



JUDICIAL COUNCIL OF CALIFORNIA

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April 23, 2015

Hon. Hannah-Beth Jackson
Chair, Senate Judiciary Committee
State Capitol, Room 2187
Sacramento, California 95814

Subject: SB 682 (Leno) – **Oppose Unless Amended**
Hearing: Senate Judiciary Committee – April 28th

Dear Senator Jackson:

The Judicial Council opposes SB 682 because the bill would severely hamper the trial courts' ability to contract for personal services. The council has submitted amendments (attached) that, if adopted, would remove Judicial Council's opposition. The council remains committed to working with the author to reduce the extreme and undue burden that SB 682 would place on the trial courts' ability, during these tight budget times, to stretch limited resources and maintain public access to justice.

In his October 13, 2013 veto message for AB 566, a bill substantially similar to SB 682, Governor Brown stated that the measure as drafted went too far. Specifically, he said, "*It requires California's courts to meet overly detailed and—in some cases—nearly impossible requirements when entering into or renewing certain contracts.*" These concerns have not been addressed in SB 682. For example, SB 682 requires trial courts to demonstrate actual cost savings for the duration of every personal services contract but does not allow this cost savings to be achieved through lower contractor pay rates. Further, the contract cannot cause any existing trial court employee to lose their job, seniority, or experience a reduction in wages, benefits, hours, involuntary transfer to a new class, or an involuntary transfer requiring a change in residence. In other words, SB 682 requires courts to use court employees to perform many

services even if it would be more efficient and cost effective for courts to contract for these services. SB 682 also applies retroactively to existing contracts and would force courts to convert cost-effective contracts to employee positions at significantly higher costs with no increase in the level of service to the public. In some cases, the cost increases could be insurmountable and courts may have to discontinue or reduce services.

The Judicial Council opposes SB 682 because the bill:

- Presumes no personal services contract is valid unless it meets one of several very limited exceptions or has achieved the impossible balance of attaining actual savings without reducing labor and benefits costs. The bill states that a “contract shall not be approved solely on the basis that savings will result from lower contractor pay rates or benefits” and prohibits local trial courts from entering into any personal services contract unless the court can demonstrate *both* “that the contract will result in actual overall cost savings...” *and* that “the contractor’s wages...do not undercut trial court pay rates.” Nor can the contract cause a trial court employee to lose their job or seniority, or experience a reduction in wages, benefits, hours, involuntary transfer to a new class, or involuntary transfer requiring a change in residence.

SB 682’s contradictory and conflicting provisions requiring that personal services contracts demonstrate savings while forbidding those savings from lower salary and benefit costs present a literal *Catch-22*; a contract that cannot demonstrate savings from lower contracting rates will have no savings and thus be prohibited. And, ironically, a contract with significant savings wouldn’t be allowed.

- Applies to any services “currently or customarily” performed by trial court employees. Not only is this overly broad, it’s also vague and retroactive.

Customarily is not defined in the bill. What service duration would be considered “customarily” and how far back in time would “customarily” extend? This vagueness makes SB 682 unworkable and places the courts at substantial risk for noncompliance. By applying to a wide range of service contracts, the bill reduces local trial courts’ ability to use the most cost effective tools and innovations available to maintain the greatest level possible of access to justice for the public.

SB 682 also applies retroactively to existing contracts and would force courts to convert cost-effective contracts to employee positions at significantly higher costs with no increase in the level of service to the public. In some cases, the cost increases could be insurmountable and courts may have to discontinue or reduce services to the public. In contrast, similar contracting restrictions placed on other state and local entities applied prospectively. Specifically, when contracting restrictions were extended to K–12 schools and community colleges, the legislation included a “grandfather clause” allowing for the continuation and renewal of existing contracts without being affected by the new restrictions. SB 682 does not include a grandfather clause. SB 682 also includes much more restrictive

language—“when a trial court intends to enter into, or renew or extend a contract”—intended to claw-back existing contracts.

- Inhibits the trial courts’ ability to manage their staff and resources, which is critical in view of substantial budget cuts in recent years and an ongoing funding gap of more than \$600 million. The funding gap refers to the difference between the funding currently received by the trial courts, and the funds needed to meet existing workload demands. It is based on a calculation that takes into account both the number of trial court filings annually as well as the types of cases filed. The flexibility of contracting out for certain services is integral to the trial courts’ ability to meet their budget obligations while also providing access to justice for the public.
- Reduces local control and discretion over trial court management. Trial courts are uniquely and constitutionally independent, as well as different from one another. Each presiding judge has the responsibility to manage the court in a manner deemed appropriate to the unique characteristics of that court and its court users. Restrictions on the way trial courts provide for appropriate staffing reduces the courts’ ability to serve the public. Many courts currently contract for services, such as child custody evaluations and probate investigations. In light of judicial branch autonomy, and taking into consideration the budget crisis facing the trial courts, the courts should not be even further hampered in their ability to provide court services.
- Conflicts with recently enacted legislation regarding judicial branch contracting. The Judicial Branch Contract Law (JBCL), Chapter 10, Statutes of 2011, is modeled after Public Contract Code provisions governing state agency contracting. SB 682 is inconsistent with JBCL and the Judicial Branch Contracting Manual (JBCM). For example, under the JBCM, not all service contracts need to be procured through a publicized, competitive bidding process. Courts may procure services without conducting a competitive procurement for contracts less than \$5,000 and contracts for services from other governmental entities. Also, SB 682 applies to court reporters and the JBCM specifically excludes court reporters.

