branch organization and operations. As a result, the processes and procedures reflected in the revisions adopted by the council in April 2012 were intended to implement the objectives of both the underlying *SAM* or *SCM* provision and, most importantly, the PCC, as expressed in PCC sections 100–102.¹²

Proposed revisions to the manual

Continuing the approach reflected in the April 2012 revisions to the manual, staff continued to make revisions that compensate for the incompatibility of the PCC with judicial branch organization and operations. These incompatibilities include the unique role that DGS plays in

¹² PCC sections 100–102 contain the Legislature’s findings and intent regarding the code. Section 100 includes the legislative finding that placing all public contract law in one code will make that law clearer and easier to find, and states that the legislative intent in enacting the code is to achieve the following objectives: to clarify the law with respect to competitive bidding requirements; to ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds; to provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices; and to eliminate favoritism, fraud, and corruption in the awarding of public contracts. Section 101 provides that California public contract law should be efficient and the product of the best of modern practice and research. Section 102 provides that California’s public contract law should be uniform to encourage competition for public contracts and to aid public officials in the efficient administration of public contracting, to the maximum extent possible, for similar work performed for similar agencies.

executive branch procurement and the authority and discretion that the PCC grants to DGS. Of particular interest to JBEs are PCC sections 10301 and 6611, which grant authority to DGS (or its Director) to set certain procurement thresholds and to engage in a “best and final offer” negotiation process, respectively.

As discussed above, the organization of the executive branch is centralized with most purchasing authority and responsibility for the branch vested in DGS. By contrast, the judicial branch has a decentralized structure with no equivalent to DGS (or its Director); instead, each JBE is vested with its own purchasing authority. And, significantly, the Judicial Branch Contract Law mandates that DGS have no involvement in judicial branch procurement,¹³ yet many PCC provisions grant authority to DGS or its Director. Earlier versions of the manual authorized JBEs to exercise authority or discretion similar to the authority and discretion assigned to DGS in specified situations.¹⁴ Feedback from JBEs, including members of the Working Group, however, revealed the need to expand the situations in which the authority and discretion provided to DGS or its Director are similarly extended to JBEs. PCC sections 10301 (authorizing the Director of DGS to establish the threshold amount above which contracts for goods shall be awarded to lowest responsible bidder) and 6611 (authorizing DGS to use statutory negotiations process in specified circumstances) in particular are considered by JBEs to be necessary for an efficient and competitive procurement process. To realize the legislative intent of the Judicial Branch Contract Law to promote efficiency in public contracting—and to provide for a comprehensive procurement process for JBEs that is similar in scope to the process for executive branch agencies—staff revised the manual to acknowledge that JBEs may exercise the same authority and discretion granted to DGS, for example, in PCC sections 10301 and 6611. This approach is also consistent with PCC section 19205(b), which states that “where there is a reference in this code to an officer or employee of a state agency, for purposes of this part, these terms shall refer to a member, judicial officer, officer, employee, or other person of a judicial branch entity, as applicable.”

Other revisions to the manual include:

- Clarifying the manual’s provisions and requirements;
- Updating the manual to address newly adopted PCC provisions;
- Eliminating internal inconsistencies in the manual; and
- Removing requirements determined post-adoption to be inapplicable to JBEs.

Comments and Alternatives Considered

Comments received

Proposed revisions to the manual were submitted for public comment for four weeks, from July 2 through July 30, 2012. The invitation to comment specifically sought input on whether the manual presents information in a clear and understandable way and is user-friendly, whether the content is appropriate and workable for courts of different sizes and staffing capabilities, and

¹³ PCC, § 19207.

¹⁴ For example, all versions of the manual reflect interpretation of the Judicial Branch Contract Law as allowing a JBE to exercise the same authority to establish leveraged procurement agreements that PCC section 10298 grants to DGS.

whether commentators identified any material omissions in the proposed manual. The Working Group and staff continued to review and revise the manual throughout and after the public comment process. Three formal comments were received in response to the invitation to comment, all from representatives of California superior courts and member of the *Judicial Branch Contracting Manual Working Group*.¹⁵ Many of the comments and suggested revisions requested clarification of specific technical requirements in the manual. Modifications were made where possible to address comments received and to incorporate the suggested revisions.

