



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No. 20-155

For business meeting on: September 24–25, 2020

Title	Agenda Item Type
Judicial Branch Administration: Revisions to <i>Judicial Branch Contracting Manual</i>	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
None	October 1, 2020
Recommended by	Date of Report
Hon. David Rosenberg, Chair Advisory Committee on Audits and Financial Accountability for the Judicial Branch	September 25, 2020
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Executive Summary

The Advisory Committee on Audits and Financial Accountability for the Judicial Branch recommends that the Judicial Council adopt proposed revisions to the *Judicial Branch Contracting Manual*. The proposed revisions include edits to incorporate new Disabled Veteran Business Enterprise (DVBE) requirements, as well as edits to add an exception to competitive bidding for the procurement of training.

Recommendation

The Advisory Committee on Audits and Financial Accountability for the Judicial Branch recommends that the Judicial Council, effective October 1, 2020, revise and adopt proposed revisions to the *Judicial Branch Contracting Manual*.

The proposed revisions to the *Judicial Branch Contracting Manual* are shown in tracked changes in Attachment A.

Relevant Previous Council Action

At the Judicial Council’s regular business meeting on August 26, 2011, the council adopted the initial version of the *Judicial Branch Contracting Manual* (referred to as the JBCM or manual), effective October 1, 2011, the operative date of substantive requirements of the California Judicial Branch Contract Law (JBCL).¹ In December 2011, April and August 2012, December 2013, June 2015, June 2016, July 2017, July 2018, and September 2019, the council adopted revisions to the JBCM. The version of the JBCM adopted by the council in September 2019, effective October 1, 2019, remains in effect as of the date of this report.²

Analysis/Rationale

Statutory requirement and development of the JBCM

The JBCL was enacted on March 24, 2011, and became effective on that date. With certain exceptions,³ the JBCL requires that superior and appellate courts, the Judicial Council, and the Habeas Corpus Resource Center (referred to collectively as judicial branch entities, or JBEs) comply with provisions of the Public Contract Code applicable to state agencies and departments related to the procurement of goods and services.⁴ The JBCL applies to all covered contracts initially entered into or amended by JBEs on or after October 1, 2011.⁵ The JBCL also requires the council to adopt a manual containing procurement and contracting policies and procedures that must be followed by all JBEs.⁶

This report is being submitted by the Advisory Committee on Audits and Financial Accountability for the Judicial Branch (Audit Committee) pursuant to rule 10.63 of the California Rules of Court. Under rule 10.63, the duties of the Audit Committee include (1) advising and assisting the council in performing its responsibilities and exercising its authority under the JBCL, and (2) reviewing and recommending to the council proposed updates and revisions to the JBCM.⁷

The policies and procedures in the manual must be “consistent with [the Public Contract Code] and substantially similar to the provisions contained in the *State Administrative Manual* and the *State Contracting Manual*.”⁸ The requirement that JBEs comply with applicable provisions of the Public Contract Code is independent of the requirement that JBEs follow the policies and

¹ Pub. Contract Code, §§ 19201–19210.

² The current version of the JBCM is at: <https://www.courts.ca.gov/documents/jbcl-manual.pdf>.

³ *Id.*, §§ 19204(c), 19207, and 19208.

⁴ *Id.*, § 19204(a).

⁵ *Id.*, § 19203.

⁶ *Id.*, § 19206.

⁷ Cal. Rules of Court, rule 10.63(c)(2) & (c)(3).

⁸ Pub. Contract Code, § 19206.

procedures in the JBCM. Since the adoption of the initial JBCM, Judicial Council staff has continued to receive input from the JBCM Working Group regarding proposed revisions to the JBCM, and the council has adopted nine sets of revisions.

Proposed revisions to the JBCM

Assembly Bill 230 created new DVBE-related contracting and procurement requirements.⁹ For example, pursuant to AB 230, Public Contract Code section 10230 requires that every awarded contract that includes a DVBE participation incentive shall contain a provision requiring the contractor to comply with all rules, regulations, ordinances, and statutes that govern the DVBE program, including, without limitation, Military and Veterans Code section 999.5. Therefore, conforming edits are proposed for chapter 3 (pages 9–10) of the JBCM to describe the new AB 230 DVBE requirements.

