



# JUDICIAL COUNCIL OF CALIFORNIA

ADVISORY COMMITTEE ON AUDITS AND  
FINANCIAL ACCOUNTABILITY FOR THE  
JUDICIAL BRANCH

[www.courts.ca.gov/auditcommittee.htm](http://www.courts.ca.gov/auditcommittee.htm)  
[auditcommittee@jud.ca.gov](mailto:auditcommittee@jud.ca.gov)

## AUDITS AND FINANCIAL ACCOUNTABILITY COMMITTEE

### OPEN MEETING AGENDA

Open to the Public Unless Indicated as Closed (Cal. Rules of Court, rule 10.75(c)(1))

THIS MEETING IS BEING CONDUCTED BY ELECTRONIC MEANS

OPEN PORTION OF THIS MEETING IS BEING RECORDED

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**Date:** July 12, 2019  
**Time:** 12:15 – 1:15 PM  
**Public Call-In Number:** 1-877-820-7831; Public Listening Code 4045700

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Meeting materials for open portions of the meeting will be posted on the advisory body web page on the California Courts website at least three business days before the meeting.

Agenda items are numbered for identification purposes only and will not necessarily be considered in the indicated order.

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#### **I. OPEN MEETING (CAL. RULES OF COURT, RULE 10.75(C)(1))**

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##### **Call to Order and Roll Call**

##### **Opening Comments by the Chair and Vice-Chair**

Presenter(s)/Facilitator(s): Hon. Judge Rosenberg—Chair; Hon. Presiding Justice  
Siggins—Vice Chair

##### **Approval of Minutes**

Approve minutes of the June 28, 2019, meeting of the audit committee.

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#### **II. PUBLIC COMMENT (CAL. RULES OF COURT, RULE 10.75(K)(2))**

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##### **Written Comment**

In accordance with California Rules of Court, Rule 10.75(k) (1), written comments pertaining to any agenda item of a regularly noticed open meeting can be submitted up to one complete business day before the meeting. For this specific meeting, comments should be e-mailed to [auditcommittee@jud.ca.gov](mailto:auditcommittee@jud.ca.gov) or mailed or delivered to Judicial Council of California, Audit Services, 455 Golden Gate Avenue, 5<sup>th</sup> Floor, San Francisco, California 94102 attention: Audit Services. Only written comments received by 12:15 pm on July 11<sup>th</sup>, 2019 will be provided to advisory body members prior to the start of the meeting.

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**III. INFORMATION ONLY ITEMS (NO ACTION REQUIRED)**

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**Info 1**

**General Discussion by Members of the Committee**

Open discussion by committee members regarding any topic within the scope and purview of the Advisory Committee for Audits and Financial Accountability for the Judicial Branch.

Presenter(s)/Facilitator(s): Grant Parks, Principal Manager – Judicial Council’s Audit Services

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**IV. DISCUSSION AND POSSIBLE ACTION ITEMS (1 ITEM ONLY)**

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**Item 1**

**Revisions to the Judicial Branch Contracting Manual (Action Required)**

Review and approve the proposed changes to the Judicial Branch Contracting Manual per California Rules of Court, Rule 10.63(c)(3), as well as the accompanying report to the Judicial Council.

Presenter(s)/Facilitator(s):

Oliver Cheng, Attorney – Judicial Council’s Legal Services

John Prestianni, Supervising Attorney – Judicial Council’s Legal Services

Jimmy Nguyen, Attorney – Judicial Council’s Legal Services

Andrew Tran, Attorney – Judicial Council’s Legal Services

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**V. ADJOURNMENT**

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**Adjourn the meeting**



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## ADVISORY COMMITTEE ON AUDITS AND FINANCIAL ACCOUNTABILITY FOR THE JUDICIAL BRANCH

### MINUTES OF OPEN MEETING WITH CLOSED SESSION

June 28, 2019  
12:15 p.m. - 1:15 p.m.  
Conference Call

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**Advisory Body Members Present:** Hon. David Rosenberg, Hon. Peter Siggins, Hon. Susan Matcham, Hon. Mary Ann O'Malley, Mr. Kevin Lane, Mr. Kevin Harrigan, Ms. Tania Ugrin-Capobianco,

**Advisory Body Members Absent:** Ms. Sherri Carter, Mr. Phil Jelcich (non-voting advisory member)

**Others Present:** Mr. Grant Parks, Mr. Robert Cabral, Mr. Alex Calvo (CEO – Santa Cruz Superior Court), Ms. Sue Wong, (CFO – San Francisco Superior Court)

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#### OPEN MEETING

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##### Call to Order and Roll Call

The chair called the meeting to order at 12:16 p.m. and took roll call.

##### Approval of Minutes

Ms. Ugrin-Capobianco moved to approve the minutes of March 28, 2019 meeting. Judge O'Malley seconded the motion. There was no further discussion of the minutes. Motion to approve passed by unanimous voice vote of the committee members present.

No public comments were received for this meeting.

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#### DISCUSSION AND ACTION ITEMS

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##### Info Item 1

##### Report from Audit Services

Mr. Parks informed members that audit teams are currently performing audits at Modoc and Trinity superior courts. These audit reports will likely be presented to the committee in late September. Mr. Parks spoke with Ms. Carter yesterday regarding the Court Innovations Grant Program. Los Angeles Superior Court will be the next audited court under this program. Turning to staffing levels, Mr. Parks noted that Audit Services has one vacancy that it expects to fill soon, thus leaving two additional vacant positions that will remain unfilled due to budgetary restrictions.

Mr. Parks also informed the audit committee that the Judicial Council recently entered into an agreement with the State Controller's Office (SCO) to audit 8 more trial courts during FY 2019-20. These audits will focus on court compliance with the State's rules for the for revenues, expenditures and fund balances under each court's control. These audits are required under Government Code, Section 77206(h). The scope of work for these audits is basically the same scope as seen by the audit committee in previous meetings. To ensure funding for these audits continues in fiscal year 2020-21 and beyond, the committee had previously approved a budget change proposal (BCP) in March 2019 to fully fund the SCO's audits on an ongoing basis (i.e. 14-15 audits per year; each court on roughly a 4-year audit cycle). Mr. Parks concluded his comments by noting the Judicial Council had recently adopted its first set of data quality standards for JBSIS reporting, which was an issue the audit committee had first raised with the Court Executives Advisory Committee (CEAC) in April 2018. Mr. Parks also reminded committee members that its next meeting will take place on July 12<sup>th</sup>, which will be a special meeting to discuss proposed changes to the *Judicial Branch Contracting Manual*.

Judge O'Malley asked about the timing and sufficiency of the BCP request. Mr. Parks replied that the BCP is still working its way through the judicial branch's process, noting it will be submitted to the Department of Finance in September 2019 and—if approved by the Department of Finance—will become part of the Governor's FY 2020-21 budget. Judge O'Malley then asked if the budget allocation in FY 2019-20 is enough to cover the SCO's audit costs for the coming fiscal year. Mr. Parks confirmed enough spending authority exists to pay for the next round of SCO audits. Judge Rosenberg raised his concern about the number of vacant audit positions. Mr. Parks replied that Audit Services—just like any other state department or internal office within the Judicial Council—must manage its workload based on the financial resources it has available. Mr. Parks noted that many other offices within the Judicial Council are operating under similar budgetary constraints, and the audit plan that will be discussed later in this meeting reflects the audit staffing levels Audit Services expects to achieve.

## **Info Item 2.**

### **General Discussion by Members of the Committee**

No items discussed.

## **Action Item 1**

### **Annual Audit Plan- Fiscal Year 2019-20 (Action Required)**

Mr. Parks began the discussion, noting one of the primary tasks of this committee is to approve the annual audit plan. This plan outlines which courts get audited by Audit Services and defines the scope of those audits. To provide context for the audit committee's discussion of the plan, Mr. Parks provided an overview of the audit findings reported in fiscal year 2018-19. As shown in the materials, the audit committee has reviewed a total of 18 audit reports. For 87% of all audit findings, the courts agreed or partially agreed with the reported issues and recommendations. The materials also show the areas where courts have difficulties, most notably in their compliance with the Judicial Council's cash handling policies and their reporting of case filings data pursuant to the JBSIS manual. Given the Judicial Council's recent adoption of a tolerable error rate for JBSIS reporting, Audit Services is developing a new template to report JBSIS-related audit findings. This new template is intended to more easily allow a reader to see whether a court is above or below the 2% data quality threshold.

Reflecting on the cash handling findings, Mr. Parks reminded the committee that it had previously issued an audit advisory on this topic in November 2018. Mr. Parks recommended that cash handling and JBSIS reporting continue to be an area of focus in the audit plan. Committee members and staff then reviewed the proposed audit

schedule. Judge O'Malley and Ms. Ugrin-Capobianco thanked committee staff for the presentation. Mr. Harrigan noted the audit committee had previously suspended a portion of the audit plan regarding the payment practices for court interpreters. He recommended the committee reconsider this decision at its next regular meeting in September 2019. Without further discussion, the committee took the following actions.

**Action:** Mr. Harrigan moved to add an agenda item to our next audit committee meeting in September 2019 to consider reinstating the "court interpreter payments" component of the annual audit plan (seconded by Ms. Ugrin-Capobianco). The motion passed by unanimous voice vote of the committee members present.

**Action:** Ms. Ugrin-Capobianco moved to approve the FY 19-20 annual audit plan (seconded by Presiding Justice Siggins). The motion passed by unanimous voice vote of the committee members present.

## **Action Item 2**

### **External Audit Report – State Controller's Office (Action Required)**

Mr. Parks began the discussion on the audit of the Judicial Council by the State Controller's Office (SCO). Similar to how the SCO evaluates the superior courts' compliance with state rules, so too does it audit the Judicial Council per Government Code, Section 77206(i). The SCO's overall conclusion for this audit confirms the Judicial Council has complied with the State's rules regarding the revenues, expenditures and fund balances under its control for fiscal year 2017-18. Despite this positive outcome, the SCO's auditors did identify three issues and the Judicial Council is actively working towards taking corrective action. Mr. Parks summarized the three findings, which focused on the lack of segregation of duties for the reporting of employee leave balances to the State, and inadequate reconciliations for certain account receivable balances owed by the Judicial Council's employees. There was no further discussion by committee members.

**Action:** Judge Matcham moved to approve this report for posting (seconded by Mr. Harrigan). The motion passed by unanimous voice vote of the committee members present.

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## **A D J O U R N M E N T**

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There being no further open meeting business, the meeting was adjourned to closed session at 12:45 p.m.

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## **C L O S E D   S E S S I O N**

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### **Item 3**

#### **Draft Audit Report – Rule of Court 10.75(d) (6) (Action Required)**

##### **Non-final audit reports or proposed responses to such reports**

Committee members discussed the draft audit report of the Riverside Superior Court, per Rule of Court 10.63(c)(3).

**Action:** Presiding Justice Siggins moved to approve this report for posting (seconded by Judge O'Malley). The motion passed by unanimous voice vote of the committee members present.

**Item 4**

**Draft Audit Report – Rule of Court 10.75(d) (6) (Action Required)**

**Non-final audit reports or proposed responses to such reports**

Committee members discussed the draft audit report for San Benito Superior Court's administration of Court Innovations Grant Program, per Rule of Court 10.63(c)(1).

**Action:** Judge O'Malley moved to approve this report for posting (seconded by Presiding Justice Siggins). The motion passed by unanimous voice vote of the committee members present.

**Item 5**

**Draft Audit Report – Rule of Court 10.75(d) (6) (Action Required)**

**Non-final audit reports or proposed responses to such reports**

Committee members discussed the draft audit report for San Francisco Superior Court, per Rule of Court 10.63(c)(1).

**Action:** Judge O'Malley moved to approve this report for posting (seconded by Ms. Ugrin-Capobianco). The motion passed by unanimous voice vote of the committee members present.

**Item 6**

**Draft Audit Report – Rule of Court 10.75(d) (6) (Action Required)**

**Non-final audit reports or proposed responses to such reports**

Committee members discussed the draft audit report for Santa Cruz, per Rule of Court 10.63(c)(1).

**Action:** Ms. Ugrin-Capobianco moved to approve this report for posting (seconded by Mr. Harrigan). The motion passed by unanimous voice vote of the committee members present.

Adjourned closed session at 1:15 p.m.

Approved by the advisory body on \_\_\_\_\_, 2019.



## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on September 23–24, 2019

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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>	October 1, 2019
Recommended by	Date of Report
Hon. David Rosenberg, Chair	July 12, 2019
Advisory Committee on Audits and Financial Accountability for the Judicial Branch	Contact
	Oliver Cheng, Attorney
	415-865-4616
	<a href="mailto:oliver.cheng@jud.ca.gov">oliver.cheng@jud.ca.gov</a>

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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*. Most of the revisions reflect changes in the Public Contract Code. Additional revisions clarify procurement roles and a contractor certification.

### Recommendation

The Advisory Committee on Audits and Financial Accountability for the Judicial Branch recommends that the Judicial Council, effective October 1, 2019, revise and adopt proposed revisions to the *Judicial Branch Contracting Manual*.

The text of the revised chapters of the manual showing the recommended revisions in track changes is included as 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 the manual), effective October 1, 2011, the operative date of substantive requirements of the

California Judicial Branch Contract Law (JBCL).<sup>1</sup> In December 2011, April and August 2012, December 2013, June 2015, June 2016, July 2017, and July 2018, the council adopted revisions to the manual. The version of the manual adopted by the council in July 2018, effective August 1, 2018, remains in effect as of the date of this report.

## **Analysis/Rationale**

### **Statutory requirement and development of the manual**

The JBCL was enacted on March 24, 2011, and became effective on that date. With certain exceptions,<sup>2</sup> 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.<sup>3</sup> The JBCL applies to all covered contracts initially entered into or amended by JBEs on or after October 1, 2011.<sup>4</sup> The JBCL also requires the council to adopt a manual containing procurement and contracting policies and procedures that must be followed by all JBEs.<sup>5</sup> The policies and procedures in the manual must be “consistent with [the Public Contract Code] and substantially similar to the provisions contained in the State Administrative Manual and the State Contracting Manual.”<sup>6</sup> The requirement that JBEs comply with applicable provisions of the Public Contract Code is independent of the requirement that JBEs follow the policies and procedures in the manual. Since the adoption of the initial *Judicial Branch Contracting Manual*, Judicial Council staff has continued to receive input from the Judicial Branch Contracting Manual Working Group regarding revisions to the manual, and the council has adopted eight sets of revisions.

The Judicial Council, effective February 20, 2014, adopted rule 10.63 of the California Rules of Court to establish by rule the Advisory Committee on Financial Accountability and Efficiency for the Judicial Branch, which in 2017 was renamed the Advisory Committee on Audits and Financial Accountability for the Judicial Branch. Under subdivisions (c)(2) and (c)(3) of this rule, the duties of the committee include (1) advising and assisting the council in performing its responsibilities and exercising its authority under the California Judicial Branch Contract Law (JBCL) and (2) reviewing and recommending to the council proposed updates and revisions to the JBCM.

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<sup>1</sup> Pub. Contract Code, §§ 19201–19210.

<sup>2</sup> *Id.*, §§ 19204(c), 19207, and 19208.