The Superior Court of Riverside County objected, and several members of the Working Group concurred, to the inability under the current version of the manual to set certain procurement thresholds and to engage in a “best and final offer” negotiation process. Not only did this inability erode local control and discretion to determine the processes and procedures best suited to their specific needs, the Working Group members explained, it also resulted in higher costs to the courts. As discussed above, in response to these comments staff revised the manual to acknowledge that JBEs may exercise the same authority and discretion granted to DGS in PCC sections 10301 and 6611.

Alternatives considered

The AOC did not consider any alternatives to the manual because it is required by law and the proposed revisions will make the manual more effective and workable for the trial courts and other judicial branch entities.

Staff considered interpreting the PCC as not allowing JBEs to exercise the authority and discretion assigned to DGS by PCC sections 10301 and 6611. Given the comments by JBEs that the inability to exercise this authority and discretion would lead to higher costs for JBEs and ultimately the public, the legislative intent of the JBCL to promote efficiency in public contracting, and the importance of establishing a comprehensive procurement process for JBEs that is similar to the process to in place for executive branch agencies, staff concluded that the Legislature did not intend to deprive all entities within the judicial branch the ability to exercise the same authority and discretion as DGS where appropriate and necessary. Accordingly, staff rejected this alternative.

Implementation Requirements, Costs, and Operational Impacts

By clarifying the manual’s provisions and requirements, the proposed revisions will mitigate the costs and burdens that superior courts and other JBEs would otherwise incur as a result of the Judicial Branch Contracting Law.

Attachment

1. Comment chart at pages 9- 21.

¹⁵ A chart providing the full text of the comments and responses is attached at pages 9-21. For ease of use, the comment chart has been organized by the chapters of the manual. The comment chart first lists the commentators in alphabetical order. The chart then lists the comments received on the overall manual and on each chapter.

2. Attachment A: Revised *Judicial Branch Contracting Manual*

List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	Position	Comment	Committee Response
1.	Superior Court of Riverside County By Luke McDannel Procurement Manager	NI	See comments on specific provisions below.	
2.	Superior Court of Sacramento County By Fred Cabrera, Contract Services Manager, and William Yee	NI	See comments on specific provisions below.	
3.	Superior Court of San Bernardino County By Debra Meyers Deputy Court Executive Officer/General Counsel	NI	See comments on specific provisions below.	

General		
Commentator	Comment	Committee Response
<p>Superior Court of Riverside County By Luke McDannel Procurement Manager</p>	<p>IS IT PROPER TO SEEK PUBLIC AND COURT COMMENT <u>AFTER</u> ACTION HAS BEEN TAKEN BY THE JUDICIAL COUNCIL, AS OPPOSED TO <u>BEFORE</u> <u>SUBMISSION</u> TO THE JUDICIAL COUNCIL?</p> <p>JBCM REFERENCE: All Sections.</p> <p>Many of the JBCM Revisions included in the current Invitation to Comment were previously prepared in a rushed fashion and have already been submitted to and approved by the Judicial Council in April, 2012. "Time pressure" has often been cited during this whole JBCM process as a justification/reason for hurrying to get items finalized and submitted to the Judicial Council. There has been little, if any, serious, thoughtful discussion of alternatives, long term ramifications, economic reality considerations, procurement best practices, etc.</p> <p>Long-standing principles of democracy and open government call for comment, debate, discussion, and full consideration before government decisions; Not "Vote now, and ask for input later."</p>	<p>The revisions that were adopted by the council at its regular business meeting on April 24, 2012, were based on public and court comments. Based on the circumstances, as set forth in more detail below, it was appropriate for council to adopt the proposed revisions in April 2012 and direct staff to seek additional public comment on those revisions.</p> <p>As background, the California Judicial Branch Contract Law, enacted March 24, 2011, requires all JBEs to comply with the Public Contract Code (PCC), as discussed in the preceding report, with respect to all contracts initially entered into or amended by the entities on or after the October 1, 2011, operative date. This statutory requirement is separate from the council's obligation to adopt, by January 1, 2012, a judicial branch contracting manual that must be followed by all JBEs. If the council had not adopted a manual by the October 1, 2011, operative date, however, JBEs would have been required to follow applicable policies and procedures in the <i>State Administrative Manual (SAM)</i> and the <i>State Contracting Manual (SCM)</i>.</p> <p>Because of the incompatibility of the <i>SAM</i> and the <i>SCM</i> with judicial branch organization and structure, staff recommended, and council approved at its August 24, 2011, meeting— its last regular business meeting before October 1, 2011—adoption of the manual effective October 1, 2011. Having a manual in place as of that operative date of the new law provided guidance to JBEs on the provisions of the PCC that apply to them. The council agreed that adoption of the manual was preferable to the alternative of being governed by the <i>SCM</i> and <i>SAM</i> provisions beginning October 1, 2011.</p>