Further, JBCL (Public Contract Code section 10344) generally requires that service contracts be awarded to the highest scored bid. SB 682 could prohibit the awarding of contracts to the highest scored bid. Competition and efficient public contracting are basic tenets of procurement (PCC 19202), however, SB 682 likely would result in less efficiency and less competition in the courts’ contracting as courts would be prohibited from entering into a service contract even if the contract had been competitively bid and even if it would result in more efficient, cost-effective court operations.

In addition, the detailed requirements of the JBCM obviate the need for provisions of SB 682 requiring a publicized, competitive bidding process; contract specifications regarding staff qualifications; and nondiscrimination standards to be met by contractors.

- Affects circumstances that are more appropriately addressed at the local level through collective bargaining agreements. Currently, trial courts bargain individually with labor unions for their employee collective bargaining agreements. Notably, at least 20 local trial courts have collective bargaining agreements that include provisions relative to contracting for personal services. Applying one-size-fits-all contracting restrictions on the 58 trial courts unnecessarily interferes with the ability of the trial courts and the respective bargaining units to enter into agreements the courts and court employees consider best for the individual courts, court users and court employees.

SB 682 appears to be modeled after a Government Code section that limits contracting in the executive branch for services that could be performed by civil service employees (section 19130). This contracting restriction model is inappropriate for the trial courts because, unlike the executive branch agencies, the trial courts must operate independently from one jurisdiction to the next. Moreover, most executive branch agencies can manage the amount of work they receive, the number and types of people they serve, and the services provided. In contrast, trial courts must accept all filings from the public, have no control over the number and types of cases they must process, and have no ability to limit court users. In order to effectively manage their caseloads, courts need flexibility in managing their costs and contracts.

In order to move the dialog forward, presiding judges and court executive officers met regularly to discuss the proposed legislation and craft amendments that, if adopted, would remove Judicial Council opposition. After much review and discussion, those amendments were available and presented to the author's staff and the bill's sponsors on April 20th and representatives from the Judicial Council, the Trial Court Presiding Judges Advisory Committee, and the Court Executives Advisory Committee met with the author's staff and proponents to review the proposed amendments on April 21st.

The Judicial Council is open to continuing discussions about the bill and would be happy to meet with you and your staff on the proposed amendments in order to make SB 682 workable for the courts.

Sincerely,



Cory T. Jaspersen
Director

CTJ/lmb

Attachment

cc: Members, Senate Judiciary Committee
Ms. Ronak Daylami, Counsel, Senate Judiciary Committee
Mr. Mike Petersen, Consultant, Senate Republican Office of Policy

Judicial Council Amendments Mock-up for SB 682 (Leno)

*******Amendments are in BOLD*******

The people of the State of California do enact as follows:

SECTION 1.

Section 71621 is added to the Government Code, to read:

71621.

The purpose of this section is to establish standards for when a trial court intends to enter into, ~~or renew or extend,~~ a contract for any services that are currently ~~or have been customarily~~ performed by that trial court's employees.

(a) Contracts for services that are currently ~~or customarily~~ performed by trial court employees are permissible in a trial court when all of the following conditions are met:

(1) The trial court clearly demonstrates that the contract will result in actual overall cost savings to the trial court, provided that:

(A) In comparing costs, there shall be included the trial court's additional costs of providing the same service as proposed by a contractor. These additional costs shall include the salaries and benefits of additional staff that would be needed and the costs of additional space, equipment, ~~and~~ materials and other factors needed to perform the function.

(B) In comparing costs, there shall not be included the trial court's indirect overhead costs unless these costs can be attributed ~~solely~~ to the function in question and would not exist if that function was not performed by the trial court. Indirect overhead costs shall mean the pro rata share of existing administrative salaries and benefits, rent, equipment costs, utilities, and materials.

(C) In comparing costs, there shall be included in the costs of a contractor providing a service any continuing trial court costs that would be directly associated with the contracted function. These continuing trial court costs shall include, but not be limited to, those for inspection, supervision, and monitoring.

(2) Proposals to contract out work shall not be approved solely on the basis that savings will result from lower contractor pay rates or benefits. ~~Contracts shall be eligible for approval if the contractor's wages are at the industry's level and do not undercut trial court pay rates.~~

(3) The contract does not cause the displacement of trial court employees. The term "displacement" includes layoff, demotion, loss of employment or employment seniority, ~~involuntary transfer to a new class,~~ involuntary transfer to a new location requiring a change of residence, and time base reductions. Displacement does not include changes in shifts or days off, nor does it include reassignment to other positions within the same class and general location

(4) ~~The savings shall be large enough to ensure that they will not be eliminated by private sector and trial court fluctuations that could normally be expected during the contracting period.~~

~~(5) The amount of savings clearly justify the size and duration of the contracting agreement.~~

~~(6) To the extent the contract is subject to the Judicial Branch Contracting Manual adopted by the Judicial Council required by section 19206 of the Public Contract Code, the contract shall comply with the applicable provisions of the operative manual. The contract is awarded through a publicized, competitive bidding process.~~

~~(7) The contract includes specific provisions pertaining to the qualifications of the staff that will perform the work under the contract, as well as assurance that the contractor's hiring practices meet applicable nondiscrimination standards.~~

~~(8) The potential for future economic risk to the trial court from potential contractor rate increases is minimal.~~

~~(9) The contract is with a firm. A "firm" means a corporation, partnership, nonprofit organization, or sole proprietorship.~~

~~(10)~~ The potential economic advantage of contracting out is not outweighed by the public's interest in having a particular function performed directly by the trial court.