<sup>3</sup> *Id.*, § 19204(a).

<sup>4</sup> *Id.*, § 19203.

<sup>5</sup> *Id.*, § 19206.

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



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

Many of the proposed edits are based on Assembly Bill 2764,<sup>7</sup> which amended Public Contract Code section 10430 effective January 1, 2019. As a result of AB 2764, procurements of IT goods and services are subject to additional vendor certifications. Therefore, conforming edits are proposed to chapters 4, 4C, and 5 of the JBCM to describe the vendor certifications.<sup>8</sup>

In addition, clarification edits are proposed to more closely align the JCBM with the *State Contracting Manual*. In chapter 1 of the JBCM, the committee recommends clarifying that whenever possible, different staff persons should be responsible for approval of invoices and preparation of payments to vendors.<sup>9</sup> In chapter 8 (Appendix A) of the JBCM, the committee recommends clarifying the procedure to verify a vendor's qualification to do business in California.

### **Comments**

Proposed revisions to the manual were submitted for public comment from May 30 through June 12, 2019. 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. The public comment that was received and the committee's response are set forth in the chart on page 4.

### **Fiscal and Operational Impacts**

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

### **Attachments**

1. Comment chart, at page 4
2. Attachment A: Revised chapters of the *Judicial Branch Contracting Manual* with revisions in track changes format

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<sup>7</sup> Stats. 2018, ch. 220.

<sup>8</sup> The proposed edits are in chapter 4 (sections 4.4(C)(1) and 4.4(E)), chapter 4C (Step 6(B) and (C)), and chapter 5 (section 5.13).

<sup>9</sup> The proposed edits are in chapter 1 (section 1.1(C)(1)).

COMMENT CHART

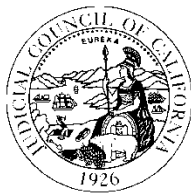
**Invitation to Comment SP19-02**

**Judicial Administration: *Judicial Branch Contracting Manual***

Commentator	Position	Comment	Committee Response
<p>Sherri R. Carter, Executive Officer/Clerk of Court</p> <p>Superior Court of California, County of Los Angeles</p>	<p>Agree</p>	<p>The JCC states that its work necessarily relies upon, in part, the ideas and input of its advisory committees and related working groups and task forces. This ITC, an update of the JCBM, asserts that “[s]taff received feedback from the Judicial Branch Contracting Manual Working Group regarding the proposed revisions.” Yet the Working Group, comprising procurement professionals from courts across the state, had no meetings in the past year; the only information exchanged was from JCC staff to the group. There were no group conference calls or meetings and little opportunity for the members of the Working Group to raise ideas or suggestions. The JBCM Working Group is a valuable resource and a much-needed voice for the courts in an important area. It should be given the opportunity to be heard, prior to release of proposals for comment.</p>	<p>The commentator agrees with the proposed changes to the <i>Judicial Branch Contracting Manual</i> (JBCM). Aside from agreeing with the proposed JBCM revisions, the remainder of the public comment does not substantively address the proposed revisions. Instead, the commentator makes various comments about the level of participation by the JBCM Working Group.</p> <p>The JBCM Working Group was provided with opportunities to ask questions and provide input on the proposed revisions.</p>

## **Attachment A**

Revised chapters of the *Judicial Branch Contracting Manual*  
(revisions in track changes format)



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 1  
Page 1 of 11

## PURCHASING AUTHORITY

### CHAPTER 1

Original Release Date:  
October 1, 2011

Revised Effective:  
~~August 1, 2018~~

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## INTRODUCTION

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

## DEFINED TERMS

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

## 1.1 PURCHASING AUTHORITY OF JUDICIAL BRANCH ENTITIES

### A. Purchasing Authority Basics

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

JBE	Legal Basis
Supreme Court	Established by article VI, section 2 of the California Constitution. See also Government Code (GC) sections 68803 and 68807.
Courts of Appeal	Established by article VI, section 3 of the California Constitution. See also GC 69141. Pursuant to CRC 10.1004(c)(6), authority is vested in the Administrative Presiding Justice, who may in turn delegate this authority to the clerk/administrator pursuant to CRC 10.1020(c).
Superior Courts	Established by article VI, section 4 of the California Constitution. Pursuant to CRC 10.603(c)(6)(D), authority is vested in the Presiding Judge, who may in turn delegate this authority to the Court Executive Officer.

JBE	Legal Basis
Habeas Corpus Resource Center (HCRC)	Established by GC 68661. Pursuant to GC 68664(a), responsibility for the HCRC's "day-to-day operations" is assigned to the Executive Director.
Judicial Council	Established by article VI, section 6 of the California Constitution. See also GC 68506 and CRC 10.80.

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

## **B. Scope of Authority**

### **1. Limitations on Purchasing Authority**

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

The Judicial Council is responsible for the construction, acquisition, and operation of appellate court facilities (GC 69204(b)) and superior court facilities (GC 70391(b)). In addition to any responsibilities delegated by the Judicial Council, GC 69206 and 70392 assign certain court facilities-related responsibilities to the AOC.<sup>1</sup>

Under GC 70392(e), however, the AOC<sup>1</sup> is authorized to delegate its responsibilities for ongoing operation and management to a court for some or all of the existing court facilities used by that court.

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

JBEs may enter into Intra-branch Agreements (IBAs) with other JBEs for goods or services, including IT goods and services. JBEs may enter into Memoranda of Understanding (MOUs) with other governmental entities for goods or services, including IT goods and services.

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<sup>1</sup> Under CRC 10.81(b)(2) and (3), the references to the AOC in GC 69206 and 70392 are now deemed to refer to the Judicial Council staff.

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

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

## C. Purchasing Roles and Responsibilities

### 1. Roles and Responsibilities

The following table defines the roles and responsibilities of individuals involved in a JBE's procurement activities. In some JBEs, especially smaller superior courts, one individual may perform several of these roles. The same employee may initiate the requisition and receive the goods or services, although receipt by a second person strengthens internal controls. Different employees must be responsible for procurement activities and payment approval. When possible, different employees should be responsible for approving invoices and preparing payments.

Assignment	Roles and Responsibilities
Procurement and Contracting Officer (PCO)	<ul style="list-style-type: none"> <li>• Is responsible for all procurement and contracting within the JBE</li> <li>• Ensures that all procurement and contracting activities within the JBE comply with applicable procurement laws</li> <li>• Provides the necessary resources to ensure that all staff are properly qualified and trained in all aspects of the procurement process</li> </ul>



Assignment	Roles and Responsibilities
	<ul style="list-style-type: none"> <li>Oversees development of the Local Contracting Manual</li> </ul>
<p>Buyer</p> <p><b>Note:</b> A JBE may elect not to designate a Buyer. If the JBE does not do so, then the Buyer role reverts to the PCO.</p>	<ul style="list-style-type: none"> <li>Performs day-to-day purchasing and contracting activities</li> <li>Is knowledgeable about applicable procurement laws and best practices</li> <li>Ensures that the needs of the JBE are met within applicable procurement laws</li> <li>Maintains the procurement file and related documentation</li> </ul>
<p>ADA Coordinator</p> <p><b>Note:</b> 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"> <li>Assists and responds to questions or concerns regarding procurement-related reasonable accommodation needs</li> </ul>
<p>DVBE Advocate</p> <p><b>Note:</b> If no DVBE Advocate is designated, the DVBE Advocate role reverts to the PCO.</p>	<ul style="list-style-type: none"> <li>Identifies potential DVBE prime contractors or subcontractors and potential contracting opportunities</li> <li>Makes information regarding pending solicitations available to certified DVBE firms capable of meeting the JBE's business needs (MVC 999.12)</li> </ul>

Assignment	Roles and Responsibilities
<p>Procurement-Card Coordinator</p> <p><b>Note:</b> A JBE may elect not to designate a Procurement-Card Coordinator. If the JBE does not do so, then the Procurement-Card Coordinator role reverts to the PCO.</p>	<ul style="list-style-type: none"> <li>• Ensures compliance with relevant procurement card procedures and contract terms</li> <li>• Adds, deletes, and alters card restrictions/limits</li> <li>• Reviews billing reports to monitor payments and disputes</li> </ul>
<p>Protest Hearing Officer</p> <p><b>Note:</b> If a protest hearing officer is not designated by a JBE, the Buyer's supervisor will act as the protest hearing officer.</p>	<ul style="list-style-type: none"> <li>• Evaluates protests</li> <li>• Issues written determinations regarding protests</li> </ul>
<p>Protest Appeals Officer</p> <p><b>Note:</b> If a protest appeals officer is not designated by a JBE, the protest hearing officer's supervisor will act as the protest appeals officer.</p>	<ul style="list-style-type: none"> <li>• Evaluates protest-related appeals</li> <li>• Issues written determinations regarding appeals of protests</li> </ul>
<p>Payment Officer</p>	<ul style="list-style-type: none"> <li>• Ensures timely payment of invoices</li> <li>• Ensures that proper internal approvals have been secured before processing payment</li> </ul>

## 2. Ethics

### a. Ethics training

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

### b. Ethics and Conflicts

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

All personnel involved in the procurement process must:

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

Other ethical issues include the following:

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

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

*c. Gifts and Gratuities*

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

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

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

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

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

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

## 1.2 LOCAL CONTRACTING MANUAL

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

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

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

Contents: The Local Contracting Manual must include the JBE's organizational structure; for example, who fills the roles identified in section 1.1.C.1 of this chapter.

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

- Normal lead times for different types of purchases;
- Required approvals, both internal and external;
- Certification of availability of funds;
- Setting up and maintaining official procurement files; and
- Signature authorization (who can sign what).

The JBE may include in its Local Contracting Manual a signature authorization listing chart, such as the one below:

Value of Contract	Person(s) or Position(s) Authorized to Sign
Up to \$5,000	<i>[name or position]</i>
Up to \$100,000	<i>[name or position]</i>

Value of Contract	Person(s) or Position(s) Authorized to Sign
Above \$100,000	<i>[name or position]</i>

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



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 4  
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## **COMPETITIVE SOLICITATION OVERVIEW**

### **CHAPTER 4**

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## **INTRODUCTION**

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

## **DEFINED TERMS**

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

## **4.1 THE BASICS OF COMPETITION**

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

### **A. General Requirements**

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

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

### **B. Developing Prospective Bidder Resources**

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

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

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

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

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

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

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

### C. Confidentiality

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

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

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

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

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

## D. Advertising

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

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

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

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

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

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

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

**Note:** DGS's Cal eProcure system may require that an advertisement remain in the CSCR longer than 10 days. Other electronic bidding systems may have similar requirements. Buyers should confirm the advertisement end date if using these systems.

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<sup>1</sup> DGS's Cal eProcure system currently uses FI\$Cal technology. JBEs may be required to register with FI\$Cal to use certain features of DGS's Cal eProcure system.

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](http://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

- Specify the quantities of the sample goods required.

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

## **4.2 SOLICITATION DOCUMENTS GENERALLY**

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

### **A. Developing the Solicitation Document**

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

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

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

2. PCC 6611 Special Negotiation Process: If the procurement will include a special negotiation process (e.g., the use of supplemental bids), the Solicitation Document must provide appropriate details.

## B. Required Provisions

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

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

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

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

- A schedule of key dates, including the Bid Closing Time;
- Information on how Bids are to be submitted (e.g., sealed envelope with the solicitation number on the outside of the sealed package);
- Where Bids must be sent or delivered;
- Any attachments that are required to be returned by Bidders, such as administrative or technical requirements; and
- Evaluation information.

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

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

5. Bidder signatures: For any written solicitation, regardless of dollar value, solicitation format, or delivery method (i.e., faxed, mailed, or delivered in person), Bids should include the signature of an authorized representative of the Bidder. Faxed or

electronic signatures are acceptable if allowed by the Solicitation Document. Of course, a faxed or electronic signature could not be used in any solicitation requiring a sealed bid as such bids must be delivered to the JBE in a sealed envelope.

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

6. Faxed bid responses: The following paragraph (or equivalent) must be included in all written 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. The pages of the faxed bid received before the bid due date and 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 due date and time.

**Note:** JBEs should consider adopting a solicitation value (e.g., \$10,000) above which faxed bids will not be accepted. JBEs may also consider limiting the acceptance of faxed Bids to solicitations conducted via telephone or e-mail. Any limit on faxed bids should be included in the JBE’s Local Contracting Manual.

7. Loss leader prohibition: Except as noted below, a JBE must include the following statement in every (i) non-IT goods Solicitation Document, (ii) non-IT services IFB or RFP that involves the furnishing of equipment, materials, or supplies, and (iii) IT goods or services RFP:

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

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

- Request for Offers (RFOs) for acquisitions from LPAs;
- Procurements using the SB/DVBE option; and
- Non-competitively bid procurements.



8. Socioeconomic and environmental program language: JBEs are reminded to include socioeconomic and environmental program language in their solicitations, as applicable. If the DVBE incentive is waived, the Solicitation Document should state that the DVBE incentive is being waived. Refer to chapter 3 of this Manual for further information regarding socioeconomic and environmental programs, including circumstances in which JBEs may waive the DVBE incentive from individual competitive solicitations.

9. Tie bids: It is possible that two Bids will have the same cost (when a lowest responsible bidder approach is used) or receive the same score (when a highest scored bid approach is used). JBEs should include a tiebreaker provision in the Solicitation Document to address how the contract award will be made in the event of a tie. Examples of permissible tiebreakers are a coin toss or other similar objective method. The event must be observed by witnesses, and the affected Bidders should be invited to observe.

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

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

12. Conflict Minerals: PCC 10490 places restrictions on procurements that include goods or services that involve certain “conflict minerals.” These minerals include cassiterite, columbite-tantalite, gold, and wolframite—minerals found in many technological products such as mobile telephones, laptop computers, and digital video recorders.

Scrutinized companies, as defined in PCC 10490(b), are ineligible to submit Bids to JBEs for procurements involving conflict minerals. Accordingly, if a JBE is conducting a procurement for goods or services that involves these minerals, the JBE should require each Bidder to certify either (i) it is not a “scrutinized company” as defined in PCC 10490(b), or (ii) the goods or services the Bidder would provide to the JBE are not related to products or services that are the reason the Bidder must comply with Section 13(p) of the Securities Exchange Act of 1934.<sup>2</sup>

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<sup>2</sup> PCC 10490(b) defines a “scrutinized company” as “a person that has been found to be in violation of Section 13(p) of the Securities Exchange Act of 1934 by final judgment or settlement entered in a civil or administrative action brought by the Securities and Exchange Commission and the person has not

### C. Amending a Solicitation Document

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

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

A Solicitation Document may be modified before the Bid Closing Time. In the case of a modification resulting from a solicitation specifications protest, a Solicitation Document may be modified after the Bid Closing Time.

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

**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, Prospective Bidders will need more time to submit a responsive Bid, then the Bid Closing Time should be extended in the addendum.

2. Evaluation criteria revisions: Evaluation criteria may not be changed after the Bid Closing Time.

### D. Multiple Awards for Services

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

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remedied or cured the violation in a manner accepted by the commission on or before final judgment or settlement." Section 13(p) of the Securities Exchange Act of 1934 requires certain entities to make disclosures concerning conflict minerals.