General		
Commentator	Comment	Committee Response
		<p>To have a manual in place by the operative date of the Judicial Branch Contract Law meant that the time period for development of the manual—including its review by judicial branch entity personnel and the public—was extremely compressed. Application of the manual since its adoption has revealed the need to revise it. The council adopted revisions to the introduction of the manual in December 2011. More comprehensive revisions were circulated for public comment in February 2012.</p> <p>Based on the volume and content of feedback that staff received about the manual and the revisions that were circulated for public comment in February, 2012, staff made extensive substantive revisions to the manual. Staff considered submitting the new revisions for public comment to allow all JBEs the opportunity to comment on the revisions <i>before</i> returning to the council with proposed revisions. Consultation with the <i>Judicial Branch Contracting Manual Working Group</i> and the Court Executives Advisory Committee indicated, however, that the post-public comment period revisions address the courts' main concerns with the manual (and with previously proposed revisions) and make the manual more effective and workable for the trial courts and other JBEs. To provide relief sooner rather than later to JBEs that were currently struggling to comply with the requirements in the earlier version of the manual, staff decided to recommend adoption of the proposed revisions effective April 24, 2012, followed by public comment on the adopted version so that all JBEs would have the opportunity to provide feedback on the revised manual.</p>

General		
Commentator	Comment	Committee Response
		<p>All of the foregoing background facts were included in the report to the council when it considered and adopted revisions to the manual in April 2012.</p> <p>For the public comment period relevant to the proposal before the council (July 2-30, 2012), staff asked for comments on: 1) revisions that were adopted by the council in its April 2012 meeting; and 2) proposed revisions that have been made since April 2012. The current proposed revisions were made in consultation with the <i>Judicial Branch Contracting Manual Working Group</i>.</p>

Socioeconomic and Environmental Programs—Chapter 3		
Commentator	Comment	Committee Response
<p>Superior Court of Sacramento County By Fred Cabrera, Contract Services Manager, and William Yee</p>	<p>Chapter 3--Socioeconomic and Environmental Programs <u>Section 3.1 (A)</u> COMMENT: As to the DVBE Incentive, this section states: “To implement the DVBE program JBEs <i>must grant Bidders that provide DVBE participation a DVBE incentive</i> (MVC 999.5(a)). A DVBE incentive is a prescribed percentage reduction in the DVBE Bidder’s Bid price where the JBE is selecting a Bidder using the “lowest responsible Bidder” methodology or the addition of a prescribed number of points to the DVBE Bidder’s Bid score where the JBE is using the “highest scoring Bidder” approach.</p> <p>Implementation of a DVBE “incentive” program will necessarily result in a JBE’s expenditure of <i>more</i> tax dollars to vendors who are not the lowest responsible bidder. Moreover, mandated expenditure of more taxpayer dollars on procurements would be impractical during a “fiscal</p>	<p>The manual has been revised to clarify that a JBE may, in the event of a fiscal emergency, waive inclusion of multiple contracts in its JBE program. See chapter 3, section 3.1 (F), “Waiver of a DVBE Incentive” of the manual.</p>