(b) This section does not preclude a trial court or the Judicial Council from adopting more restrictive rules regarding the contracting of court services.

(c) Contracting shall also be permissible when any of the following conditions can be met:

(1) The contract is for a new trial court function and the Legislature has specifically mandated or authorized the performance of the work by independent contractors.

(2) The contract is between a trial court and another trial court or ~~local~~ government entity. ~~for services to be performed by employees of the other trial court or employees of the local government entity.~~

(3) The services contracted for ~~cannot be satisfactorily performed by trial court employees, or~~ are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability cannot be obtained from the court's trial court employees.

(4) The contract is for services for a trial court with fifteen or fewer judges.

(5) The contractor will provide equipment, materials, facilities, or support services that could not feasibly be provided by the court in the location where the services are to be performed.

(6) The contract is for technology or automation services that can result in cost savings or efficiencies, improved public access, greater information security, or enhanced privacy protection.

~~(7)~~ The services are incidental to a contract for the purchase or lease of real or personal property. Contracts described in this paragraph, known as "service agreements," shall include, but not be limited to, agreements to service or maintain office equipment or computers that are leased or rented.

~~Service agreements do not include contracts to operate equipment or computers for purposes other than service or maintenance.~~

~~(8)~~ The legislative, administrative, or legal goals and purposes cannot be accomplished through the utilization of trial court employees because of the need to protect against a conflict of interest or to ensure independent and unbiased findings in cases where there is a clear need for an independent, outside perspective.

~~(9)~~ Due to an emergency, a contract is necessary for the immediate preservation of the public health, welfare, or safety.

(10) The contract is for services that can better protect the safety or security of court employees, judicial officers, court facilities, or members of the public who use court facilities.

~~(11)~~ The contractor will conduct training courses for which appropriately qualified trial court employee instructors are not available from the court, provided that permanent instructor positions shall be filled through the process for hiring trial court employees.

~~(12)~~ The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation through the process for hiring trial court employees would frustrate their very purpose or the temporary or occasional nature of the services does not justify the hiring of a regular employee.

This paragraph shall not apply to the services of official court reporters, except individual official reporters pro tempore may be used by a trial court when the criteria of this paragraph are met.

(13) The contract is for services that are necessary for court operations following a reduction in force or layoff for organizational necessity pursuant to section 71652 and an applicable memorandum of understanding between the court and a recognized employee organization allows for such a contract.

~~(14)~~ The contract is a personal services contract developed pursuant to rehabilitation programs in accordance with Sections 19403 and 19404 of the Welfare and Institutions Code, pursuant to habilitation programs in accordance with Chapter 13 (commencing with Section 4850) of Division 4.5 of the Welfare and Institutions Code, or pursuant to a program vendored or contracted through a regional center or the State Department of Developmental Services in accordance with the Lanterman Developmental Disabilities Services Act (Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code), and the contract will not cause an existing trial court employee to incur a loss of his or her

employment or employment seniority; a reduction in wages, benefits, or hours; or an involuntary transfer to a new location requiring a change in residence.

(1015) The contract is for the services of any court interpreter. Contracts for the services of any court interpreter, and restrictions on contracting out interpreter services, shall be governed by the Trial Court Interpreter Employment and Labor Relations Act (Chapter 7.5 (commencing with Section 71800)) and any memorandum of understanding or agreement entered into pursuant to that act, or by the other provisions of this chapter, the Trial Court Employment Protection and Governance Act, and any memorandum of understanding or agreement entered into pursuant to that act, as applicable.

(16) The contract is for services provided to a court by a traffic assistance program as provided in Section 11205.2 of the Vehicle Code.

(17) The contract is a memorandum of understanding between the court and a recognized employee organization regarding the employment of trial court employees.

SEC. 2.

71621 of the Government Code, as added by Section 1 of this act, shall apply to contracts for services entered into after January 1, 2016. This section shall not apply to the renewal of contracts for services subsequent to January 1, 2016, where the contract was entered into before January 1, 2016, irrespective of whether the contract is renewed or rebid with the existing contractor or with a new contractor. If a trial court entered into, or renewed or extended, a contract between July 1, 2015, and December 31, 2015, inclusive, for services that were provided or are customarily provided by its trial court employees and that contract has a term extending beyond March 31, 2016, the trial court shall provide a report by no later than February 1, 2016, to the Department of Finance, chairperson of the Joint Legislative Budget Committee and the chairpersons of the Senate Committee on Judiciary and Assembly Committee on Judiciary. The report shall provide all of the following:

(a) A copy of the contract.

(b) An analysis of whether the contract is permissible under the standards set forth in Section 71621 of the Government Code, as added by Section 1 of this act.

(c) An analysis of whether the contract resulted in the displacement of trial court employees.

(d) An analysis of whether the contract involves the use of contractors to perform the type of services that were customarily performed by trial court employees.

SEC. 3.

The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.