The single solicitation must (i) have clear, concise descriptions of the work to be performed or goals and objectives to be achieved, (ii) state the intended number of awards,<sup>3</sup> and (iii) provide a clear objective standard on how awards will be made. The single solicitation should give Bidders sufficient information to be able to understand what is to be accomplished and to be able to budget accordingly.

### **4.3 BID HANDLING**

1. Bid submissions: Generally, Bids are handled as follows:
  - When sealed Bids are required, each Bid must be separately sealed inside an envelope, signed (if required by the Solicitation Document), and received by the Bid Closing Time to be considered for award.
  - Bids must be kept in a secured area and remain confidential until bid opening.
  - Bids received after the Bid Closing Time are considered nonresponsive and must not be considered for award.<sup>4</sup>
  
2. Submission of bids by fax: Faxed bids should only be accepted when:
  - The Solicitation Document specifically states they will be allowed; and
  - They are received on the fax machine at the telephone number specified in the Solicitation Document.

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

Any solicitation that requires a sealed Bid cannot be faxed.

### **4.4 VENDOR SELECTION**

#### **A. Vendor Selection Basics**

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

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<sup>3</sup> The intended number of awards may be a range; for example, 2–4.

<sup>4</sup> A JBE may adopt, in its Local Contracting Manual, a requirement that late Bids be returned unopened to the applicable Bidder.

- Be unbiased and able to evaluate all Bids fairly; 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 be used only to provide clarification or subject matter expertise to the Evaluation Team.

## B. No Bids

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

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

**Option 2:** If, in the opinion of the Buyer, a second solicitation would not result in a different outcome, the Buyer may cancel the solicitation and proceed with a sole source purchase following the requirements in chapter 5, section 5.9 of this Manual. If possible, the JBE should select as the sole source a responsible Bidder whose Bid was substantially technically compliant/responsive with the specifications.

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

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

## C. Required Certifications or Permits

The PCC requires JBEs to obtain certifications or permits in connection with certain purchases.

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

~~For acquisitions of non-IT goods or services,~~ JBEs must require certain vendors to certify whether they are a “scrutinized company.” This applies regardless of the procurement approach used including, but not limited to: RFQs, RFPs, IFBs, and non-competitively bid procurements (except as specified below). The JBE may use the certification form contained in Appendix A of this chapter, or develop its own form.

The only exception to JBEs obtaining this information is for contracts awarded using (i) an LPA, if the entity creating the LPA obtained a Darfur certification, or (ii) Intergovernmental Contracts (IGCs).

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

2. Iran Contracting Act: Procurements of non-IT goods, non-IT services, or IT goods and services of **one million dollars (\$1,000,000) or more** must address the requirements of the Iran Contracting Act. Generally speaking, the act is intended to place limits on transaction with entities that engage in certain investment activities in Iran, for the reasons stated in PCC 2201.

An entity is ineligible to bid on, submit a proposal for, enter into, or renew any contract with a JBE for goods or services of one million dollars (\$1,000,000) or more if the entity engages in investment activities in Iran, as defined in the act.

In addition, a financial institution is ineligible to bid on, submit a proposal for, enter into, or renew any contract with a JBE for goods or services of one million dollars (\$1,000,000) or more if the financial institution extends credit, as defined in the act, to a business identified on a list of ineligible vendors maintained by DGS (Iran List).

Prior to submitting a bid or proposal and prior to executing any JBE contract or renewal for goods or services of one million dollars (\$1,000,000) or more, an entity must certify that it is not on the Iran List. Also, financial institutions must certify that they are not extending credit to an ineligible vendor as described in the act. This certification requirement applies regardless of the procurement approach, method, or solicitation format used, including RFPs, IFBs, RFQs, and non-competitively bid procurements. The act provides exceptions to the certification requirement; see PCC 2203(c) and (d) for additional information regarding the exceptions.

The sample certification in Appendix B may be used to satisfy the act's certification requirements.

3. Unruh Civil Rights Act and California Fair Employment and Housing Act: All procurements of **one hundred thousand dollars (\$100,000) or more** must address the requirements of PCC 2010. Generally speaking, PCC 2010 is intended to protect civil rights and prevent discrimination.

Prior to submitting a bid or proposal and prior to executing any JBE contract or renewal for goods or services of one hundred thousand dollars (\$100,000) or more, an entity must certify that it is in compliance with the Unruh Civil Rights Act and the California Fair Employment and Housing Act, and that any policy that the entity has adopted against any sovereign nation or peoples recognized by the government of the United States, including, but not limited to, the nation and people of Israel, is not used to discriminate in violation of the Unruh Civil Rights Act or the California Fair Employment and Housing Act.

The sample certification in Appendix C may be used to satisfy the PCC 2010's certification requirements.

The certification is required regardless of the procurement approach, method, or solicitation format, including, but not limited to: RFQs, RFPs, IFBs, non-competitive bids, and the SB/DVBE Option.

4. Purchases of Tangible Personal Property: If a purchase includes tangible personal property, the Vendor must submit to the JBE, for itself and each of its affiliates that make sales for delivery into California, a copy 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 Vendor must submit this documentation before a contract is executed.

There are two exemptions to this requirement:

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

The JBE should inform Bidders of this requirement in applicable Solicitation Documents. Alternatively, the JBE may require all Bidders to submit this documentation with their Bids in applicable solicitations.

**Note:** Depending on the specific situation, computer software may constitute “tangible personal property” for purposes of this section. Software is considered tangible personal property if (i) the software is transmitted to the JBE on a CD-ROM or other tangible medium, or (ii) the software includes a printed user’s manual or other physical accessory. Software is not considered tangible personal property if (i) the software is transmitted to the JBE via the Internet, and (i) no tangible medium, printed manual, or other physical accessory is included with the software.

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

#### **D. Deviations**

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

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

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

- Is not in substantial accord with the solicitation requirements;
- Provides an advantage to one Bidder over other Bidders in any way (such as reducing the cost of providing the goods or services); or
- Has a potentially significant effect on the delivery, quantity, or quality of items bid, amount paid to the Vendor, or the cost to the JBE.

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

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

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

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

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

## E. Tax Delinquents

Pursuant to PCC 10295.4, a JBE shall not enter into any contract ~~for the acquisition of non-IT goods or services~~ with a person or entity identified by the Franchise Tax Board



(FTB) or the Board of Equalization (BOE) as one of the 500 largest tax delinquents. Any contract entered into in violation of PCC 10295.4 is void and unenforceable.

Before executing any contract or renewal ~~for non-IT goods or services~~, the JBE should verify that the contractor is not on either of the following lists:

FTB list: [www.ftb.ca.gov/aboutFTB/Delinquent-Taxpayers.shtml](http://www.ftb.ca.gov/aboutFTB/Delinquent-Taxpayers.shtml)

BOE list: [www.boe.ca.gov/sutax/top500.htm](http://www.boe.ca.gov/sutax/top500.htm)

This requirement applies regardless of the procurement approach, method, or solicitation format used, including: RFPs, IFBs, RFQs, and non-competitively bid procurements.

#### **4.5 REVERSE AUCTIONS**

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

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

- The reverse auction documentation must specify (i) the date and time when the JBE will start accepting online Bids, and (ii) the date and time when the JBE will stop accepting online Bids;
- Prospective Bidders must register before the reverse auction opening date and time;
- Prospective Bidders must agree to any terms and conditions and other requirements of the solicitation;
- All Bids must be posted online and be updated on a real-time basis;
- Bidders must be allowed to lower their Bids below the lowest currently-posted bid; and
- Bids must be accepted until the specified closing date and time.

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

#### 4.6 FOLLOW-ON CONTRACTING

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

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

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

- Are consulting services present?
- Does the contract call for services that are advisory in nature, providing a recommended course of action or personal expertise and having an end product that transmits information or analysis related to the governmental functions of a JBE?

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

1. IT contracts typically considered as consulting services contracts:
  - Feasibility study;
  - Strategic planning and business process reengineering/improvement (not included in the lifecycle of an IT project); and
  - Maintenance and operations.
2. IT contracts typically not considered as consulting services contracts:

- Design development and implementation;
  - Project management;
  - Independent validation and verification; and
  - Independent project oversight consultant.
3. IT contracts that require analysis of the specific details of the contract to determine whether or not it is a consulting services contract:
- Acquisition specialist.

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

#### **4.7 SUMMARY DOCUMENT**

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

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

Procurement summary information includes but is not limited to:

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

**APPENDIX A**

**DARFUR CONTRACTING ACT CERTIFICATION**

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

To submit a bid or proposal to the [JBE], the proposer/bidder must insert its company name and Federal ID Number below and complete **ONLY ONE** of the following three paragraphs. To complete paragraph 1 or 2, simply check the corresponding box. To complete paragraph 3, check the corresponding box **and** complete the certification for paragraph 3.

<i>Company Name (Printed)</i>	<i>Federal ID Number</i>
<i>Printed Name and Title of Person Checking Box (for paragraph 1 or 2 below)</i>	

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

**OR**

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

**OR**

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

**CERTIFICATION FOR PARAGRAPH 3:**

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

<i>Company 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>	

**APPENDIX B****IRAN CONTRACTING ACT CERTIFICATION**

Pursuant to Public Contract Code (PCC) section 2204, you must complete this Iran Contracting Act certification when (i) submitting a bid or proposal to the [JBE] for a solicitation of goods or services of \$1,000,000 or more, or (ii) entering into or renewing a contract with the [JBE] for the purchase of goods or services of \$1,000,000 or more.

To submit a bid or proposal to, or enter into or renew a contract with, the [JBE], you must complete **ONLY ONE** of the following two paragraphs. To complete paragraph 1, check the corresponding box **and** complete the certification for paragraph 1. To complete paragraph 2, simply check the corresponding box.

1. We are not on the current list of persons engaged in investment activities in Iran created by the California Department of General Services (“DGS”) pursuant to PCC 2203(b), and we are not a financial institution extending \$20,000,000 or more in credit to another person, for 45 days or more, if that other person will use the credit to provide goods or services in the energy sector in Iran and is identified on the current list of persons engaged in investment activities in Iran created by DGS.

**OR**

2. We have received written permission from the [JBE] to submit a bid or proposal, or enter into or renew a contract, pursuant to 2203(c) or (d). *A copy of the written permission from the [JBE] is included herewith.*

**CERTIFICATION FOR PARAGRAPH 1:**

I, the official named below, certify that I am duly authorized to legally bind the proposer/bidder/vendor to the clause in paragraph 1. This certification is made under the laws of the State of California.

<i>Company 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>	

**APPENDIX C****UNRUH CIVIL RIGHTS ACT AND  
CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT CERTIFICATION**

Pursuant to Public Contract Code (PCC) section 2010, the following certifications must be provided when (i) submitting a bid or proposal to the [JBE] for a solicitation of goods or services of \$100,000 or more, or (ii) entering into or renewing a contract with the [JBE] for the purchase of goods or services of \$100,000 or more.

**CERTIFICATIONS:**

1. We are in compliance with the Unruh Civil Rights Act (Section 51 of the Civil Code);
2. We are in compliance with the California Fair Employment and Housing Act (Chapter 7 (commencing with Section 12960) of Part 2.8 of Division 3 of the Title 2 of the Government Code);
3. We do not have any policy against any sovereign nation or peoples recognized by the government of the United States, including, but not limited to, the nation and people of Israel, that is used to discriminate in violation of the Unruh Civil Rights Act (Section 51 of the Civil Code) or the California Fair Employment and Housing Act (Chapter 7 (commencing with Section 12960) of Part 2.8 of Division 3 of Title 2 of the Government Code); **and**
4. Any policy adopted by a person or actions taken thereunder that are reasonably necessary to comply with federal or state sanctions or laws affecting sovereign nations or their nationals shall not be construed as unlawful discrimination in violation of the Unruh Civil Rights Act (Section 51 of the Civil Code) or the California Fair Employment and Housing Act (Chapter 7 (commencing with Section 12960) of Part 2.8 of Division 3 of Title 2 of the Government Code).

The certifications made in this document are made under penalty of perjury under the laws of the State of California. I, the official named below, certify that I am duly authorized to legally bind the proposer/bidder/vendor to the certifications made in this document.



<i>Company 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

Judicial Branch Contracting Manual

Chapter 4C  
Page 1 of 31

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

CHAPTER 4C

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**INTRODUCTION**

In light of the unique aspects of information technology (IT) and its importance to Judicial Branch Entity (JBE) programs, the Public Contract Code (PCC) allows for a flexible and expeditious approach to IT procurements. The most significant difference between IT and non-IT procurements is that IT procurements may be awarded on the basis of “value effectiveness” within a competitive framework. When procuring IT goods and services, JBEs must consider factors other than price, except when acquiring hardware independently of a system integration project. (See PCC 12102.2(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.<sup>1</sup>

**DEFINED TERMS**

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

**STEP 1—PERFORM PRELIMINARY ANALYSIS**

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

**Procurement Value**

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

- Value of the IT goods to be procured;
- Value of the IT services to be procured;

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<sup>1</sup> This step-by-step guide may be superseded in whole or in part if a JBE uses a special negotiation process. For more information regarding special negotiation processes, see chapter 2, section 2.1.H of this Manual.

- 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. In particular, a series of related services that would normally be combined and bid as one job cannot be split into separate tasks, steps, phases, locations, or delivery times to avoid adhering to competitive solicitation requirements.

### **IT-Specific Issues**

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

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

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

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

### **STEP 3—ASSEMBLE PROCUREMENT TEAM**

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

- Technical experts;

- Personnel to help develop the Solicitation Document;
- Evaluation Team members; and
- Legal counsel, if applicable. (See chapter 8, section 8.4.B of this Manual for more information on legal review of contracts.)

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

#### **STEP 4—SELECT SOLICITATION DOCUMENT TYPE**

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

- Request for Quotes (RFQs)
- Invitations for Bid (IFBs)
- Requests for Proposal (RFPs)

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

Solicitation Document	Procurement Size	Type of Procurement
RFQ	Up to \$100,000 <sup>2</sup>	IT goods, IT services, and any combination of IT goods and services
IFB	Any size	Acquisition of hardware independently of a system integration project

<sup>2</sup> A JBE may adopt a higher or lower threshold for the use of RFQs in its Local Contracting Manual. If the JBE adopts a higher threshold, the JBE must ensure that (i) the higher threshold is reasonable and appropriate, and (ii) the JBE provides adequate oversight for the use of larger-value RFQs. Also, note that procurements under \$10,000 may be conducted without a competitive solicitation; see chapter 5, section 5.1 of this Manual.

RFP	Any size	IT goods, IT services, and any combination of IT goods and services
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**Note:** The JBE may use other names for these Solicitation Documents; it does not need to refer to or title them as “RFQs,” “IFBs,” or “RFPs.”

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

**Note:** This step is applicable to procurements using IFBs and RFPs, but is inapplicable to RFQ procurements.

The JBE may consider a phased approach when using an IFB or 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. If a phased approach is used, the JBE will work 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. This is accomplished through the submission of a conceptual proposal, a detailed technical proposal, or a draft Bid prior to the submission of a final Bid. This approach 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 final Bid, and it facilitates the correction of defects before they become fatal to a Bid.