Socioeconomic and Environmental Programs—Chapter 3

Commentator	Comment	Committee Response
	<p>emergency” when a JBE does not have the resources to comply.</p> <p>EXPLANATION: Section 3.1 (A) must be read in the context of the Legislature’s stated purpose: “... that every state procurement authority honor California’s disabled veterans by taking all <i>practical</i> actions necessary to meet or exceed the Disabled Veterans Business Enterprise participation goals of a minimum of 3 percent of total contract value.”</p> <p>California’s judicial branch is currently experiencing an unprecedented budget shortfall, mandated by the Legislature, resulting in significant staff reductions, cuts in public services, and diminished access to justice. In the current fiscal crisis, JBEs lack the resources needed to carry out the extensive administrative and record-keeping requirements associated with a formal DVBE procurement program as required by the JBCM. Moreover, given the judicial branch’s extensive budget cuts, spending more money on goods and services than is necessary is neither fiscally prudent nor “practical.”</p> <p>Accordingly, language should be added to Chapter 3 that permits a JBE to declare a “fiscal emergency” justifying its decision to not implement a DVBE program. In these circumstances, JBEs should at least include DVBEs when seeking bids for goods and services, but ultimately award based on the lowest responsible bid. This alternative approach during fiscal emergencies is practical and yet continues to honor the spirit behind the DVBE legislation.</p>	

Step-by-Step Guide for the Procurement of Non-IT Goods—Chapter 4A

Commentator	Comment	Committee Response
<p>Superior Court of Riverside County By Luke McDannel Procurement Manager</p>	<p>JBCM ATTEMPTS TO UNDULY RESTRICT LOCAL COURT DISCRETION IN MAKING AWARDS IN COMPETITIVE PROCUREMENTS OF NON-IT GOODS UNDER \$25,000</p> <p>JBCM REFERENCE: Ch. 4A Procurement of Non-It Goods, Step 11 Evaluate the Bid, A. RFQs</p> <p>The JBCM and the related footnote states in part “ ... (<i>courts</i>) are not statutorily required to award contracts less than \$25,000 to the lowest responsible bidder, but should do so in the absence of a valid business reason.” The Court feels that the JBCM overstates this “suggestion,” particularly as to the bolded portion of the sentence. In the absence of statutory authority, what is the basis for this language? The Court feels that it has a larger amount of discretion than the JBCM clause suggests in making such awards under \$25,000.</p>	<p>The referenced footnote has been removed and the following language has been added to the text of Chapter 4A: “JBEs are not statutorily required to award the contract to the lowest responsible bidder if the JBE has a valid business reason to do otherwise.”</p>

Step-by-Step Guide for the Procurement of IT Goods and Services—Chapter 4C

Commentator	Comment	Committee Response
<p>Superior Court of Riverside County By Luke McDannel Procurement Manager</p>	<p>PORTIONS OF THE MANDATED FIVE-STEP RFP EVALUATION PROCESS FOR IT GOODS AND SERVICES RFPs WILL HAMPER COST NEGOTIATIONS WITH PROPOSERS, COSTING COURTS MONEY.</p> <p>JBCM REFERENCE: Ch. 4C, Step 14 Evaluate Bids, C. RFPs</p> <p>The JBCM sets forth a five-step evaluation process for IT Goods and/or Services RFPs. Two of the steps are particularly problematic for the Court and could well severely limit or negatively impact the Court’s ability to successfully negotiate with proposers to achieve lower prices and cost savings for the Court.</p> <p>Specifically, <i>Evaluation Step 3</i> of publishing the results of the completed noncost evaluation and also <i>Evaluation Step 4</i> of then publicly opening the cost portions. If followed, these two steps would result in all proposers knowing exactly who their competition was, and also knowing exactly what their competition’s pricing is. Obviously, this situation could severely hinder the Court’s attempts to negotiate pricing, using a Best and Final Offer technique, or other negotiation techniques.</p> <p>The Court proposes the following revision, deleting Steps 3 and 4:</p>	<p>The manual has been revised to acknowledge that each JBE may decide to use the PCC 6611 negotiation processes, including best and final offers, in certain circumstances. See chapter 2, section 2.1.H of the manual for additional information.</p>

Step-by-Step Guide for the Procurement of IT Goods and Services—Chapter 4C

Commentator	Comment	Committee Response
	<ol style="list-style-type: none"> 1. The Evaluation Team must review the noncost 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 noncost criteria for all Bids using the methods specified in the RFP. 3. The JBE must publish the results of the completed noncost evaluation. Unless specified otherwise in the Local Contracting Manual, this publication must occur on the JBE's website. 4. The Evaluation Team must publicly open the cost portion of the Bids as specified in the RFP (except Bids determined to have a material deviation in the noncost portion). 5. The Evaluation Team must evaluate the cost portion of the Bids opened in item 4 above. <p>The remaining Steps (1, 2, 5) still set institute the important general, overall concept of the Evaluation Team evaluating noncost items first, separate from cost. Then evaluate cost. While at the same time, preserving the Court's ability to enter into full, unfettered, unhampered cost negotiations with one or more proposers, without those proposers having the one-sided benefit of knowing exactly what cost their competition has proposed.</p>	