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May 14, 2015

Hon. Ricardo Lara
Senate Appropriations Committee
State Capitol, Room 5050
Sacramento, California 95814

Subject: SB 682 (Leno), as amended May 5, 2015 – Oppose, Unless Amended/Fiscal
Impact Statement
Hearing: Senate Appropriations Committee – May 18, 2015

Dear Senator Lara:

SB 682 establishes requirements and restrictions on courts wishing to enter into personal services contracts in addition to those already in place.

Trial courts are already subject to detailed competitive bidding and transparency requirements under the Judicial Branch Contract Law (JBCL) as well as internal audits and regular procurement audits by the State Auditor. In addition, the trial courts (along with all other judicial branch entities) are required to report detailed information on each and every contract twice each year to the Legislature.

The Judicial Council has significant concerns about the costs to implement SB 682, as well as the vagueness of its terms, its potential conflicts with other laws, particularly the Judicial Branch Contracting Law, and the burdens it places on an already beleaguered trial court system still struggling with the loss of more than \$1 billion in budget cuts since 2008–09.

Fiscal Impacts

Based on a recent survey, California's trial courts would be absorbing *no less than \$10 million in new expenses*, and as much as \$15 million, to hire employees to perform work that is being done now, at least in part, by contractors. As a result of these cost increases, courts anticipate that more clerk and service staff positions will be eliminated, meaning that the public will receive fewer services and experience greater delays as a direct result of the implementation of SB 682.

The contracts that SB 682, as currently amended, will impact include the following:

Contracts that aren't urgent, temporary or occasional: Many small and mid-size courts seamlessly use a combination of employee and contractor court reporters, investigators, mediators, and other court service providers. By the terms of SB 682, since these are ongoing needs, as opposed to the one-time or limited-time help envisioned by the language "urgent, temporary or occasional," courts would not be allowed to contract for these services. Note, too, that the bill's exception for "urgent, temporary, or occasional" only comes into play if the delay in going through the regular hiring process would frustrate the purpose for which the urgent, temporary, or occasional position is required. So, no planned project, no matter how limited in duration or occasional it may be, can benefit from this exception. This unfortunate consequence will mean the loss of qualified, experienced and loyal part-time or temporary contract workers from an already struggling court system.

Contracts for services customarily performed by court employees: Some courts have moved to contracts for a variety of services including court reporting, guardianship and conservatorship investigations, mediations, IT, collections, data entry, and janitorial services. These contracts provide courts with the dual benefits of expertise and lower costs to the courts' bottom line. Many of these services could potentially be prohibited when these existing contracts come up for renewal or extension. Any of these services identified as customarily performed by court employees would be subject to the restrictions in the bill. Also the term "customarily" isn't defined. How many years in the past does it extend, 1 year, 2 years, 5 years, more? Given the absence of a definition and no affirmative language in the bill such as a grandfather clause to specify that the bill does not apply to the renewal or extension of contracts for services that are already in place, it is very difficult to determine the full scope and fiscal impact of the bill, particularly how many existing services the bill will claw back.

Contracts for court reporting services: The application of the bill to contracts for court reporter services will negatively impact those courts that contract for court reporter services. This provision, based on its placement in the bill as an exception to the exception for contractors that fill a need for "urgent, temporary, or occasional" services, would require contracts for individual court reporters to be put through a competitive public bidding process. This is unworkable. Many

courts that supplement their court reporter staff with contract court reporters pro tempore will be unable to afford hiring additional staff reporters without the unfortunate reduction of other court services.

Contracts with other trial courts and contracts with local government entities that use contractors: Many courts have realized that they cannot comprehensively collect delinquent debt, procure services and supplies, or undertake janitorial or building maintenance. Many of these courts have contracted with other trial courts and county entities for these services. Many courts and counties, however, contract with professional private enterprises that do not satisfy the terms of SB 682, which specifically states that contracts between trial courts and local government entities must be for work performed by *the employees* of the trial court or local government entity. Additionally, courts would not be protected from this provision of SB 682 because often they have experience collecting fines, fees, assessments, and penalties, managing janitorial staff, and procuring supplies; for the most part, trial courts lack the funding for staff to assign to these kinds of services, can contract with fellow courts and county entities, and use precious court funding to provide services to the public. In some cases, the counties have also contracted out the work—these contracts would be prohibited when they are due for renewal or extension. Ironically, this restriction would not allow trial courts to contract with the Judicial Council or other state entities like, for example, the Franchise Tax Board to collect delinquent court-ordered debt.

Burden on Limited Court Resources

In addition to its fiscal impacts, SB 682 may limit the use of technology for data management and reporting. Courts have been attempting to automate services such as filing, document retrieval, payments, and others to improve customer services, become more efficient, and save money. Savings from automation have allowed courts to allocate funds to those services and programs that cannot be automated, assigning staff to the work that requires a human element such as court customer/user services. Due to the special and unique responsibilities of the local trial courts, the Trial Court Employment Protection and Governance act specifically excluded “automation, including, but not limited to, fax filing, electronic recording, and implementation of information technology systems” from the scope of representation. (See GOV 71634(b).) SB 682 would, instead, subject contracts for these services to additional restrictions and could discourage future technology innovation by eliminating the ability of courts to contract out for services that would be much more cost effective than retaining employees for services such as data entry, scanning, or handling hard copies of case files. Additionally, SB 682 could be used to undo existing efficiencies in the use of technology by clawing back existing services when contracts come up for renewal or extension. The fiscal impacts of eliminating these kinds of services are difficult to calculate, but any negative fiscal impact is made worse by the commensurate reduction in services that would accompany a reduction in court automation.