A phased approach includes one or more of the following:

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

Conceptual proposal: A conceptual proposal may be included to allow each Bidder to provide a general concept of a Bid with just enough detail to enable the Evaluation Team to determine if the Bidder is on the right track toward meeting the functional requirements as stated in the IFB or RFP and, if not, where the Bidder must change a concept. This step invites the Bidder to be as innovative as the IFB or 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 IFB or RFP, and if not, which elements are not responsive and what changes would be necessary and acceptable.

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

The 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.<sup>3</sup> 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**

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<sup>3</sup> 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 1.A1.0). 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.



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

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

The RFQ should:

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

Before soliciting Bids in response to an RFQ, the JBE should determine whether the contract resulting from the RFQ will be awarded on a “lowest responsible bidder” basis or on a “highest scored bid” basis. If the RFQ is being used to procure hardware independently of a system integration project, the JBE may award the contract on a “lowest responsible bidder” basis or on a “highest scored bid” basis. Otherwise, the JBE must award the contract on a “highest scored bid” basis.

## **B. IFBs**

IFBs may be used to procure hardware independently of a system integration project.<sup>4</sup> Contracts resulting from 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

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<sup>4</sup> See PCC 12102.2(b): “The acquisition of hardware acquired independently of a system integration project may be made on the basis of lowest cost meeting all other specifications.”

requirement, a yes or no answer is required. There is no “fully,” “barely,” “almost,” or “exceeded” level of evaluation.

IFBs must include:

1. Time schedules relating to the procurement, including:
  - Date to submit questions or seek clarification (as applicable);
  - Date of Bidders’ conference (as applicable);
  - Due date for the conceptual proposal (as applicable);
  - Due date for the technical proposal (as applicable);
  - Due date for the draft Bid (as applicable);
  - Bid Closing Time;
  - Timetable that the JBE will follow in evaluating Bids and awarding the contract; and
  - Anticipated contract term, including start and end dates.
2. Time and place where the Bid will be opened (the place must be accessible to Bidders and other members of the public, and may be at the JBE’s facilities);
3. Where the intent to award notice will be posted (e.g., website address);
4. The JBE’s contact person for administration of the solicitation; and
5. 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 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 material exception (addition, deletion, or other modification) to the JBE’s terms and conditions will render a Bid nonresponsive. Note that the JBE, in its sole discretion, will determine what constitutes a material exception.

**Description of IT Goods:** The IFB must contain a description of the desired IT goods. The description should include:

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

**Acquisition of additional items:** It is sometimes difficult at the IFB stage to know with certainty the exact quantities of IT goods that will be required. To the extent practical, the IFB should provide for a contract to be written so as to enable acquisition of additional

items. This will avoid redundant acquisition processes if the JBE determines it needs more of the IT goods of the type already procured.

Required Elements of Bids: IFBs must specify what Bidders must address or include in their Bids. This includes certifications (e.g., Iran Contracting Act [and Darfur Contracting Act certification](#)) or other required document or information.

Bid Sealing 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.

Phased Approach—Notice to Bidders: If the IFB is to include a conceptual proposal and/or a detailed technical proposal step, the JBE should include the following (or substantially similar) language in the IFB:

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 Bids; (2) ensure that the JBE clearly understands what each Bidder intends to offer 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 IFB requirements.**

If a draft Bid is included in the procurement, the IFB should specify that the draft Bid must contain all the material required in the final Bid, except that no cost information may be included.

### C. RFPs

RFPs are used to procure a wide variety of IT goods and services. Depending on the type and value of the procurement, the RFP content requirements will vary.

### Information about the Procurement Process:

RFPs must include:

1. The standards the JBE will use in evaluating Bids;
2. Time schedules relating to the procurement, including:
  - Date to submit questions or seek clarification (as applicable);
  - Date of Bidders' conference (as applicable);
  - Due date for the conceptual proposal (as applicable);
  - Due date for the technical proposal (as applicable);
  - Due date for the draft Bid (as applicable);
  - Bid Closing Time;
  - Timetable that the JBE will follow in evaluating Bids and awarding the contract; and
  - Anticipated contract term, including start and end dates.
3. Time and place where the sealed cost portions of the Bid will be opened (the place must be accessible to Bidders and other members of the public, and may be at the JBE's facilities);
4. Where the intent to award notice will be posted (e.g., website address);
5. The JBE's contact person for administration of the solicitation; and
6. The JBE's standard terms and conditions for the acquisition of IT goods and services.

To the extent practicable, the JBE should also distribute with the RFP the terms and conditions specific to the procurement, or simply attach the entire proposed contract, including available appendices.

Description of IT Goods: The RFP must contain a description of the desired IT goods (if any). The description should include:

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

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

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

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

**Acquisition of additional items:** It is sometimes difficult at the RFP stage to know with certainty the exact quantities of IT goods that will be required. To the extent practical, the RFP should provide for a contract to be written so as to enable acquisition of additional items. This will avoid redundant acquisition processes if the JBE determines it needs more of the IT goods of the type already procured.

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

- Whether and to what extent Progress Payments will be allowed;
- Penalties for late or inadequate performance;

- Known or estimated budgetary limitations on the contract price; and
- Travel expenses (what will and will not be paid by the JBE).

**Note:** See chapter 9 of this Manual for more information regarding Progress Payments.

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

1. A description of the Bidder's qualifications, which may include at the JBE's discretion:
  - Copies of current business licenses, professional certifications, or other credentials;
  - Proof of financial solvency or stability (e.g., balance sheets and income statements);
  - Proof that the Bidder, if a corporation, is in good standing and qualified to conduct business in California; and
  - For Bidders that are nonprofit organizations, proof of nonprofit status.
2. A list of references for whom the Bidder has provided similar goods or performed similar work; and
3. If subcontractors are contemplated:
  - Identification of those persons or firms;
  - The portions and monetary percentages of the work to be done by the subcontractors;
  - How and why these subcontractors were selected;
  - Resumés of each major subcontract participant; and
  - Description of how subcontracted work will be controlled, monitored, and evaluated.
4. Required certifications (e.g., Iran Contracting Act and Darfur Contracting Act)

If the RFP is soliciting IT services, the JBE may also require Bids to include:

- A list of similar services successfully completed by the Bidder, with samples if applicable;
- A description of the lead personnel and anticipated supporting personnel to be employed during performance (by classification or title) and their qualifications to perform the work;
- Identification of a project coordinator;
- Resumés for each major contract participant who will exercise a major policy, administrative, or consultative role in carrying out the services;

- An overall description of the techniques, approaches, and methods to be used in performing the services; and
- The total cost of the services, with a detailed breakdown showing how the costs were determined, and the desired method of payment. The detailed budget breakdown may include:
  - Identification of position/classification titles funded;
  - Salary rates or ranges;
  - Percentage of time devoted to the work;
  - Fringe benefits;
  - Operating expenses;
  - Travel and per diem expenses;
  - Overhead or indirect costs;
  - Subcontractors with the same type of cost details; and
  - Other costs.

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

The evaluation plan must provide for a fair and equitable evaluation of all Bids. The evaluation plan should ensure the following:

- Cost is appropriately considered (see the section below regarding the assignment of cost points).
- Exceptions to the JBE's terms and conditions (additions, deletions, or other modifications) may be considered as part of the evaluation process.
- If a material exception (addition, deletion, or other modification) is taken to a minimum term, the Bid is nonresponsive. Note that the JBE, in its sole discretion, will determine what constitutes a material exception.

The JBE may consider the following criteria when developing the evaluation plan.

- Quality of the IT goods or services.
- Technical competency of Bidder's personnel.
- Reliability of delivery and implementation schedules.
- The maximum facilitation of data exchange and systems integration.
- Warranties, guarantees, support, and return policy.
- Bidder's understanding of the JBE's problem or needs.

- Ability to deliver IT goods and services on time.
- Reasonability and feasibility of the Bidder's proposed approaches, methods, procedures, and timelines.
- Organizational and management capability, management competency, fiscal and personnel resources.
- Exceptions (additions, deletions, or other modifications) to the terms and conditions that may be detrimental to the JBE.
- Professional qualifications of the personnel who the Bidder will commit to the project.
- Sufficiency of allocated staff resources.
- Performance monitoring plans and procedures.
- Adequate fiscal, accounting, cost-monitoring or budget-monitoring procedures.

**Cost Points:** The evaluation criteria must be based on value-effective factors that include cost. These factors are weighted; generally, the administrative and technical requirements should equal 50 percent and cost should equal 50 percent.

The evaluation criteria for the acquisition of IT goods and services must not be limited to cost alone. The JBE may not assign 100 percent of the total points to cost; other factors must be considered.

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

**Bid Sealing Requirements:** The RFP must require the Bidder to submit the cost portion of its Bid in a sealed envelope separate from the remainder of the Bid.

**Phased Approach—Notice to Bidders:** If the RFP is to include a conceptual proposal and/or a detailed technical proposal step, the JBE should include the following (or substantially similar) language in the RFP:

This procurement will follow a phased approach designed to increase the likelihood that Bids will be received without disqualifying defects. The additional step(s) will (1) ensure that the Bidders clearly understand the JBE's requirements before attempting to develop their final solutions; (2) ensure that the JBE clearly understands what each Bidder intends to propose before those Bids are finalized; and (3) give the JBE and each



Bidder the opportunity to discuss weaknesses or potentially unacceptable elements of a Bid and give the Bidder the opportunity to modify its Bid to correct such problems.

As part of the phased approach, the JBE may review a Bidder's submissions for errors, defects, or other problems. **The JBE makes no warranty that all errors, defects, or other problems will be identified. The Bidder is solely responsible for submitting a Bid that is free of errors and defects, and complies with all RFP requirements.**

If a draft Bid is included in the procurement, the RFP should specify that the draft Bid must contain all the material required in the final Bid, except that no cost information may be included.

Consulting Services—Follow-On Contracting Language: All RFPs that include a consulting services component should include the language below (or substantially similar language).

Bids in response to JBE procurements for assistance in the preparation of feasibility studies or the development of recommendations for the acquisition of IT goods and services must disclose any financial interests (e.g., service contracts, original equipment manufacturer (OEM) agreements, 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.

## STEP 7—PREPARE ADVERTISING

A JBE must advertise solicitations as shown in the following table:<sup>5</sup>

Procurement for	Advertising required
IT Goods	If total procurement value is \$100,000 or more

<sup>5</sup> All IT solicitations must be advertised as set forth in this table, even if the JBE adopts a threshold for use of RFQs that is higher than \$100,000.

Procurement for	Advertising required
IT Services	If total procurement value is \$10,000 or more
IT Goods and Services	If the total procurement value is \$100,000 or more <b>or</b> the services portion of the procurement is \$10,000 or more

Although not required, a JBE may advertise a solicitation that has a total procurement value less than the applicable amount shown in the table above. Because the advertisement should be released before or simultaneously with the Solicitation Document, the Buyer should prepare any necessary advertisement in conjunction with the Solicitation Document. See chapter 4, section 4.1.D of this Manual for advertising methods.

**Note:** If the JBE is using an RFP, the JBE must post the RFP in a public location such as the JBE’s website. All changes to the RFP must also be posted in the same public location in which the RFP was originally posted.

**STEP 8—OPTIONAL: HOLD BIDDERS’ CONFERENCE**

Bidders’ conferences provide Prospective Bidders an opportunity to understand better the IT goods or services being procured by a JBE. Holding a Bidder’s conference is always optional, at the JBE’s discretion. Bidders’ conferences are more common in solicitations for complex procurements.

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

**STEP 9—OPTIONAL: COMPLETE PHASED APPROACH STEPS**

If included in the IFB or RFP, the JBE should complete the various steps of the phased approach, as described below.

**Note:** A phased approach is not used in RFQ solicitations.

## **Review Conceptual Proposal and Detailed Technical Proposal**

The Evaluation Team will receive and review the conceptual proposal and/or the detailed technical proposal to determine if either proposal (or portion thereof):

- Is nonresponsive to a requirement;
- Is otherwise defective; or
- Requires clarification so that the JBE may fully understand the proposed solution.

The Evaluation Team must review each proposal in accordance with any evaluation methodology outlined in the IFB or RFP.

### **Confidential Discussions with Bidder**

Based on its review of the proposal(s), the Evaluation Team will prepare an agenda of items to be discussed separately with the Bidder and transmit the agenda to the Bidder. The agenda will include the identification of discovered defects, but may also include a discussion of the Bidder's proposed support, implementation plans, validation plans, demonstration plans, and proposed contracts, as appropriate. The Evaluation Team should meet with the Bidder to discuss the items on the agenda. These discussions are confidential.

The primary purpose of the discussion is to ensure that the Bidder's final Bid will be responsive. The Evaluation Team should identify its concerns, ask for clarification, and express its reservations if a particular requirement of the IFB or RFP is not appropriately satisfied, in the opinion of the Evaluation Team.

At the conclusion of the meeting, the JBE should prepare a memorandum documenting the clarified items and how the Bidder proposes to correct the noted defects. The JBE may schedule additional meetings with a Bidder at the JBE's discretion. If additional meetings are scheduled, the process set forth in this sub-step ("Confidential Discussions with Bidder") will be repeated. The JBE may require the resubmission of selected materials as part of this process.

If, after discussion with a Bidder, the JBE is of the opinion that the Bidder's conceptual proposal or detailed technical proposal cannot be restructured or changed in a reasonable time to satisfy the needs of the JBE, and that further discussion would not likely result in an acceptable Bid in a reasonable time, the Evaluation Team should give

the Bidder written notice that the conceptual proposal or detailed technical proposal has been rejected and that a final Bid submitted along such lines would be nonresponsive.

### **Evaluate Draft Bids**

The Evaluation Team should review draft Bids for administrative or clerical errors and inconsistencies that, if contained in the final Bid, may cause the Bid to be rejected. If the Evaluation Team discovers errors that can be corrected without overhauling the Bid, the Evaluation Team should communicate this information to the Bidder and give the Bidder an opportunity to correct the identified errors before the Bid Closing Time. The Evaluation Team may communicate this information through a confidential memo, or through a confidential meeting.

**Note:** The draft Bid review is not intended to check for responsiveness to IFB or RFP requirements, but only for administrative or clerical errors and inconsistencies that could cause the Bid to be deemed nonresponsive on a technicality.

## **STEP 10—RECEIVE BIDS**

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

### **A. RFQs**

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

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

### **B. IFBs and RFPs**

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

Bids received pursuant to an IFB solicitation remain confidential until the Bids are publicly opened. Bids received pursuant to an RFP solicitation remain confidential until an intent to award notice is posted.

## **STEP 11—OPEN BIDS**

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

### **A. IFBs**

The Buyer must publicly open the sealed Bids.

### **B. RFPs**

The opening and evaluation of Bids in response to IT RFPs is a multistep process. See step 14 for information for additional details.

The JBE must first open the noncost portion of all Bids received. This does not need to be done publicly. The sealed cost portions of the Bids must not be opened until the Evaluation Team has completed evaluating the noncost portion of all Bids.

The sealed cost portion of a Bid will not be opened if the noncost portion of the Bid contains one or more material deviations. See section 4.4.D for more information regarding material deviations.