Leveraged Procurement—Chapter 6

Commentator	Comment	Committee Response
<p>Superior Court of Riverside County By Luke McDannel Procurement Manager</p>	<p>FROM THE JBCM POINT OF VIEW IS THERE A DIFFERENCE BETWEEN (A) THE USE OF AN LPA, AND (B) “PIGGYBACKING” ON A CONTRACT?</p> <p>JBCM REFERENCE: Ch. 6, LPA, 6.3 ...Establishing an LPA Hypothetical Situation: A Court conducts a JBCM-compliant competitive procurement, and makes a proper award. The Court has not worked in concert with any other courts during the procurement process and does not know if any other courts, or any other government agencies, might be interested in eventually using this contract, or not. The Court was not overly concerned with creating an LPA for others to use, so the Court has not followed the “Recommended steps for establishing an LPA” from JBCM Ch. 6, Section 6.3.</p> <p>The following (or similar) “piggyback clause” is included in the contract with the contractor:</p> <p><i>Cooperative Agreement (“Piggybacking”): The Court competitive procurement process conducted during [insert date] which resulted in the execution of this Agreement was JBCM-compliant. The provisions and pricing of this contract may be extended to other California governmental entities. Governmental entities wishing to use this contract will be responsible for issuing their own purchase documents / agreements / purchase orders, etc., providing for their own acceptance, and making any subsequent payments. Contractor shall be required to include in any contract entered into with another agency or entity that is entered into as an extension of this Agreement a contract clause that will hold harmless the Court from all claims, demands, actions or causes of actions of every kind resulting directly or indirectly, arising out</i></p>	<p>Yes. Under the manual, a leveraged procurement agreement (LPA) involves leveraging of the buying power of multiple entities. The hypothetical situation described in the comment does not appear to involve leveraging of buying power of multiple entities. Under the hypothetical, potential bidders and bidders were not informed during the competitive solicitation process that the contract was intended to provide multiple entities with the right to procure goods/services. If that fact had been provided, potential bidders may have submitted bids and bidders may have submitted different bids. Therefore, there is a difference between the LPAs discussed in the manual and the hypothetical situation described in the comment. The manual authorizes the former but not the latter.</p> <p>A response to this comment involves providing legal advice, which should be provided on a privileged and confidential basis by a JBE’s legal counsel rather than in the manual. The Administrative Office of the Courts’ Office of the General Counsel will provide a response to this comment directly to the commentator.</p>

Leveraged Procurement—Chapter 6

Commentator	Comment	Committee Response
	<p align="center"><i>of, or in any way connected with the use of this contract. Any participating governmental entities are responsible for obtaining all certificates of insurance and bonds required. The Court makes no guarantee of usage by other users of this contract.</i></p> <p>May another Court “piggyback” on this contract without having to conduct its own competitive procurement process?</p>	
<p>Superior Court of San Bernardino County By Debra Meyers Deputy Court Executive Officer/General Counsel</p>	<p>Is there a difference between the use of an LPA and piggybacking on a contract? There isn’t much information or guidance on how or when to use LPA instruments such as a WSCA, CMAS, etc. Can we assume that the Court has discretion for example, in deciding whether to use a PO or a short form agreement as an ordering document or whether to attempt to issue a JBCM-compliant ordering document or to be satisfied that the master agreement was negotiated by DGC?</p>	<p>Because LPA programs (including instructions, requirements, policies, and applicable laws) are subject to change without notice, detailed information on specific LPA programs could quickly become outdated or inaccurate. Because revisions to the manual are adopted by the council, it is not advisable to include specific information that could be the subject of frequent change. The Administrative Office of the Courts’ Office of the General Counsel, Transactions and Business Operations Unit is available to assist with questions regarding use of specific LPAs.</p> <p>An LPA might have specific requirements or form templates for ordering documents, so a JBE might not have discretion to select the ordering document. A JBE should carefully review a LPA (and related documentation) that it is considering using to determine applicable terms and conditions and whether those terms and conditions are acceptable to the JBE.</p>