Further, the terms of SB 682, should the bill be signed into law, require significant reporting for personal services contracts entered into before the effective date of the bill. The branch is already subject to myriad reporting, data tracking, and audit requirements. Provisions within SB 682 add to this burden, and in so doing, detract resources from the personnel and services that provide direct public access to courts and to justice. Moreover, as a result of requiring courts to report retroactively, courts will face additional costs of \$40,000 to comply with this provision. A more efficient use of court resources would be to forego this report entirely, or add an urgency clause to the bill that would make it effective upon signing.

The trial courts do not resist providing information about their operations and budgets. On the contrary, the trial courts comply with a host of reporting requirements on an annual or semi-annual basis. Below is a description of the kinds of reporting, data tracking and audit requirements the branch currently undertakes:

Internal Audits: The Office of Internal Audit Services was established in 2001 in response to the Trial Court Funding Act of 1997, which made the Judicial Council responsible for financial oversight of the trial courts. Auditing responsibilities of this unit include all entities within the judicial branch including the trial courts. The unit conducts risk assessments, develops audit programs, performs audits of the judicial branch entities, assists state and external auditors, and recommends improvements based on audit results, thereby playing a key role in meeting the branch's fiscal oversight responsibilities.

The California Judicial Branch Contract Law (JBCL; Stats. 2011, ch. 10): The JBCL requires the courts, the Judicial Council, Administrative Office of the Courts¹ and the Habeas Corpus Resource Center (HCRC) to comply with provisions of the code related to the procurement of goods and services. The JBCL applies to contracts, including purchase orders, entered into or amended on or after October 1, 2011. The JBCL directed the Judicial Council to adopt and publish a *Judicial Branch Contracting Manual* that sets out policies and procedures that the courts, the AOC, and the HCRC must follow, and that are consistent with the Public Contract Code and substantially similar to the provisions contained in the *State Administrative Manual* and the *State Contracting Manual*. (It should be noted that the *Judicial Branch Contracting Manual* was developed in a timely manner and became effective on October 1, 2011.) The requirements for judicial branch procurement and contracting activities under the JBCL and *Judicial Branch Contracting Manual* were often in addition to those in the *Trial Court Financial Policies and Procedures Manual* (TCFPPM), AOC policy 7.2.1 Procurement of Goods and Services, and other applicable policies. Other features of the JBCL include the following:

¹ Effective July 29, 2014, the use of the name of Administrative Office of the Courts (AOC) was retired. See Cal. Rules of Court, rules 10.1, 10.80 and 10.81.

- Local contracting manuals: The JBCL requires each court, the AOC, and the HCRC to adopt a local contracting manual for procurement and contracting.
- Reporting: The JBCL imposes mandatory periodic reporting requirements on the Judicial Council concerning contracting activities of the judicial branch.
- Audits: The State Auditor is required to audit the trial courts to assess their implementation of the JBCL. The State Auditor is also required to audit the appellate courts, the Judicial Council, and the HCRC to assess their implementation of the JBCL. The first round of audits was completed in 2013, and then will be implemented bi-annually thereafter.
- Large contracts: The JBCL requires that the courts, the Judicial Council, and the HCRC notify the State Auditor, in writing, within 10 business days of entering into a contract with a total cost estimated to be more than \$1 million. Contracts for administrative or infrastructure IT projects with total costs estimated to be more than \$5 million also are subject to the review and recommendations of the California Technology Agency.

Legislative reports: The judicial branch currently prepares nearly three dozen reports annually, totaling more than 4,500 pages, for submission to the Legislature, some of which are due biennially and quarterly. One of these reports, the “Judicial Branch Semiannual Contract Report of Executed Contracts and Vendor Payments,” is prepared and submitted to the Legislature two times per year, contains in excess of 800 pages of detail pertaining to every contract entered into and vendor payments made by the trial courts (as well as other judicial branch entities). The most current of these reports was submitted to the Joint Legislative Budget Committee on January 30, 2015, and can be found online on the judicial branch website located here: www.courts.ca.gov/7466.htm. (759 pages)

Need for Judicial Branch Amendments

Attached with this letter is a mock-up version of SB 682 that was prepared by the Judicial Council following input from the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee. The mock-up was presented to the author’s staff and the bill’s sponsors on April 21, 2015. Without these amendments, SB 682 continues to be unworkable and costly for the courts, and further diminishes public access to, and by extension confidence in, the judicial system. In sum, here are the concerns with SB 682 in its current form that require the Judicial Council to oppose unless amended:

- SB 682 RESULTS IN A CATCH 22: SB 682’s contradictory and conflicting provisions requiring that personal services contracts demonstrate savings while forbidding those savings from lower salary and benefit costs present a literal *Catch-22*; a contract that cannot demonstrate savings from lower contracting rates will have no savings and thus be prohibited.