Updates are proposed for chapter 4 (page 7) to update a DGS website link, and to chapter 4C (pages 7 and 23) to update references to a *State Contracting Manual* (SCM) section (due to SCM updates) and a Public Contract Code subsection (due to Public Contract Code renumbering).

Edits are proposed for chapter 5 (pages 8–9) to add an exception to competitive bidding for the procurement of non-IT training.

Policy implications

The policies and procedures in the manual must be consistent with the Public Contract Code and substantially similar to the provisions contained in the SCM. Adopting the proposed revisions to the JBCM regarding the new AB 230 DVBE requirements (including new DVBE requirements in Public Contract Code section 10230) will enable the JBCM to remain consistent with the Public Contract Code. The proposed edits to add an exception to competitive bidding are closely based on the exception to competitive bidding for the procurement of non-IT training that is set forth in the SCM.¹⁰ As a result, the JBCM would provide judicial branch entities with greater flexibility to procure training, while also remaining substantially similar to the SCM, in accordance with the JBCL.

Comments

The proposed revisions to the JBCM were submitted for public comment from June 12 through June 26, 2020. The invitation to comment specifically sought input on whether the revisions were clear and understandable, appeared to work from a court operations perspective, and were user-friendly. No public comments were received.

⁹ Stats. 2019, ch. 676.

¹⁰ The SCM's exception to competitive bidding for the procurement of non-IT training is in SCM Vol. 1, Section 5.80(B)(2)(n)). SCM Vol. 1 is available at: <https://www.dgs.ca.gov/OLS/Resources/Page-Content/Office-of-Legal-Services-Resources-List-Folder/State-Contracting>.

Alternatives considered

None.

Fiscal and Operational Impacts

No significant costs or operational impacts will result from implementing the recommendations in this report.

Attachments

Attachment A: Proposed revisions to the *Judicial Branch Contracting Manual*, with revisions in tracked changes format

Proposed Revisions to the *Judicial Branch Contracting Manual*
(revisions in tracked changes format)

Proposed revisions to the *Judicial Branch Contracting Manual*:
Chapter 3 (Socioeconomic and Environmental Programs), pages 9-10.

Contract Obligations: Every awarded contract that includes a DVBE participation incentive shall contain a provision requiring the contractor to comply with all rules, regulations, ordinances, and statutes that govern the DVBE Program, including, without limitation, MVC Section 999.5. (See PCC 10230).

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

- The total amount of money the prime contractor received under the contract;
- The name and address of the DVBE subcontractor that participated in the performance of the contract;
- The amount of money and percentage of work each prime contractor committed to provide to each DVBE subcontractor and the amount each DVBE subcontractor received from the prime contractor; and
- That all payments under the contract have been made to the DVBE subcontractor. Upon request by the JBE, the prime contractor shall provide proof of payment for the work.

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.⁴

LPAs: If a JBE procures goods or services using an LPA that includes DVBE participation, some or all of the purchase may count toward the JBE's DVBE goal. See chapter 6 of this Manual for additional information regarding DVBE considerations when using LPAs.

⁴ MVC 999.7 and PCC 10115.5, which required state agencies to provide annual reports to the Governor and DGS with respect to meeting DVBE goals, were repealed effective January 1, 2007.

SB/DVBE Option: The DVBE incentive is not applicable when a JBE conducts a procurement using the SB/DVBE option. See section D in the “Selected Topics Relevant to the Solicitation of IT Goods and Services” portion of chapter 4C of this Manual for additional information regarding the SB/DVBE option.

Replacing DVBE Subcontractors or Suppliers: A contractor shall use the DVBE subcontractors or suppliers identified in its bid or proposal, unless the JBE approves in writing replacement by another DVBE subcontractor or supplier. (See MVC 999.5(f)).