## **STEP 12—DETERMINE IF COMPETITION HAS BEEN ACHIEVED**

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

### **A. RFQs**

A Buyer should use his or her procurement expertise and experience to determine whether the Bid to be selected is fair and reasonable. Buyers should obtain at least two Bids from Bidders whenever there is reason to believe a response from a single Bidder is not a fair and reasonable price.

## **B. IFBs or RFPs**

If the JBE does not receive at least two Bids then:

- The JBE may consider cancelling and reissuing the solicitation. If the JBE takes this course, the JBE should consider modifying any possible restrictive requirements in the IFB or RFP.
- If JBE awards the contract, the Buyer should document in the procurement file the names and addresses of the firms or individuals that were solicited for Bids.

### **STEP 13—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 RFQ solicitations.

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

### **STEP 14—EVALUATE BIDS**

The process of evaluating Bids differs significantly for RFQs, IFBs, and RFPs. The requirements in this step are in addition to the general requirements set forth in chapter 4, section 4.4 of this Manual, and any requirements listed in the the Solicitation Document. There is no requirement to award a contract; see chapter 4, section 4.4.B of this Manual for additional details.

## **A. RFQs**

The JBE must award the contract (if at all) on a “lowest responsible bidder” basis or on a “highest scored bid” basis, depending on which methodology was selected in step 6 above. For more information about the “lowest responsible bidder” basis, see section B below. For more information about the “highest scored bid” basis, see section C below.

## B. IFBs

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

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

- **Responsible Bidder** means a Bidder that possesses the required experience, facilities, and financial resources and is fully capable of performing the relevant contract.
- **Responsive Bid** means a Bid that complies with the requirements of the Solicitation Document and the terms and conditions of the proposed contract without material deviation.

**Note:** See chapter 3 of this Manual for more information regarding preferences, incentives, and discounts. See chapter 4, section 4.4.D of this Manual for guidance on determining whether a deviation is material.

## C. RFPs

The evaluation of Bids received in response to RFPs involves a five-step process.

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.<sup>6</sup>
3. The JBE must publish the results of the completed noncost evaluation, excluding the small business preference and DVBE incentive. Unless specified otherwise in the Local Contracting Manual, this publication must occur on the JBE's website.

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<sup>6</sup> Evaluation of the noncost criteria includes determining if a Bidder has met the applicable requirements for the small business preference and the DVBE incentive, if applicable. However, because the small business preference and DVBE incentive cannot properly be applied until both the noncost and cost portions of the Bids have been scored, these factors should be excluded when publishing the results of the completed noncost evaluation.

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(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



the cost portions of all Bids received by the JBE were maintained sealed and secured until the time all cost portions of Bids were opened. The signed certificate should be included in the procurement file.

A sample certificate that JBEs may use is included as appendix B of this chapter.

## **STEP 15—NOTICE OF INTENT TO AWARD**

### **A. RFQs**

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

### **B. IFBs and RFPs**

When using an IFB or RFP, the JBE must post a notice of intent to award on its website or in a public place in the offices of the JBE at least five Court Days before the contract is awarded.

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

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

If a Bidder submits a valid protest within five Court Days of the posting of the intent to award, the JBE must not award the contract until either the protest has been withdrawn or the JBE's protest hearing officer has responded to the protest. For more information regarding the protest procedure, see chapter 7 of this Manual.

## **STEP 16—CREATE THE CONTRACT**

The Buyer should memorialize the purchase using a contract. Unless a purchase order is used, the contract must be signed by an authorized representative of the Bidder that can bind the Bidder contractually.

**STEP 17—CREATE THE PROCUREMENT SUMMARY DOCUMENT**

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

**STEP 18—NOTICES OR REVIEWS**

The JBE must complete any required notices or reviews. See chapter 2, section 2.2 of this Manual for additional details.

**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. Performance-Based or Share-In Savings Contracts**

For contracts related to IT integration or development projects that generate revenues or achieve savings over a quantifiable baseline of existing costs, JBEs must consider and may incorporate performance-based or share-in-savings contract terms to manage risks and create incentives for successful contract performance.

Performance-based or share-in-savings contracts may have the following characteristics, among others:

- Contract terms that specify business outcomes to be achieved, not the solution to be provided;
- Contract terms that structure the contract to maintain maximum Vendor commitment to project success and minimize risk to the JBE by sharing risk with the private sector;
- Utilization of “best value” evaluation methods, which means to select the solution that will achieve the best result based on business performance measures, not necessarily the lowest price; and

- Contract terms that base payments to the Vendor primarily on achieving predefined performance measures.

### C. 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.

### D. SB/DVBE Option

For procurements of IT goods and services greater than \$5,000 but less than \$250,000, a JBE may use a streamlined competitive solicitation that targets only Small Businesses or DVBEs. This streamlined competitive solicitation is known as the SB/DVBE option.<sup>7</sup>

When using the SB/DVBE option, the JBE must target either Small Businesses or DVBEs. The JBE must receive Responsive Bids from at least two Small Businesses or two DVBEs. Each Prospective Bidder must itself be a Small Business or a DVBE; entities subcontracting to Small Businesses or DVBEs may not be targeted when using the SB/DVBE option.

To solicit IT goods or services using the SB/DVBE option, follow the steps set forth in this chapter 4C, with the following modifications:

#### Step 2

- The list of Prospective Bidders must consist of Small Businesses or DVBEs. The JBE may locate eligible entities using the DGS database located at [www.caleprocure.ca.gov/pages/PublicSearch/supplier-search.aspx](http://www.caleprocure.ca.gov/pages/PublicSearch/supplier-search.aspx).

#### Step 6

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<sup>7</sup> The SB/DVBE option should not be confused with the small business preference or the DVBE incentive. See chapter 3 of this Manual regarding those distinct programs.

- Because protests are not allowed in connection with the SB/DVBE option, the Solicitation Document should (i) state that no protest is allowed, and (ii) indicate that no intent to award notice will be posted.
- Because Bids in connection with the SB/DVBE option do not need to be opened publicly, the Solicitation Document should not include (i) the time and place where Bids will be opened, or (ii) a requirement that the Bids, or any portion thereof, be sealed.
- The “loss leader” language may be omitted from the Solicitation Document.
- The Solicitation Document should indicate that no small business preference or DVBE incentive will be offered.
- Instead of using a fixed Bid Closing Time, the JBE may award the contract upon receipt of the second Responsive Bid. If this approach is used, details must be provided in the Solicitation Document. Once the second Responsive Bid is received, the JBE should notify any known Prospective Bidders that have not yet submitted a Bid that the JBE is no longer accepting Bids.

#### Step 7

- There is no advertising requirement for solicitations using the SB/DVBE option. Instead, the JBE provides the Solicitation Document to the selected Small Businesses or DVBEs directly. The JBE may wish to provide the Solicitation Document to more than two Small Businesses or DVBEs, to increase the chances it will receive at least two Responsive Bids.
- The JBE is not required to post the Solicitation Document on its website or in any other public location.

#### Step 10

- Bids received pursuant to an SB/DVBE option solicitation remain confidential until a contract is executed.

#### Step 11

- Bids in connection with the SB/DVBE option do not need to be opened publicly. The multistep process for opening Bids in response to RFPs is not applicable.

#### Step 12

- Competition has been achieved if the JBE receives Responsive Bids from at least two Small Businesses or two DVBEs.

- If the JBE does not receive Responsive Bids from at least two Small Businesses or two DVBEs, the JBE may not award a contract using the SB/DVBE option.

**Step 14**

- The multistep process for opening Bids in response to RFPs is not applicable.
- The certification in connection with Bids received in response to RFPs is not applicable.

**Step 15**

- The JBE is not required to post an intent to award.

Note: The JBE should ensure that the bidder instructions and other documents related to the solicitation correctly reflect the process to be used by the JBE.

**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 JBE issues an RFP where the maximum number of cost points is 60. The JBE receives three bids:

<u>Bidder</u>	<u>Bid Amount</u>
A	\$90,000
B	\$98,000
C	\$80,000

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

Bidder A is assigned 53 cost points, as shown below:

Line 1	60
Line 2	\$80,000
Line 3	\$90,000
Line 4	.8888
Line 5	53.3333
Line 6	53

Bidder B is assigned 49 cost points, as shown below:

Line 1	60
Line 2	\$80,000
Line 3	\$98,000
Line 4	.8163
Line 5	48.9795
Line 6	49

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**APPENDIX B  
SAMPLE COST PROPOSAL CERTIFICATION**

**Cost Proposal Certification  
For  
RFP # \_\_\_\_\_**

I certify under penalty of perjury under the laws of the State of California that I have kept the cost portion of each Bid received for the RFP identified above sealed and secured from its receipt until the Bid opening on **[date]**.

\_\_\_\_\_

**[Buyer's name]** **[date]**

Executed in \_\_\_\_\_ [city], \_\_\_\_\_ [state]





# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 5  
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## **NON-COMPETITIVELY BID (NCB) PROCUREMENTS**

### **CHAPTER 5**

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## **INTRODUCTION**

In certain circumstances, Judicial Branch Entities (JBEs) may procure non-IT goods, non-IT services, and IT goods and services without going through a competitive process (advertising, receiving Bids, etc.). In these non-competitively bid (NCB) procurements, a single entity is afforded the opportunity to provide the specified non-IT goods, non-IT services, or IT goods and services.

The following are the categories of allowed NCB procurements:

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

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

## **DEFINED TERMS**

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

### **5.1 PURCHASES UNDER CERTAIN DOLLAR AMOUNTS**

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 \$10,000 without conducting a competitive procurement so long as the Buyer determines that the pricing is fair and reasonable.

The Buyer should include documentation on fair and reasonable pricing in the procurement file. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required.

**Note:** JBEs may not split a single transaction into a series of transactions for the purpose of evading competitive solicitation requirements. In particular, a series of related services that would normally be combined and bid as one job cannot be split into separate tasks, steps, phases, locations, or delivery times to avoid adhering to competitive solicitation requirements.

**Note:** Although not required to do so, JBEs may competitively solicit Bids for purchases under the foregoing dollar amount limits. An RFQ is usually used for such procurements.

## **5.2 EMERGENCY PURCHASES**

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

An emergency procurement must be approved in writing by the Approving Authority or his or her delegee. The Approving Authority (or delegee) may approve an emergency procurement only if he or she determines that immediate acquisition is necessary for the protection of the public health, welfare, or safety.<sup>1</sup>

When completing an emergency purchase, the Buyer should include in the procurement file the following information:

- A description of the emergency;
- A description of the non-IT goods, non-IT services, or IT goods and services to be purchased, and their prices;
- The names and quotations of suppliers contacted; and
- A copy of the written approval.

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<sup>1</sup> For purchases of non-IT services, the Approving Authority (or delegee) may also approve an emergency procurement if he or she determines that immediate acquisition is necessary for the protection of state property.

### 5.3 PURCHASES FROM GOVERNMENTAL ENTITIES

JBEs may purchase non-IT goods, non-IT services, and IT goods and services of any value from other governmental entities without conducting a competitive procurement.

**Note:** The procurements covered by this section are those in which the governmental entity directly sells the non-IT goods, non-IT services, or IT goods or services to the JBE. This situation is distinct from when a governmental entity has signed an LPA with a Vendor and allows the JBE to purchase from that Vendor using the LPA. For more information on LPAs, see section 5.5 below.

The Buyer should note in the procurement file that the purchase is being made from a governmental entity. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required.

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

**Note:** For purposes of this chapter, a "governmental entity" includes, without limitation, (i) a governmental agency from California or any state, (ii) a state college or state university from California or any state, (iii) a local governmental entity or agency, including those created as a joint powers authority, and local governmental entities from other states, (iv) an auxiliary organization of the California State University, or a California community college, (v) the federal government, (vi) a foundation organized to support the Board of Governors of the California Community Colleges, or (vii) an auxiliary organization of the Student Aid Commission established under Education Code section 69522.

### 5.4 LEGAL SERVICES

JBEs may purchase legal services of any value without conducting a competitive procurement. Legal services include:

- Services performed by an attorney or an attorney's staff; and
- Services performed by consultants and expert witnesses in connection with pending or anticipated legal proceedings.

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

### **5.5 CERTAIN LPAs**

If a JBE procures non-IT goods, non-IT services, or IT goods and services in accordance with chapter 6 of this Manual through an LPA established by such JBE or another entity, the JBE may procure such goods or services without having to conduct its own competitive bidding.

### **5.6 COMMUNITY REHABILITATION PROGRAMS (CRPs)**

JBEs may purchase non-IT goods, non-IT services, and IT goods and services of any value from a business entity operating a CRP without conducting a competitive procurement, provided that the goods or services meet the specifications and needs of the JBE and are purchased at a fair market price as determined by the JBE.

**Note:** The CRP must meet the criteria established by Welfare and Institutions Code section 19404 in order for the JBE to purchase from the CRP. To confirm compliance, the JBE should request a copy of the CRP's approval certificate, issued by the Department of Rehabilitation.

The Buyer should note in the procurement file the purchase is being made from a CRP. The JBE should document its procurement file to support that the price offered by a CRP is fair and reasonable.

### **5.7 LICENSING OR PROFICIENCY TESTING EXAMINATIONS**

JBEs may purchase non-IT services of any value related to the development, maintenance, administration, or use of licensing or proficiency testing examinations, without conducting a competitive procurement.

The Buyer should note in the procurement file that the purchase is for licensing or proficiency testing examinations. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required.

### **5.8 SUBVENTION AND LOCAL ASSISTANCE CONTRACTS**

These are contracts providing assistance to local governments and aid to the public directly or through an intermediary, such as a nonprofit corporation organized for that purpose. JBEs may enter into subvention and local assistance contracts without conducting a competitive procurement.

The Buyer should note in the procurement file that the contract is a subvention or local assistance contract. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required.

## 5.9 SOLE SOURCE

JBEs may purchase non-IT goods, non-IT services, and IT goods and services of any value without conducting a competitive procurement if (i) the vendor is the only source of the goods and/or services that meet the JBE's need, or (ii) a grant application submittal deadline does not permit the time needed for a competitive procurement of services.

**Example:** A JBE needs to purchase a replacement fuse. The JBE's electrical systems are quite old, and only one entity currently manufactures the type of fuse that is needed. The JBE may purchase the fuse from that entity as a sole source.

**Example:** A JBE needs a piece of software customized. Only one entity has the intellectual property rights necessary to alter the software and license the resulting modifications to the JBE. The JBE may contract with that entity as a sole source.

A sole source request must be provided to the sole source approver.

The sole source request should include the following information:

- Description of the non-IT goods, non-IT services, or IT goods and services to be procured;
- Explanation of why the non-IT goods, non-IT services, or IT goods and services cannot be procured competitively;
- The effort made to solicit competitive Bids, if any;
- Documentation that the pricing offered is fair and reasonable; and
- Special factors affecting the cost or other aspect of the procurement, if any.

The sole source approver is:

- The Approving Authority;
- The delegee of the Approving Authority; or
- Another person identified as the sole source approver in the JBE's Local Contracting Manual.

The sole source approver 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 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.