- **THE LANGUAGE IS OVERLY BROAD:** The negative impact on the courts is significant, and includes contracts for services “currently and customarily performed by trial court employees.” In other words, the reach of the bill would extend back in time to any work customarily provided by court employees. How many years back does “customarily” reach—1 year, 2 years, more? This remains unclear.
- **THE RESULT OF THE BILL WILL BE HARMFUL TO THE PUBLIC:** Courts will be forced to convert functional and effective contract positions, or forego converting positions that are better suited to contracting, in favor of more costly staff positions, necessitating cuts to other court services, thus limiting public access to the courts on an even greater scale than currently faced.
- **THE BILL TREATS COURTS UNFAIRLY:** SB 682 is more restrictive than existing contracting laws for state agencies, K-12 school districts, and community college districts. When enacted, these statutes applied prospectively; in fact, the law for schools and community college districts included a grandfather clause to ensure that the restrictions on contracting applied prospectively and did not claw back existing contracts. SB 682, however, does NOT contain a grandfather clause and applies to any contract, including existing contracts that are renewed, or extended.
- **SB 682 CONFLICTS WITH EXISTING LAW:** SB 682 conflicts with the Judicial Branch Contract Law that requires all courts to comply with provisions of the Public Contract Code that are applicable to state agencies and departments related to procurement and contracting policies and procedures. Also, SB 682 undermines the goals of fair competition and efficiency embodied in the law and burdens courts with a whole new layer of procurement and contracting obligations, making it nearly impossible to comply with existing contracting requirements.
- **SB 682 IS UNNECESSARY:** As already required by law, court contracts are subject to disclosure, reporting (including a comprehensive report detailing every judicial branch contract, submitted to the Legislature twice each year), and audit requirements, all of which are produced regularly and made public; thus, there is no well-grounded basis for these additional restrictions on the flexibility of courts to contract for cost-effective services and unnecessarily inflate court costs. (A chart that shows the conflicts and duplication between SB 682 and the JBCL is attached.)

Hon. Ricardo Lara

May 14, 2015

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Please contact me at 916-323-3232 or cory.jasperson@jud.ca.gov if you have any questions or would like further information.

Sincerely,



Cory T. Jasperson
Director

CTJ/AL/yc-s

Attachments

cc: Members, Senate Appropriations Committee
Hon. Mark Leno, Member of the Senate
Ms. Jolie Onodera, Consultant, Senate Appropriations Committee
Mr. Matt Osterli, Fiscal Consultant, Senate Republican Fiscal Office
Ms. Ronak Daylami, Counsel, Senate Judiciary Committee
Mr. Mike Peterson, Policy Consultant, Senate Republican Office of Policy
Ms. June Clark, Deputy Legislative Affairs Secretary, Office of the Governor
Ms. Tiffany Garcia, Program Budget Analyst, Department of Finance

Judicial Council Amendments Mock-up for SB 682 (Leno)

as amended on May 5, 2015

*******Amendments are in BOLD*******

The people of the State of California do enact as follows:

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(a) Contracts for services that are currently ~~or customarily~~ performed by trial court employees are permissible in a trial court when all of the following conditions are met:

(1) The trial court clearly demonstrates that the contract will result in actual overall cost savings to the trial court, provided that:

(A) In comparing costs, there shall be included the trial court's additional costs of providing the same service as proposed by a contractor. These additional costs shall include the salaries and benefits of additional staff that would be needed and the costs of additional space, equipment, ~~and materials~~ **and other factors** needed to perform the function.

(B) In comparing costs, there shall not be included the trial court's indirect overhead costs unless these costs can be attributed ~~solely~~ to the function in question and would not exist if that function was not performed by the trial court. Indirect overhead costs shall mean the pro rata share of existing administrative salaries and benefits, rent, equipment costs, utilities, and materials.

(C) In comparing costs, there shall be included in the costs of a contractor providing a service any continuing trial court costs that would be directly associated with the contracted function. These continuing trial court costs shall include, but not be limited to, those for inspection, supervision, and monitoring.

(2) Proposals to contract out work shall not be approved solely on the basis that savings will result from lower contractor pay rates or benefits. ~~Contracts shall be eligible for approval if the contractor's wages are at the industry's level and do not significantly undercut trial court pay rates.~~

(3) The contract does not cause the displacement of trial court employees. The term "displacement" includes layoff, demotion, loss of employment or employment seniority, ~~involuntary transfer to a new class,~~ involuntary transfer to a new location requiring a change of residence, and time base reductions. Displacement does not include changes in shifts or days off, nor does it include reassignment to other positions within the same class and general location

(4) ~~The savings shall be large enough to ensure that they will not be eliminated by private sector and trial court fluctuations that could normally be expected during the contracting period.~~

(5) ~~The amount of savings clearly justify the size and duration of the contracting agreement.~~

(64) To the extent the contract is subject to the Judicial Branch Contracting Manual adopted by the Judicial Council required by section 19206 of the Public Contract Code, the contract shall comply with the applicable provisions of the operative manual. The contract is awarded through a publicized, competitive bidding process.

~~(75) The contract includes specific provisions pertaining to the qualifications of the staff that will perform the work under the contract, as well as assurance that the contractor's hiring practices meet applicable nondiscrimination standards.~~

~~(8) The potential for future economic risk to the trial court from potential contractor rate increases is minimal.~~

~~(9) The contract is with a firm. A "firm" means a corporation, partnership, nonprofit organization, or sole proprietorship.~~

~~(106)~~ The potential economic advantage of contracting out is not outweighed by the public's interest in having a particular function performed directly by the trial court.

(b) This section does not preclude a trial court or the Judicial Council from adopting more restrictive rules regarding the contracting of court services.

(c) Contracting shall also be permissible when any of the following conditions can be met:

(1) The contract is for a new trial court function and the Legislature has specifically mandated or authorized the performance of the work by independent contractors.