Contracts—Chapter 8		
Commentator	Comment	Committee Response
Superior Court of Riverside County By Luke McDannel Procurement Manager	<p>THE TERMS AND CONDITIONS MANDATED OR RECOMMENDED BY THE JBCM ARE A MOVING TARGET</p> <p>JBCM REFERENCE: Appendices to Chapter 8</p> <p>The Court has spent a significant amount of time and resources developing forms and templates that comply with the terms and conditions mandated or recommended by the JBCM. The revised appendices to Chapter 8 create a moving target, so that the Court has to re-expend time and resources to update its forms and templates.</p>	<p>The changes to the list of mandatory and recommended contract terms and conditions are attributed to the following: 1) changes in the law; 2) revisions to the manual based on the volume and feedback of superior courts; and 3) post-adoption determination that certain terms and conditions are recommended rather than mandatory.</p> <p>Except for a limited number of additional terms and conditions required by new law, the overwhelming majority of the revisions to the list of contract terms and conditions have changed terms and conditions from mandatory to recommended. These changes alone do not invalidate executed contracts using the previous version of the manual. Nor do the changes make those contracts noncompliant with the current version of the manual.</p>
Superior Court of San Bernardino County By Debra Meyers Deputy Court Executive Officer/General Counsel	<p>The terms and conditions mandated or recommended by the JBCM are a moving target. Riverside expressed concern about the time spent updating forms and templates every time a change is made. Our Court shares this concern. We are also concerned that the frequent changes could cause some problems with the upcoming audit.</p>	<p>See response to preceding comment.</p>

Contract Administration—Chapter 11

Commentator	Comment	Committee Response
<p>Superior Court of Riverside County By Luke McDannel Procurement Manager</p>	<p>DOES A CHANGE ORDER UNDER A CONTRACT ENTERED PRE-JBCM TRIGGER APPLICABILITY OF JBCM TO THAT CONTRACT?</p> <p>JBCM REFERENCE: Chapter 11.8.B</p> <p>The revised language clarifies the distinction between change orders and amendments, but fails to further clarify that a change order (as opposed to an amendment) to a contract entered pre-JBCM does not have to include JBCM-compliant terms and conditions.</p> <p>THE COURT SUPPORTS THE PROPOSED DELETION OF JBCM LANGUAGE WHICH WOULD HAVE IMPOSED BURDENSOME, PROBLEMATIC REQUIREMENTS ON COURTS' VENDOR PERFORMANCE EVALUATION PROCESS.</p> <p>JBCM REFERENCE: Ch. 11, Section 11.12 CONTRACT CLOSE OUT, Post contract Evaluation</p> <p>The Court previously advocated for deletion of the following portion of this section:</p> <p>If the JBE conducts an evaluation, the JBE must notify and send a copy of the evaluation to the Vendor within 15 days. The Vendor must have the right, within 30 days after receipt, to submit to the JBE a written response statement that must be filed with the evaluation in the procurement file.</p> <p>With this deletion, it is much more likely that the Court may</p>	<p>No. The manual applies to covered contracts initially entered or amended on or after October 1, 2011. As explained in chapter 11, section 11.8 of the manual, change orders are neither contracts nor amendments. Therefore, executing a change order on a contract entered into before October 1, 2011, does not trigger applicability of the manual to that contract. Note: if a JBE executes what is essentially an amendment (i.e., a modification that exceeds the scope of changes permitted by the original contract) to a pre-October 1, 2011, contract but calls it a “change order,” the manual will still apply to that contract.</p> <p>No response required.</p>

Contract Administration—Chapter 11

Commentator	Comment	Committee Response
	look at implementation of an ongoing Vendor Performance Evaluation process.	
Superior Court of San Bernardino County By Debra Meyers Deputy Court Executive Officer/General Counsel	Does a change order under a contract entered pre-JBCM trigger applicability of JBCM to that contract? Based on previous communications, we think change orders do not trigger JBCM applicability. It would be good to have it codified in the actual manual.	See response to preceding comment.