**Example:** The JBE purchases 80 chairs, each costing \$100. The value of the purchase (\$8,000) is below \$10,000, and the purchase was completed as an NCB procurement pursuant to section 5.1 above. The JBE wishes to purchase an additional 30 chairs, each costing \$100, through use of an amendment. Because the new value of the contract (\$11,000) will be over \$10,000, the JBE should submit the amendment to an NCB process.

**Note:** Amendments correcting incidental omissions or mistakes (not affecting quantity, dollar amounts, or time) do not require an NCB process. For example, an amendment correcting or updating contact information would not require an NCB process.

## B. NCB Process for Amendments

The Buyer submits an NCB amendment request to the sole source approver.

The NCB amendment request should include the following information:

- Description of the contract terms to be changed;
- Documentation that the pricing of the amended contract is fair and reasonable; and
- Why the Buyer has determined that the amendment is in the JBE's best interest.

### 5.12 TRIAL COURTS: PUBLIC INPUT REQUIREMENT

A trial court must seek input from the public at least 15 Court Days before execution of an NCB contract in an amount that exceeds the greater of \$400,000 or 10 percent of the total trial court budget.

This requirement does not apply to a contract between a trial court and a county that is provided for by statute (e.g., court-county MOUs under GC 77212).

For detailed requirements regarding this public-input process, see CRC 10.620.

### 5.13 CERTIFICATION AND OTHER REQUIREMENTS IN NCB PROCUREMENTS

JBEs are required to comply with certain certification and other requirements in NCB procurements. These include:<sup>2</sup>

- Iran Contracting Act certification for purchases of goods or services of \$1,000,000 or more (see chapter 4, section 4.4.C.2 of this Manual);
- Darfur Contracting Act certification ~~for purchases of non-IT goods or services~~ (see chapter 4, section 4.4.C.1 of this Manual); and
- seller's permit requirement for purchases of tangible personal property (see chapter 4, section 4.4.C.3 of this Manual).

In addition, any contract for the purchase of ~~non-IT~~ goods or services with a contractor identified by the Franchise Tax Board or the Board of Equalization as one of the 500 largest tax delinquents is void and unenforceable (see chapter 4, section 4.4.E of this Manual).

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<sup>2</sup> Contracts resulting from NCB procurements must comply with applicable requirements in chapter 8 of this Manual.



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Judicial Branch Contracting Manual

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## CONTRACTS

### CHAPTER 8

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## INTRODUCTION

This chapter provides information on preparing, approving, and executing JBE contracts.<sup>1</sup> The main body of this chapter discusses the basic construction of contracts and the mandatory and permissive subject matters for inclusion in JBE contracts. The appendices to this chapter identify mandatory and permissive contract terms for JBE contracts.

## DEFINED TERMS

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

Under California law a “contract” is “an agreement to do or not to do a certain thing.”<sup>2</sup> This chapter refers specifically to agreements for goods and services. Unless expressly excluded from the JBCM or JBCL, or the context dictates otherwise, the term “contract” as used in this chapter includes all agreements for goods or services, including purchase orders (POs), intergovernmental contracts (IGCs), and other documents for goods and services, regardless of the document’s form or title.

## 8.1 BASIC PRINCIPLES

### A. Writing Requirement

All contracts entered into by JBEs must be in writing.

### B. Roles and Responsibilities

Each JBE is responsible for the commercial risks that flow from contracts it enters into and should undertake risks only in proportion to the benefits expected from a contract. Contracts should be prepared, negotiated, and executed in the best interests of the JBE. Contracts should be prepared and negotiated only by persons with appropriate skill and experience who are free from conflicts of interest. Contracts must be executed only by persons with legal authority to do so.

It is the JBE’s responsibility to ensure that the contract meets applicable legal requirements and that the contract terms are appropriate to the type of contract.

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<sup>1</sup> This chapter does not address contracts for public works.

<sup>2</sup> Civil Code section 1549.

## 8.2 CATEGORIES OF CONTRACTS

This subsection describes the basic categories of contracts used by JBEs and when those contracts are used. The category names are used for reference, as an individual contract may have a different name or title. For example, certain MOUs with executive branch agencies may be called “Interagency Agreements” or “IAs.” Requirements in this Manual apply to all contracts in the following categories of contract, unless expressly excluded from the JBCL or JBCM, regardless of the name or title of the contract.

### A. Purchase Orders (POs)

These contracts may be used for purchase of goods from nongovernmental entities<sup>3</sup> regardless of the purchase amount. POs are also often used for purchase of goods and for services that are ancillary to the purchase of the goods. In addition, POs are typically used for “off the shelf” goods and software or for routine, low cost, or low risk services.<sup>4</sup>

- Goods that must be customized or specially manufactured and services of a complex, high risk, or specialized nature should be purchased using a standard agreement.
- Unless the PO is signed by both parties, the proposed Vendor has no duty of performance unless and until the Vendor commences performance of its duties under the PO. If the PO is not to be countersigned and returned to the JBE, the PO should contain a clause that states that Vendor’s commencement of performance under the PO constitutes acceptance and binds the Vendor to all contract terms.

### B. Standard Agreements

These contracts may be used for the purchase of goods or services from nongovernmental entities regardless of the contract amount.

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<sup>3</sup> For purposes of this chapter, a “governmental entity” includes, without limitation, (i) a California department or agency, or a department or agency of any other state, (ii) a public college or state university established by California or any other state, (iii) a local governmental entity or agency in the United States or its territories, including those created as a joint powers authority (iv) an auxiliary organization of the California State University, or a California community college, (v) the federal government, (vi) a foundation organized to support the Board of Governors of the California Community Colleges, (vii) an auxiliary organization of the Student Aid Commission established under Education Code section 69522, or (viii) a public benefit organization. A public benefit organization is an organization chartered by a governmental entity and designed to perform some public benefit such as building or maintaining public infrastructure, or raising bond money for those purposes.

<sup>4</sup> A JBE may wish to adopt in its Local Contracting Manual limitations on the use of POs to purchase services. For example, the JBE may limit the use of POs to services incidental to a purchase of goods, or for services valued at less than a certain dollar amount.

### C. Short Form Agreements

These contracts include fewer terms and conditions than a Standard Agreement, and are typically used for the purchase of goods or services not to exceed \$50,000 from nongovernmental entities.<sup>5</sup> The agreement is intended to be used for routine purchases and in situations where not all of the provisions found in a Standard Agreement would be appropriate. As noted in the appendices to this chapter, fewer terms are required to be included in these agreements than are required in Standard Agreements.

### D. Intergovernmental Contracts (IGCs)

These contracts may be used for any purchase of goods and services between a JBE and another governmental entity. If the other governmental entity is not within the judicial branch, the agreement is often called a Memorandum of Understanding (MOU). If the other governmental entity is another JBE, the agreement is often called an Intra-branch Agreement (IBA). IGCs<sup>6</sup> are simpler and have fewer provisions than POs or Standard Agreements. A JBE, however, always has the option of using a PO or Standard Agreement when contracting with a governmental entity.

## 8.3 PREPARATION OF CONTRACTS

This subsection describes the elements of a contract and typical contract provisions and, where applicable, describes the specific subject matters JBEs should address in particular contract provisions.

Appendices A, B, and C supplement this subsection. These appendices identify the substance of the certifications and provisions that are required to be included in specified categories of JBE contracts. These appendices also indicate which terms are recommended to be included in JBE contracts but are not legally required.<sup>7</sup>

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<sup>5</sup> A JBE may adopt a higher or lower threshold for the use of short form agreements in its Local Contracting Manual. If the JBE adopts a higher threshold, the JBE must ensure that (i) the higher threshold is reasonable and appropriate, and (ii) the JBE provides adequate oversight for the use of larger-value short form agreements. In addition, the JBE must ensure that larger-value short form agreements include all clauses required to be in contracts of the applicable value.

<sup>6</sup> IBAs and MOUs are collectively referred to as IGCs in this Manual.

<sup>7</sup> A JBE is not required to include in the procurement file an explanation for why a recommended CCC or other provision was included in or omitted from a contract.

## A. Content of Contracts

JBEs must include legally required terms in their contracts and should include other terms that the JBE determines are necessary to protect the JBE and mitigate the risks associated with the contract.

Sample language for terms and certifications required to be included in JBE contracts is available from the Judicial Council, together with templates for complete contracts.

Use of these sample provisions and templates is optional. Each JBE may modify the provisions or templates or use its own forms. JBEs may also use a Vendor-provided form contract provided the final contract includes appropriate terms and meets applicable legal requirements.

- Contract elements

Each contract must identify the contracting parties. Contracts typically consist of three major elements:

- Statement of Work (SOW), including the schedule of performance;
- Pricing and payment; and
- Other terms and conditions.

Each of these elements must be clearly defined so that the JBE's needs are met, and the contractor and the JBE understand their performance obligations.

- Each major element is described below, including typical subject matters that are frequently grouped together in contract sections regarding the specific element. However, contract provisions are not required to be in any specific location in the contract. For example, a topic listed below as part of a typical SOW may be placed under a different heading in a particular contract.

### 1. *Statement of Work (SOW)*

The SOW describes the goods to be purchased and/or the services to be performed. The JBE must include a detailed description of the goods to be delivered or the services to be performed, together with any deliverables required and conditions of performance, if applicable. The contract must specify (as applicable): (i) when goods are to be delivered,<sup>8</sup> (ii) when services are to be

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<sup>8</sup> The JBE may, but is not required to, specify a delivery date for goods. If no delivery date is specified, the time for shipment shall be a reasonable time in accordance with Commercial Code section 2309.



performed (start date and end date), (iii) when deliverables must be provided to the JBE, and (iv) when other contract milestones must be completed.

- The following are matters that are typically included in the SOW as part of the detailed description of the goods, services, deliverables, and required conditions of performance:
  - Quantities, specifications, and specific requirements;
  - Quality standards and warranties;
  - Delivery instructions;
  - Acceptance criteria including inspections;
  - Results and required deliverables (e.g., reports, data, or other documentation);
  - Location of performance of services, and contractor's work hours;
  - Performance timelines (schedule) or completion dates;
  - Standards of performance and skill level required and, if applicable, specific personnel and staffing requirements and identification of contractor's key personnel;
  - Details regarding equipment, labor, or materials to be provided by the parties, and coordination of effort, if applicable;
  - Optional goods or services, and provisions for requesting these items; and
  - Possible conditions that may arise during performance of the contract that would trigger modifications to the SOW, cost, or schedule.

## **2. Pricing and payment**

The price the JBE will pay for goods and services under a contract must be clearly stated. The contract should clearly specify the basis for compensation and the terms of payment, such as: lump sum (one-time payment), firm fixed price, unit price, labor rate, or other specific basis.

- Required terms:
  - A provision that makes payment subject to appropriation of funds is required in all contracts requiring the payment of JBE funds unless the JBE has the right to terminate for convenience;<sup>9</sup> and
  - If a JBE is contracting for labor, a schedule listing the hourly, daily, weekly, or monthly cost for each person or job classification must be incorporated into the contract.

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<sup>9</sup> See chapter 11, section 11.10 of this Manual for additional information regarding termination and termination clauses.

- Contracts typically include provisions covering the following subjects, as applicable in the particular circumstances, to specify the basis for compensation and set out the terms of payment:
  - Firm price or not to exceed amount of all compensation;
  - Basis of pricing such as (i) hours times hourly rate (e.g., rates contained in a fee schedule), (ii) costs incurred plus any agreed markup, or (iii) a firm fixed price;
  - For lump sum or firm fixed price contracts, a schedule of billing rates if the schedule was used to establish the lump sum or fixed price of authorized work. The schedule may also be used as the basis for establishing the cost of additional work authorized under the contract;
  - Any cost substantiation requirements and processes;
  - Any allowances that are a part of established prices;
  - Allowable and unallowable pass-through expenses (e.g., travel expenses at state rates);
  - Expense reimbursement substantiation requirements and processes;
  - Payment frequency, and schedule for Progress Payments;
  - Retention or withholding amounts:
    - Each contract should provide for payment, or a reasonable portion thereof, to be withheld pending resolution of any material dispute;
  - Conditions of payment;
  - Pricing of any modifications that may be effected by change order or through exercise of an option;
  - Respecting IGCs only:
    - A JBE should ensure that any overhead or administrative costs are reasonable considering the services being performed and conform to any applicable requirements imposed under the JBE's A-87 Cost Recovery Plan;<sup>10</sup> and
    - A JBE should not pay overhead charges (mark-ups) on more than the first \$25,000 of a subcontract.

### **3. Terms and Conditions**

The contract must include specified rights and obligations of either party that are not included in the SOW or the pricing and payment section, including additional provisions that apply to performance under the contract, as applicable.

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<sup>10</sup> For superior courts, see TCFPPM, FIN 15.02 (Indirect Cost Rate Proposal) for details about cost recovery plans and Office of Management and Budget guidelines.

- Standard Terms and Conditions. Contracts typically include the following “standard” or “general” terms and conditions:
  - Terms of shipping or packaging requirements;
  - Contract term, including any options to extend the term;
  - Where contract notices must be directed;
  - Identification of the parties’ representatives;
  - Dispute resolution; and
  - Indemnification.
- Deal Terms and Conditions. The contract may also include “deal-specific” terms applicable to the particular goods or services being procured or the circumstances of a particular purchase, such as:
  - If establishing an LPA, LPA options, terms, and conditions;
  - Any performance bond requirement;
  - Permits or licenses required of the Contractor and standards of performance required by particular personnel performing the services; and
  - Product warranties, detailed service level agreements, or performance criteria.
- Modification Provisions. Generally, provisions for modifying contract terms, including provisions for formal amendments, change orders, and exercises of options, if applicable, are required to be in a contract. These terms establish the procedure to be used for each type of modification. If a JBE wants to be able to modify a contract without a formal amendment (i.e., modifying a contract by change order or exercise of an option), the contract must include a change order provision or an option provision. See chapter 11 of this Manual for more information on contract modifications.
- Contractor Certification Clauses (CCCs). CCCs include certifications from a contractor regarding particular laws. CCCs may include a contractor’s representation or warranty that certain conditions have been met or certain circumstances are true. CCCs may be included in the terms and conditions (often in the representations and warranties section) or may be placed in a separate document that is incorporated by reference into the contract. Appendix A to this chapter contains a chart of typical CCCs, and indicates which categories of contract must include the listed CCCs. If the CCC is not required, it may be listed as recommended for a particular category of contract. Whether or not to include CCCs listed as recommended, and whether or not to include CCCs in contracts when the CCC is not listed as

mandatory or recommended, is in the discretion of the JBE, based on JBE policy and the particular circumstances.

- **Insurance.** When contracting with a nongovernmental entity, the JBE should determine whether to require the contractor to maintain insurance in connection with the performance of the contract. If so, the JBE must determine what types of insurance to require and the minimum dollar levels of each required policy. At a minimum, the JBE should require insurance in contracts involving the performance of high-risk activities described in section 8.4.B.1 of this chapter.