(2) The contract is between a trial court and another trial court or ~~local~~ government entity. ~~for services to be performed by employees of the other trial court or employees of the local government entity.~~

(3) The services contracted for ~~cannot be satisfactorily performed by trial court employees, or~~ are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability cannot be obtained from the court's trial court employees.

(4) The contract is for services for a trial court with fifteen or fewer judges.

(5) The contract is for technology or automation services that can result in cost savings or efficiencies, improved public access, greater information security, or enhanced privacy protection.

(46) The services are incidental to a contract for the purchase or lease of real or personal property.

Contracts described in this paragraph, known as "service agreements," shall include, but not be limited to, agreements to service or maintain office equipment or computers that are leased or rented.

~~Service agreements do not include contracts to operate equipment or computers for purposes other than service or maintenance.~~

(57) The legislative, administrative, or legal goals and purposes cannot be accomplished through the utilization of trial court employees because of the need to protect against a conflict of interest or to ensure independent and unbiased findings in cases where there is a clear need for an independent, outside perspective.

(68) Due to an emergency, a contract is necessary for the immediate preservation of the public health, welfare, or safety.

(9) The contract is for services that can better protect the safety or security of court employees, judicial officers, court facilities, or members of the public who use court facilities.

(710) The contractor will conduct training courses for which appropriately qualified trial court employee instructors are not available from the court, provided that permanent instructor positions shall be filled through the process for hiring trial court employees.

(8) The contractor will provide equipment, materials, facilities, or support services that could not feasibly be provided by the court in the location where the services are to be performed. This paragraph shall not apply to services contracted in order to open closed courthouses if those services were performed by trial court employees before the closure or for the ongoing operation of new or reopened courthouses.

(911) The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation through the process for hiring trial court employees would frustrate their very purpose or the temporary or occasional nature of the services does not justify the hiring of a regular employee.

This paragraph shall not apply to the services of official court reporters, except individual official reporters pro tempore may be used by a trial court when the criteria of this paragraph are met.

(12) The contract is for services that are necessary for court operations following a reduction in force or layoff for organizational necessity pursuant to section 71652 and an applicable memorandum of understanding between the court and a recognized employee organization allows for such a contract.

~~(1013)~~ The contract is a personal services contract developed pursuant to rehabilitation programs in accordance with Sections 19403 and 19404 of the Welfare and Institutions Code, pursuant to habilitation programs in accordance with Chapter 13 (commencing with Section 4850) of Division 4.5 of the Welfare

and Institutions Code, or pursuant to a program vendored or contracted through a regional center or the State Department of Developmental Services in accordance with the Lanterman Developmental Disabilities Services Act (Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code), and the contract will not cause an existing trial court employee to incur a loss of his or her employment or employment seniority; a reduction in wages, benefits, or hours; or an involuntary transfer to a new location requiring a change in residence.

~~(1414)~~ The contract is for the services of any court interpreter. Contracts for the services of any court interpreter, and restrictions on contracting out interpreter services, shall be governed by the Trial Court Interpreter Employment and Labor Relations Act (Chapter 7.5 (commencing with Section 71800)) and any memorandum of understanding or agreement entered into pursuant to that act, or by the other provisions of this chapter, the Trial Court Employment Protection and Governance Act, and any memorandum of understanding or agreement entered into pursuant to that act, as applicable.

(15) The contract is for services provided to a court by a traffic assistance program as provided in Section 11205.2 of the Vehicle Code.

(16) The contract is a memorandum of understanding between the court and a recognized employee organization regarding the employment of trial court employees.

SEC. 2.

71621 of the Government Code, as added by Section 1 of this act, shall apply to contracts for services entered into after January 1, 2016. This section shall not apply to the renewal of contracts for services subsequent to January 1, 2016, where the contract was entered into before January 1, 2016, irrespective of whether the contract is renewed or rebid with the existing contractor or with a new contractor. If a trial court entered into, or renewed or extended, a contract between July 1, 2015, and December 31, 2015, inclusive, for services that were provided or are customarily provided by its trial court employees and that contract has a term extending beyond March 31, 2016, the trial court shall provide a report by no later than February 1, 2016, to the Department of Finance, chairperson of the Joint Legislative Budget Committee and the chairpersons of the Senate Committee on Judiciary and Assembly Committee on Judiciary. The report shall provide all of the following:

(a) A copy of the contract.

(b) An analysis of whether the contract is permissible under the standards set forth in Section 71621 of the Government Code, as added by Section 1 of this act.

(c) An analysis of whether the contract resulted in the displacement of trial court employees.

(d) An analysis of whether the contract involves the use of contractors to perform the type of services that were customarily performed by trial court employees.

SEC. 3.

The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.



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TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MARTIN HOSHINO
Administrative Director

September 16, 2015

Hon. Edmund G. Brown, Jr.
Governor of California
State Capitol, First Floor
Sacramento, California 95814

Subject: SB 682 (Leno)—Request for Veto

Dear Governor Brown:

The Judicial Council opposes Senate Bill 682 as an overreach into the discretion, operation, and sound management of California's local trial courts, and an unnecessary restriction that will increase court costs and reduce public access to court services. Additionally, the consequences of SB 682 would conflict with successful efforts courts made to modernize and become more efficient in response to previous budget cuts. The bill's method to balance the important choice between hiring and maintaining permanent employees and contracting tilts too far so as to discourage the efficient use of court resources. The net effect is a reduced level of public access to justice. The Judicial Council values our court's employees and respectfully requests that you veto this bill.