3.2 AMERICANS WITH DISABILITIES ACT CONSIDERATIONS

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

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

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

3.3 STATE AGENCY BUY RECYCLED CAMPAIGN (SABRC) PROGRAM

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

Proposed revisions to the *Judicial Branch Contracting Manual*:

Chapter 4 (Competitive Solicitation Overview), page 7.

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

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

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

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

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

A JBE may submit an advertisement to the CSCR by using DGS Procurement Division's Internet web page (www.dgs.ca.gov/pd/Home.aspx), or by submitting Form STD 815 to DGS/Business Development Unit. DGS charges a fee for each advertisement that appears in the CSCR. There is an additional fee for advertisements that are not submitted electronically.

E. Samples

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

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

Proposed revisions to the *Judicial Branch Contracting Manual*:
Chapter 4C (Procurement of IT Goods and Services), pages 7 and 23.

and if not, which elements are not responsive and what changes would be necessary and acceptable.

Draft Bid: A draft Bid may be included to allow each Bidder to submit an "almost final" Bid in order to identify any faulty administrative aspect of the Bid that, if not corrected, could cause the final Bid to be rejected for ministerial reasons.

The IFB or RFP must be drafted to implement the phased approach, if applicable.

STEP 6—DRAFT SOLICITATION DOCUMENT

The Buyer should draft the final Solicitation Document. For requirements applicable to Solicitation Documents, see chapter 4, section 4.2 of this Manual.

The 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.

Bidders may claim a small business preference in any competitive solicitation of IT goods and services.³ Applicable Solicitation Documents must contain language regarding the small business preference. For additional information regarding the small business preference, see chapter 3, section 3.4.

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

A. RFQs

An RFQ is used for procurements where Bids may be solicited by phone or another method of electronic communication.

³ Government Code section 14838.5(c) allows the director of the Department of General Services (DGS) to establish a higher threshold above which state agencies must offer the small business preference. Within the executive branch, purchasing authority resides primarily with DGS (see, e.g., *State Contracting Manual*, volume 2, ~~section 4.A1.0Fi\$Cal, chapter 1, Introduction~~). Within the judicial branch, however, each JBE possesses its own purchasing authority (see chapter 1, section 1.1.A of this Manual). Accordingly, the authority to establish a higher threshold amount for a JBE resides in the Approving Authority of that JBE. If the Approving Authority establishes a higher threshold amount, the Approving Authority must ensure that the higher threshold is reasonable and appropriate.

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.

The Evaluation Team must not use any requirements other than those provided by law or specified in the RFP (or addenda thereto) to score Bids. The JBE must award the contract (if at all) to the Bidder whose Bid is given the highest score by the Evaluation Team, after applying any preference, incentives, or discounts. See chapter 3 of this Manual for more information regarding preferences, incentives, and discounts.

Suggested Cost Evaluation Criteria: JBEs may use the process for assigning cost points set forth in appendix A of this chapter. Alternately, JBEs may adopt their own processes for assigning cost points.

Note: There is an additional cost evaluation requirement for IT goods solicitations that are required to be advertised (see the table in step 7 for which solicitations must be advertised). For those solicitations, the JBE must consider a Bidder's "best financing alternative" (including lease or purchase alternatives) if any Bidder timely requests such consideration. If the solicitation is posted more than 30 days before the Bid Closing Time, the Bidder's request must be received by the JBE at least 30 days before the Bid Closing Time. If the solicitation is posted less than 30 days before the Bid Closing Time, the Bidder's request must be received by the JBE by the day that is halfway between the posting date and the Bid Closing Time. However, the JBE does not need to consider a particular financing alternative if, in the judgment of the Approving Authority, that financing alternative should not be considered. (See PCC 12102.2(d)(e).)