The most common types of insurance include:

- Commercial General Liability. This is a basic insurance policy the JBE should consider requiring. This policy covers bodily injury and property damage liability, including coverage for products, operations, hazard, personal and advertising injury liability, and contractual liability.
- Workers' Compensation and Employer's Liability. This policy should be required if the Vendor has employees.
- Professional Liability. This policy should be required if the Vendor performs consulting or professional services.
- Commercial Automobile Liability. This policy should be required if the Vendor uses an automobile or other vehicle in the performance of the contract.
- Commercial Crime Insurance. If the Vendor handles or has access to the JBE's funds or property of significant value to the JBE, the JBE should consider requiring this coverage.

Notes for contracts requiring insurance:

- If required, the commercial general liability and automobile insurance policies should be endorsed to include the JBE and its officers, agents, and employees as additional insureds with respect to the work performed for or items purchased by the JBE under the contract.
- The contract should state that no payments will be made to the contractor until all required current and complete Certificates of Insurance are properly endorsed and on file with the JBE. Agreements that include commercial crime insurance should state that the work will not begin until

all required current and complete Certificates of Insurance are properly endorsed and on file with the JBE.

- It is recommended that the contract state that the contractor will provide prompt written notice to the JBE in the event that insurance coverage is cancelled or materially changed from the coverage set forth in the current Certification of Insurance provided to the JBE.
- The contract should state that insurance will be issued by an insurance company that is acceptable to the JBE.
- If a Solicitation Document is used, the JBE should ensure that the required types and levels of insurance are specified in the Solicitation Document.

### **B. Special Provisions for IGCs**

Because of the inter-governmental nature of IGCs, not all of the subject matters discussed above are necessary in IGCs. In preparing an IGC a JBE should review the information above regarding each element to determine which of the topics are appropriate for inclusion in the particular contract and whether any of the specific requirements noted above apply to the contract. See the appendices for required and recommended certifications and contract provisions for MOUs and IBAs.

### **C. Additional Provisions Required in Certain Types of Contracts**

Certain clauses are required or recommended for certain types of contracts. Appendix C to this chapter addresses these contracts, listed below:

1. Consulting Services Contracts;
2. Credit Card Issuer Contracts;
3. Equipment Purchase Contracts;
4. Federally Funded Contracts;
5. IGCs (MOUs) with Counties for County Services;
6. IGCs with California Governmental Entities;
7. IGCs with Local Governmental Entities;
8. Information Technology Contracts;
9. Janitorial/Building Maintenance Contracts;
10. Legal Services Contracts;
11. Printing Contracts; and
12. Equipment Rental Contracts.

In some instances a single contract may fit into more than one of these types of contracts. For example, an MOU between a court and a county fits types 5, 6, and 7 (and possibly others, depending on the content of the contract). A JBE should ensure that it has consulted all relevant information in appendix C before finalizing a contract.

## **8.4 APPROVAL OF CONTRACTS**

### **A. Review and Approval of Commercial Terms**

Each JBE should establish processes and levels of approval authority for entering into contracts that are consistent with applicable law (including rules of court), and that promote responsible stewardship of public funds and help avoid prohibited conflicts of interest. Consideration should be given to applicable financial and accounting standards and best practices associated with contracting and procurement responsibility. Each JBE should also consider its size and resources when establishing processes and levels of approval authority.

### **B. Legal Review**

JBEs may arrange for legal review of their contracts by their in-house legal staff or retained counsel, or through the Judicial Council's Legal Services office. The JBE should adopt a policy in its Local Contracting Manual describing the circumstances where legal review is required.

The following are circumstances where legal review should be required.

#### ***1. High Risk Activities***

The JBE should provide for legal review if the contract provides for the performance of high risk activities. Each JBE should define "high risk activities" in its Local Contracting Manual. High risk activities may include, for example:

- Operating heavy equipment;
- Transporting, holding, or incarcerating a person;
- Applying, treating, removing, storing, or any other handling of hazardous chemicals or other hazardous substances;
- Carrying a firearm, explosive, or other weapon; or
- Transporting outside of secure premises cash, cash equivalents, securities, and other financial instruments with an aggregate value on any occurrence in excess of a certain dollar amount as specified in the Local Contracting Manual.

## **2. Contract template**

The JBE should provide for legal review where the JBE plans to adopt a contract template.

## **3. Contract Modifications**

The JBE should provide for legal review where one or more contract terms are to be modified, and:

- The contract is being modified to resolve a contract dispute; or
- The modification itself triggers a requirement for legal review under the JBE's Local Contracting Manual.

## **4. Certain Substantive Provisions Affecting Legal Risk**

The JBE should provide for legal review if the proposed terms and conditions involve, for example:

- Assuming a risk or contingent liability not under the direct control of the JBE;
- Indemnifying any contractor or third party;
- Substantially narrowing any limitation of liability that favors the JBE as set forth in the JBE's standard terms and conditions;
- Substantially limiting the liability of a contractor or other third party;
- Agreeing to liquidated damages; or
- Releasing any claim or potential claim, or otherwise settling any dispute.

The following are sample circumstances where the JBE may also wish to require legal review.

### **1. Dollar Value of Contract**

The dollar value of the contract is above a certain dollar threshold.

### **2. Revenue Agreements; Financing Agreements**

The contract is a revenue agreement or financing agreement. Revenue agreements include reimbursement, income, receivable, and cost recovery contracts. They typically fall into one of two categories:

- Contracts between a JBE and a private entity, under which the private entity provides services and pays the JBE; or
- Contracts between a JBE and a governmental or private entity, under which the JBE provides services and receives payment for the services.

Financing agreements include equipment lease/finance agreements, installment sales contracts, and other contracts under which compensation for purchased goods or services comes due over time instead of on receipt.

### **C. Review of Certain IT Contracts**

All administrative and infrastructure information technology (IT) projects of the Judicial Council or the courts with total costs estimated at more than \$5 million are subject to review and recommendations of the California Department of Technology, as specified in GC 68511.9<sup>11</sup> (PCC 19204(a)).

## **8.5 EXECUTION OF CONTRACTS**

### **A. Authority**

Contracts may not be executed by persons without authority to do so according to established levels of authority.

### **B. Process**

- Contracts may be fully executed either with original handwritten signatures or electronic signatures:
  - If the parties choose to fully execute the contract with original handwritten signatures, the JBE should create at least two originally signed counterparts of each contract—one for the JBE and one for the contractor. Other than purchase orders, contracts should first be provided to the contractor for signature and then delivered back to the JBE, who will countersign the document and return an original to the contractor. Contracts may be executed in multiple counterparts if the contract so provides.
  - If the parties choose to fully execute the contract with electronic signatures, the JBE must ensure the electronic signatures comply with California Civil Code, title 2.5, sections 1633.1-1633.17 (Uniform Electronic Transactions Act). When using electronic signatures, the recommended practice is to use, whenever possible, either digital

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<sup>11</sup> GC 68511.9 refers to the office of the State Chief Information Officer, which subsequently became the California Technology Agency, and then the California Department of Technology.



signatures<sup>12</sup> or a scanned image of a handwritten signature that is attached to an electronic document and delivered by electronic means. If the contract is signed with digital signatures, the JBE must also ensure compliance with California Code of Regulations, title 2, sections 22000–22005 (Digital Signatures), promulgated under GC 16.5. The Judicial Council’s Legal Services office is available to provide counsel to JBEs regarding compliance with the Uniform Electronic Transactions Act and California Code of Regulations, title 2, sections 22000–22005.

- Contracts (other than POs) should be mutually executed and delivered before work under the contract begins. Any work performed under a contract before it is fully executed and delivered is at the contractor’s own risk. If a contract is not mutually executed and delivered before work begins, the contractor may not be paid for that work unless the effective date of the contract is no later than the date work begins.

### **C. Payee Data Record**

For information regarding Payee Data Records, see chapter 9, section 9.1.E of this Manual.

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<sup>12</sup> A digital signature is a specific type of an electronic signature consisting of a secure, computer-generated electronic identifier, as more fully defined in Government Code section 16.5 and California Code of Regulations, title 2, sections 22000–22005.

## APPENDIX A

### CONTRACTOR CERTIFICATION CLAUSES

The following table lists Contractor Certification Clauses (CCCs) that are **mandatory** in specific categories of contracts; these are marked with an “M.” A provision is designated mandatory if the JBCL requires its inclusion in a contract, or it is required to comply with some other law, rule, or policy.

Other CCCs are **recommended** in specific categories of contracts; these are marked with an “R” in the table below. If a CCC is neither mandatory nor recommended, the table shows no mark.

Some CCCs are listed as recommended but not mandatory because there is no specific requirement that the contractor provide a certification or representation to that effect; the contract and contractor must still comply with the law.

Whether or not to include CCCs listed as recommended, and CCCs that are not listed as mandatory or recommended, is in the discretion of the JBE based on JBE policy and the particular circumstances. JBEs are not required to include in the procurement file an explanation for including or omitting a recommended CCC.

	CCC	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
1.	Authority		R	R	R (see note 1)	
2.	Qualification in California	<del>RM</del> (see note 2)	<del>M-R</del> (see note 2)	<del>M-R</del> (see note 2)		
3.	No gratuities		R			
4.	No conflict of interest		R			
5.	No interference with other contracts		R			
6.	No litigation		R			

	CCC	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
7.	Compliance with laws	R	R	R	R	
8.	Drug-free workplace		R			
9.	No harassment		R	R		
10.	Nondiscrimination	M	M	M		
11.	Domestic partners, spouses, gender, gender identity	M (see note 3)	M (see note 3)			
12.	National Labor Relations Board	M (see note 4)	M (see note 4)	M (see note 4)		
13.	Expatriate Corporations	M (see note 5)	M (see note 5)	M (see note 5)		
14.	Sweatshop Labor	M (see note 6)	M (see note 6)	M (see note 6)		
15.	Child Support Compliance Act	M (see note 7)	M (see note 7)			
16.	Iran Contracting Act	M (see note 8)	M (see note 8)			
17.	Unruh Civil Rights Act / California Fair Employment and Housing Act	(see note 9)	(see note 9)		(see note 9)	

Note 1: It is recommended that all contracts include a general representation as to the Vendor’s authority. In MOUs with government agencies, the JBE should obtain a copy of the resolution or other document authorizing the local governing body to enter into the proposed contract, unless performance by the local governmental entity will be completed before any payment by the JBE will be made.

Note 2: The JBE should verify that the Vendor is a corporation, limited liability company, or limited partnership in good standing in order to be qualified to do business in California by either calling the Office of the Secretary of State or verifying this fact on the Office of the Secretary of State’s web site at [www.sos.ca.gov](http://www.sos.ca.gov). If the JBE verifies that the Vendor is in good standing, this CCC is recommended for inclusion in the contract. This CCC is mandatory if (i) Vendor is a corporation, limited liability company, or limited partnership, and (ii) the contract will be performed in California, and (iii) the JBE does not verify that

the Vendor is a corporation, limited liability company, or limited partnership in good standing in order to be qualified to do business in California, as set forth above.

- Note 3: Applies only to contracts for \$100,000 or more. This CCC may be omitted if, after the JBE has taken all reasonable measures to find a contractor that complies with this CCC, the JBE determines that: (i) there is only one prospective contractor willing to enter into a specific contract with the JBE; (ii) the contract is necessary to respond to an emergency, as determined by the JBE, that endangers the public health, welfare, or safety, or the contract is necessary for the provision of essential services, and no entity that complies with the requirements of this CCC capable of responding to the emergency is immediately available; or (iii) the requirements of this CCC violate, or are inconsistent with, the terms or conditions of a grant, subvention, or agreement, provided that a good faith attempt has been made by the JBE to change the terms or conditions of any grant, subvention, or agreement to authorize application of this CCC.
- Note 4: Not applicable to purchases of goods by credit card for an amount less than \$2,500 from any one Vendor, not to exceed in the aggregate \$7,500 per year from the Vendor.
- Note 5: Not applicable to purchases of goods by credit card for an amount of \$2,500 or less from any one Vendor, not to exceed in the aggregate \$7,500 per year from the Vendor. In addition, the Approving Authority, or his or her designee, may waive this requirement upon a written finding that the contract is necessary to meet a compelling public interest. "Compelling public interest" includes, but is not limited to, ensuring the provision of essential services, ensuring the public health and safety, or an emergency as defined in PCC 1102.
- Note 6: Mandatory only if the contract provides (i) for furnishing equipment, materials, or supplies (except related to the provision of public works), or (ii) for the laundering of apparel, garments, or corresponding accessories. Not applicable to purchases by credit card for an amount less than \$2,500 from any one Vendor, not to exceed in the aggregate \$7,500 per year from the Vendor.
- Note 7: Mandatory only if the contract is in excess of \$100,000.
- Note 8: Mandatory only if (i) the JBE is entering into a contract for \$1,000,000 or more and the JBE did not receive an Iran Contracting Act certification as part of the solicitation process, or (ii) the JBE is renewing a contract for \$1,000,000 or more. For additional information, including a sample certification form, see chapter 4, section 4.4.C.2 of this Manual.
- Note 9: Under PCC 2010, a person proposing to enter into or renew a contract \$100,000 or more with a JBE must provide a certification regarding compliance with the Unruh Civil Rights Act and the California Fair Employment and Housing Act. For additional information, including a sample certification form, as well as PCC 2010 requirements regarding the submission of bids or proposals, see chapter 4, section 4.4.C.3, and Appendix C of chapter 4.

## APPENDIX B

### MANDATORY AND RECOMMENDED CONTRACT PROVISIONS

Some of the sample contract provisions below are **mandatory** in specific categories of contracts; these are marked with an “M” in the table below. A provision is designated mandatory if the JBCL requires its inclusion in a contract, or it is required to comply with some other law, rule, or policy.

Other sample contract provisions below are **recommended** in specific categories of contracts; these are marked with an “R” in the table below. If a provision is neither mandatory nor recommended, the table shows no mark. JBEs are not required to include in the procurement file an explanation for including or omitting a recommended CCC.

**Note:** The list in the chart below is not exhaustive. Other provisions may be appropriate depending on the subject matter of the contract and desired allocation of commercial and legal risks between the parties.

For low value, low risk, and short form agreements, JBEs may consider drafting provisions with less detail than in their standard agreements and POs, to the extent the particular language or detail is not expressly required by law.

	Provision	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
1.	Termination due to nonavailability of funds	M (see note 1)	M (see note 1)	M (see note 1)	M (see note 1)	
2.	Loss leader	M (see note 2)	M (see note 2)	M (see note 2)		
3.	Antitrust claims	M (see note 3)	M (see note 3)	M (see note 3)		

	Provision	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
4.	Recycled products/post-consumer material	M (see note 4)	M (see note 4)	M (see note 4)		
5.	Priority hiring	M (see note 5)	M (see note 5)			
6.	DVBE commitment	M (see note 6)	M (see note 6)	M (see note 6)		
7.	Small business preference commitment	M (see note 7)	M (see note 7)	M (see note 7)		
8.	Union activities	M (see note 8)	M (see note 8)			
9.	Insurance	R	R	R		
10.	State Auditor audit provision	M (if over \$10,000)	M (if over \$10,000)	M (if over \$10,000)	M (if over \$10,000)	M (if over \$10,000)
11.	General audit and records provision	R	R	R	R	R
12.	Indemnification by contractor	R	R	R		
13.	Independent contractor provision	R	R	R		
14.	Termination for cause	R	R	R	R	R
15.	Termination by JBE for convenience	R	R	R	R	R
16.	Effect of expiration or termination; survival provisions		R		R	R

	Provision	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
17.	Prohibition on assignment and subcontracting	R	R	R	R	R
18.	Binding on successors		R			
19.	Personnel and background checks		R			
20.	GAAP compliance		R			
21.	Ownership of results, rights in work product	R (see note 9)	R (see note 9)	R (see note 9)	R (see note 9)	R
22.	Confidentiality		R	R	R	R
23.	Publicity		R			
24.	Choice of law (California)	R	R	R	R	
25.	Amendment	R	R		R	R
26.	Waiver		R		R	R
27.	Severability		R		R	
28.	Time of the essence	R	R	R	R	
29.	Negotiated agreement		R			
30.	Headings		R			
31.	Counterparts		R		R	R
32.	Entire agreement	R	R	R	R	R
33.	Informal dispute resolution	R	R	R	R	R

	Provision	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
<b>34.</b>	Suspension of work		R (see note 10)			

- Note 1: Mandatory unless the JBE has the right to terminate the contract for convenience.
- Note 2: Mandatory in any contract under which goods are provided to a JBE.
- Note 3: Mandatory only if a contract was obtained by means of a competitive bid.
- Note 4: Mandatory if the contract provides for the purchase of goods specified in PCC 12207 (paper products; printing and wrapping papers; mulch, compost, and cocompost products; glass products; lubricating oils; plastic products; paint; antifreeze; tires and tire-derived products; and metal). Also mandatory in janitorial/building maintenance contracts, and printing contracts, as described in appendix C of this chapter.
- Note 5: With certain exceptions, mandatory if a contract includes services in excess of \$200,000. Exceptions: this provision should not be included in (i) consulting services contracts, or (ii) contracts for services related to public works, if the contract value exceeds the amount set from time to time, pursuant to PCC 10105. For information regarding consulting services contracts, see appendix C, section 1 of this chapter.
- Note 6: Mandatory only if a Vendor received a DVBE incentive in connection with the agreement.
- Note 7: Mandatory only if a Vendor received a small business preference in connection with the agreement; applicable only to procurements of IT goods and services.
- Note 8: Certain language is mandatory in any contract that allows for reimbursement of Vendor expenses. Other language is mandatory in contracts if the amount is above \$50,000.
- Note 9: Strongly recommended for IT agreements or other agreements where there is valuable work product.
- Note 10: Recommended if temporary delay is a possibility, particularly in large-scale or complex services agreements.



## APPENDIX C

### ADDITIONAL INFORMATION FOR CERTAIN TYPES OF CONTRACTS

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

1. Consulting Services Contracts;
2. Credit Card Issuer Contracts;
3. Equipment Purchase Contracts;
4. Federally Funded Contracts;
5. IGCs (MOUs) with Counties for County Services;
6. IGCs with California Governmental Entities;
7. IGCs with Local Governmental Entities;
8. Information Technology Contracts;
9. Janitorial/Building Maintenance Contracts;
10. Legal Services Contracts;
11. Printing Contracts; and
12. Equipment Rental Contracts.

In some instances a single contract may fit into more than one of these types of contracts. For example, a court-county MOU fits within categories 6, 7, and 8 (and possibly others, depending on the content of the MOU). A JBE should ensure that it has consulted all relevant information in this appendix before finalizing a contract.

#### 1. CONSULTING SERVICES CONTRACTS

**a. Definition.** A consulting services contract (or “consultant services contract”) is a services contract in which the service to be provided is advice or recommendations rather than the use of mechanical or physical skills. The product may include anything from answers to specific questions to the design of a system or development of a plan. Consulting services may include workshops, seminars, retreats, and conferences for which paid expertise is retained by contract, grant, or other payment for services. Consulting services contracts typically do not include:

- Contracts between JBEs and the federal government;
- Contracts with any city, county, JBE, special district, authority or other political subdivision of the state, to subvene federal funds for which no matching state funds are required; and

- Contracts for architectural and engineering services (GC 4525 et seq.).

**b. Contents.** A consulting services contract may include:

- A provision for settlement of contract disputes.
- If the contract is for \$5,000 or more:
  - Detailed performance criteria and a schedule for performance;
  - A requirement that the contractor provide a detailed analysis of the costs of performing the contract;
  - A resumé for each contract participant who will exercise a major administrative role or major policy or consultant role, as identified by the contractor; and
  - A statement that the JBE will evaluate the contractor's performance.

## **2. CREDIT CARD ISSUER CONTRACTS**

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

- The respective rights and duties of the JBE and credit card issuer regarding the presentation, acceptability, and payment of credit card drafts;
- A reasonable method to facilitate payment settlements;
- A reasonable fee or discount to be paid to the credit card issuer; and
- Other matters that may be agreed upon by the parties.

For superior courts: additional information regarding credit card payments is set forth in the TCFPPM, FIN 10.01 (Uniform Civil Fees and Criminal and Traffic Fines and Fees Collection and Distribution) and FIN 10.02 (Cash Handling).

## **3. EQUIPMENT PURCHASE CONTRACTS**

Contracts providing for the purchase of equipment using JBE funds should include a provision in substance as follows:

- Title to equipment purchased or built with JBE funds vests in the JBE upon payment of the purchase price; and
- The JBE may, at its option, repair any damaged or replace any lost or stolen items and deduct the cost thereof from contractor's invoice to the JBE, or require contractor to repair or replace any damaged, lost, or stolen equipment

to the satisfaction of the JBE at no expense to the JBE. If a theft occurs, contractor must file a police report immediately.

#### **4. FEDERALLY FUNDED CONTRACTS**

All contracts subject to this Manual that are funded in whole or in part by the federal government should contain a 30-day cancellation provision and the following provisions:

- It is understood between the parties that this Agreement may have been written for the mutual benefit of both parties before ascertaining the availability of congressional appropriation of funds, to avoid program and fiscal delays that would occur if the contract were executed after that determination was made. This contract is valid and enforceable only if sufficient funds are made available to the JBE by the U.S. Government for the fiscal year in which they are due and consistent with any stated programmatic purpose. In addition, this Agreement is subject to any additional restrictions, limitations, or conditions enacted by the Congress and to any statute enacted by the Congress that may affect the provisions, terms, or funding of this contract in any manner.
- The parties agree that if the Congress does not appropriate sufficient funds for the program, this Agreement shall be amended to reflect any reduction in funds.
- The parties may invalidate this Agreement under any termination for convenience or cancellation provision or amend the contract to reflect any reduction in funds.

JBEs using federal assistance for procurement should be aware of any applicable third party contracting requirements that may be a condition of a specific grant. JBEs should consult with legal counsel as appropriate to ensure compliance with all grant conditions.

#### **5. IGCs (MOUs) WITH COUNTIES FOR COUNTY SERVICES<sup>1</sup>**

If a superior court and its county agree that the county will provide or continue to provide services to the court that were provided in 1997, GC 77212 requires the superior courts and county to enter into a contract regarding the services. The parties must cooperate in developing and implementing the contract. The contract is typically in the form of an MOU.

- Services provided to the court may be discontinued by either party giving written notice to the other no later than 90 days before the end of the fiscal

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<sup>1</sup> This section does not apply to security MOUs between a superior court and a county.

- year (i.e., prior to April 1); some MOUs may require earlier notice. Service discontinuation only becomes effective at the beginning of the new fiscal year (July 1), per GC 77212(b) and (c).
- Under CRC 10.805, if the superior court receives or issues a notice regarding the discontinuation of county-provided services under GC 77212, a copy of the notice must be provided to the Judicial Council Director of Finance within 10 days of the notice issue or receipt date.
  - GC 77212(d) specifically requires that a court-county agreement identify the scope of services, the method of service delivery, the term of the agreement, the anticipated services outcomes, and the cost of the services. A court-county agreement for services should also contain appropriate provisions applicable to IGCs generally under this chapter.
  - GC 77212(a) states that services provided to a court shall be provided at a rate that shall not exceed the costs of providing similar services to county departments or special districts. A court may include this clause in its court-county MOU:

**Costs.** Costs charged to the court may not exceed the costs of providing similar services to county departments or special districts (GC 77212(a)).

- Counties periodically approve “cost allocation plans” detailing the actual expenditures by departments that provide indirect services to county departments and identifying the specific cost allocation methods that are used to distribute those costs. For purposes of determining the costs associated with its contract with the county, the contract should allow the superior court to review the specific charges in the cost allocation plan that were used to complete the plan, including the data elements provided by each county department.
- The amount of any indirect or overhead costs must be individually stated, together with the method of calculation of the indirect or overhead costs.<sup>2</sup>
- The Judicial Council or its delegee may audit the county figures to ensure compliance with this requirement and determine the reasonableness of the indirect or overhead costs charged to the superior court.
- CRC 10.810 defines the division of responsibility between the state and county for funding the superior court. Costs payable by a superior court under any IGC, including agreements covered by GC 77212, may not contain items that are not otherwise allowable court operations.

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<sup>2</sup> This requirement is limited to contracts entered into after January 1, 2002. See GC 77212(d).

## 6. IGCs WITH CALIFORNIA GOVERNMENTAL ENTITIES

Except for IBAs, JBEs should include the following waiver provision, or a similar provision modified as appropriate to address any indemnity provision in the contract:

**Waiver of Per Capita Risk Allocation.** The parties waive the per capita risk allocation set forth in Government Code section 895.6. Instead, they agree if one of them is held liable upon any judgment for damages caused by a negligent or wrongful act or omission occurring in the performance of this Agreement, the parties' respective pro-rata shares in satisfaction of the judgment will be determined by applying principles of comparative fault.

## 7. IGCs WITH LOCAL GOVERNMENTAL ENTITIES

When a JBE contracts with a county, city, district, or other local governmental entity, the JBE should require, together with the signed contract, a copy of the resolution or other document authorizing the local governing body to enter into the proposed contract. When performance by the local governmental entity will be completed before any payment by the JBE, however, such as a room rental or a one-time event, the JBE does not need to obtain this documentation. The JBE may wish to include the following provision in the contract (e.g., in the CCCs):

**Authority.** Attached is a true copy of the code, rule, resolution, order, motion, or ordinance authorizing Contractor to enter into or execute this Agreement.

## 8. INFORMATION TECHNOLOGY CONTRACTS

When contracting for the performance of IT services, the contract should specify who will own the work product. If the JBE will own the work product, the contract must assign ownership to the JBE. If the contractor or some other party will own the work product, the contract should provide the JBE a worldwide license to the work product at no additional cost. The license should be broad enough to allow the JBE to use the work product for any reasonable purpose. The JBE may also want to consider whether the contract should provide the JBE a right to sublicense the work product at no additional cost.

If the contract is for the purchase of systems, software, or instrumentation with imbedded chips, JBEs should include a provision substantially similar to the following in the contract:

**Four-Digit Date Compliance.** Contractor represents and warrants that it will provide only Four-Digit Date Compliant deliverables and/or services to

[JBE]. “Four-Digit Date Compliant” deliverables and services can accurately process, calculate, compare, and sequence date data, including without limitation date data arising out of or relating to leap years and changes in centuries. The contractor’s warranty and representation are subject to the warranty terms and conditions of this Agreement and do not limit the generality of warranty obligations set forth elsewhere in this Agreement.

## **9. JANITORIAL/BUILDING MAINTENANCE CONTRACTS**

The contract should provide that the contractor must retain for 60 days any employees employed at each site by the contractor/subcontractor who previously provided those services.<sup>3</sup>

End of Contract. The contract should require the contractor upon termination of the contract to provide upon request information sufficient to identify employees providing janitorial or building maintenance services at each site and to make the necessary notifications required under Labor Code section 1060 et seq.

To the extent economically feasible, the contract should also require the use of supplies containing recycled products only, and must contain a recycled products/post-consumer material clause. (See chapter 3, section 3.3 of this Manual for additional information on recycling requirements.)

## **10. LEGAL SERVICES CONTRACTS**

Legal services contracts with nongovernmental entities must contain, in substance, the following provisions. However, these provisions are not required in contracts with governmental entities, such as court-county MOUs.

The contractor shall:

- a. Adhere to legal cost and billing guidelines designated by the JBE.
- b. Adhere to litigation plans designated by the JBE, if applicable.
- c. Adhere to case phasing of activities designated by the JBE, if applicable.
- d. Submit and adhere to legal budgets as designated by the JBE.
- e. Maintain legal malpractice insurance in an amount not less than the amount designated by the JBE.

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<sup>3</sup> This does not apply to court/county MOUs for janitorial and maintenance service. See GC 71626.1 for applicable law regarding transfer of janitorial and maintenance services between court and county.

- f. Submit to legal bill audits and law firm audits if so requested by the JBE. The audits may be conducted by employees or designees of the JBE or by any legal cost-control provider retained by the agency for that purpose.

If (a) the contract amount is greater than \$50,000, (b) the services are not the legal representation of low- or middle-income persons, in either civil, criminal, or administrative matters, and (c) the services are to be performed within the state of California, then the following language (or equivalent) must be added to the legal services contract:

Contractor agrees to make a good faith effort to provide a minimum number of hours of pro bono legal services, or an equivalent amount of financial contributions to qualified legal services projects and support centers, as defined in section 6213 of the Business and Professions Code, during each year of this Agreement equal to the lesser of either (i) 30 multiplied by the number of full time attorneys in the firm's offices in California, with the number of hours prorated on an actual day basis for any contract period of less than a full year or (ii) the number of hours equal to 10 percent of the contract amount divided by the average billing rate of the firm. Failure to make a good faith effort may be cause for nonrenewal of this Agreement or another judicial branch or other state contract for legal services, and may be taken into account when determining the award of future contracts with [JBE] for legal services.

## **11. PRINTING CONTRACTS**

To the extent economically feasible, the contract should require the use of recycled paper only. The contract must contain a recycled products/post-consumer material clause. (See chapter 3, section 3.3 of this Manual for additional information on recycling requirements.)

## **12. EQUIPMENT RENTAL CONTRACTS**

A JBE should not agree to:

- Indemnify a contractor;
- Assume responsibility for matters beyond its control;
- Agree to make payments in advance;
- Accept any other provision creating a contingent liability against the JBE; or
- Agree to obtain insurance to protect the contractor.

The contract should provide that the JBE does not have responsibility for loss or damage to the rented equipment arising from causes beyond the control of the JBE. Any provision obligating the JBE to return the equipment in good condition, subject to reasonable wear and tear, also should except or exclude loss or damage arising from causes beyond the control of the JBE. The contract should expressly limit the JBE's responsibility for repairs and liability for damage or loss to that made necessary by or resulting from the negligent act or omission of the JBE or its officers, employees, or agents.

If the JBE does not elect to maintain the equipment, the contract should:

- Place the obligation on the contractor, as lessor, to keep the equipment in good working order and to make all necessary repairs and adjustments without qualification; and
- Include a clear right in the JBE to terminate or cease paying rent should the contractor fail to maintain the equipment properly.

Personal property taxes are not generally reimbursed when leasing equipment. If the contractor does not bargain for the JBE to pay the taxes, the contract should state the JBE will not do so.