Demonstration: The evaluation process may also include a demonstration, at the JBE's discretion. The demonstration may be used to verify the claims made in the Bid, corroborate the evaluation of the Bid, or confirm that the hardware and software are actually in operation. If a demonstration is required, the JBE will give notice to the Bidder. The Bidder must make all arrangements for demonstration facilities at no cost to the JBE. The location of the demonstration may be determined by the JBE. The Evaluation Team, in its good faith judgment, will determine whether or not a demonstration has been successfully executed.

Certification: The JBE's contact person for administration of the solicitation (who should have been identified in the RFP) must execute a certificate under penalty of perjury that

Proposed revisions to the *Judicial Branch Contracting Manual*:
Chapter 5 (Non-Competitively Bid Procurements), pages 8-9.

The sole source approver approves or denies the sole source request. If the sole source approver approves the sole source request, the Buyer should conduct the procurement as proposed. If the sole source approver denies the sole source request, the Buyer will either cancel the procurement or conduct a competitive solicitation to acquire the same or equivalent non-IT goods, non-IT services, or IT goods and services.

The JBE may, in its Local Contracting Manual, place restrictions on the use of sole source procurements or specify a form for sole source requests. If no form is specified in the Local Contracting Manual, the sole source request may take the form of a memorandum.

5.10 SPECIAL CATEGORY NCB CONTRACT REQUEST

The JBE may, under certain circumstances, establish a special category non-competitively bid contract request (SCR) when it determines that a significant number of repeat NCB procurements of non-IT goods, non-IT services, or IT goods and services will occur. The SCR is limited to a specific type of non-IT goods, non-IT services, or IT goods and services for which:

- There is no viable competition; or
- Competitive bidding cannot be completed using reasonable efforts before the time such non-IT goods, non-IT services, or IT goods and services are required.

The JBE may, in its Local Contracting Manual, place restrictions on the use of SCRs or specify a form for use in SCRs. If no form is specified in the Local Contracting Manual, the SCR may take the form of a memorandum.

The SCR must be signed by the sole source approver. The Buyer should place a copy of the SCR in the procurement file for any procurement of the affected non-IT goods, non-IT services, or IT goods and services.

5.11 TRAINING

JBEs may procure training without conducting a competitive procurement if: (i) the training is for JBE personnel and does not involve training on the use of IT goods or services; (ii) the dollar amount of the training contract does not exceed \$50,000; and (iii) the dollar amount of multiple training contracts with a single contractor does not exceed \$50,000 cumulatively in any 12-month period. The foregoing non-competitively bid

procurement is limited to pre-existing training courses; it does not cover the development of training or other personal or consulting services. A JBE shall not split contracts to avoid competitive bidding or other contract requirements. A JBE with recurring training needs should assess the JBE's cumulative amounts spent on training, and generally should go out to bid if there are significant ongoing and/or JBE-wide training needs.

5.1~~2~~ AMENDMENTS

The JBE should submit certain amendments to the NCB process outlined below. The NCB process ensures that the amendment is in the best interest of the JBE.

A. Amendments Covered

The types of amendments covered are those that affect the competitive basis on which the contract was awarded, including amendments that increase or decrease quantity, dollar amounts, or time. Specifically:

- Amendments to a competitively-solicited contract where the type of change contemplated in the amendment was not evaluated in the selection process;
- Amendments to an LPA purchasing document where the type of change contemplated in the amendment was not evaluated during the LPA review process; and
- Amendments to a small purchase (originally under \$10,000) which increase the value of the purchase to \$10,000 or more, if the original purchase was completed pursuant to section 5.1 above.

Example: The JBE has a services contract that is nearing expiration, and the JBE wishes to extend the term of the contract using an amendment. The contract was competitively solicited, but renewal terms were not addressed in the Solicitation Document and were not considered by the Evaluation Team. Before extending the term of this contract using an amendment, the JBE should submit the amendment to an NCB process.

Example: The JBE has a contract that grants the JBE the option to extend the term of the contract for one year. The contract is nearing expiration, and the JBE wishes to extend the term of the contract using an amendment. The contract was competitively solicited, and the extension term was evaluated during the solicitation process. There is no need to submit the amendment to an NCB process.