While the council appreciates the amendments made in this year's bill, SB 682 is fundamentally the same bill you vetoed in 2013.

This year, in an effort to reach accord, our presiding judges and court executive officers identified the top five priorities for amendments to the bill:

Prospective application. Address the stated intent that the bill is not to apply to services already under contract when these existing contracts come up for renewal or extension, and either strike "customarily" or define it so we know how far back in time it applies. [Amendment rejected.]

Technology. The courts must be able to automate and take advantage of technology to improve access by and service to the public, and meet the Governor's and Legislature's expectations that the courts become as efficient as possible. [Amendment rejected.]

Temporary or occasional. The courts must have flexibility to contract for temporary or occasional projects/workload when it would not make sense to hire permanent staff. [Amendment rejected.]

Conflicts with existing contract law. Contracts subject to the recently enacted Judicial Branch Contract Law should comply with the applicable provisions of the operative contracting manual. [The August 31, 2015 amendments require Judicial Branch Contracting Manual (JBCM) requirements in addition to the requirements proposed by SB 682. This change is the opposite of what we requested and does not address the concern that some provisions of SB 682 are in conflict with JBCM (as well as the Public Contract Code sections upon which the JBCM provisions are based). In these instances, the JBCM should prevail over the conflicting SB 682 provisions.]

Government contracts. We requested language that would ensure courts could contract with counties, as they currently do in many cases, for critical services. The courts must have the ability to contract with all other government entities, including the Judicial Council, not just local governments, and this flexibility should apply to existing contracts courts have with counties, for example, even when the counties themselves have subcontracted for the work. [The June 24, 2015 amendments strike "local" which would allow courts to contract with more government entities, however, the bill continues to prohibit contracts with government entities where the work is not performed by employees.]

Unfortunately, as noted here, this effort was largely unsuccessful.

As enrolled, SB 682's reach continues to include any services "customarily" performed by court employees. This limitation goes beyond the restrictions imposed on other entities. Contract limitations for state agencies, K-12 and community college districts, and public libraries were prospective only; SB 682 would claw back services that have already been contracted, when the contracts are due for renewal or extension.

Also, since customarily is not defined in the bill, there is no guidance as to how far back in time it would extend. Is it customary if employees provided the service last year? Three or five years ago? This vagueness makes SB 682 unworkable and places the courts at substantial risk for noncompliance.

Furthermore, in each of the past three years, the council has consistently raised objections to the bill's overly detailed requirements that, unless one of several narrow exemptions applies, the bill would require courts to achieve the near impossible balance of demonstrating actual savings *not* from reduced labor and benefits costs *and* by assuring that no trial court employee can lose their job or seniority, or experience a reduction in wages, benefits, hours, or an involuntary transfer requiring a change in residence. Ironically, a contract that saves a little may be permissible, however a contract that saves a significant amount would be prohibited.

And finally, SB 682 requires courts to hire and retain employees in circumstances in which it would be more cost-effective for courts, and allow for greater access to court services by the public, to contract for the services.

I have attached some high-level opposition points, including some information regarding the significant fiscal impact of SB 682 that summarizes the large amount of detailed analysis and background materials provided to your staff.

For these reasons, the Judicial Council respectfully requests that you veto Senate Bill 682.

Sincerely,



Martin Hoshino
Administrative Director
Judicial Council of California

MH/CTJ/AL/lmb
Attachments

cc: Hon. Mark Leno, Member of the Senate

Ms. Camille Wagner, Legislative Affairs Secretary, Office of the Governor

Ms. June Clark, Deputy Legislative Affairs Secretary, Office of the Governor

Per Senator Leno's request, we proposed language to establish a cut-off date of July 1, 2015 and clarify the intent that the contracting restrictions do not apply to services that have already been contracted when these contracts come up for renewal or extension.

“Customarily performed” as used in subdivision (a) means performed exclusively in that manner by that trial court’s employees during the two year period immediately before the date the trial court enters into the services contract; provided, however, that no period before July 1, 2015 shall be included in such two year period.

The provisions of section 71621 shall not apply to contracts for services entered into by a trial court prior to July 1, 2015, regardless of whether such contracts are renewed or extended by that trial court after July 1, 2015.

The Senator also asked us to propose a list of amendments that are our top 5 priorities:

1. Address the intent that the bill not apply to services already under contract when these existing contracts come up for renewal or extension and either strike “customarily” or define it so we know how far back in time it applies.

See proposed amendments above.

2. Technology. The courts must be able to automate and take advantage of technology to improve access and service to the public and meet the Governor’s and Legislature’s expectations that we become as efficient as possible.

The contract is for technology or automation services that can result in cost savings or efficiencies, improved public access, greater information security, or enhanced privacy protection.

3. Temporary or occasional. The courts must have flexibility to contract for temporary or occasional projects/workload when it wouldn’t make sense to hire permanent staff.

The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation through the process for hiring trial court employees would frustrate their very purpose or the temporary or

occasional nature of the services does not justify the hiring of a regular employee.

4. Contracts subject to the recently enacted Judicial Branch Contract Law should comply with the applicable provisions of the operative contracting manual. [Note, the August 31, 2015 amendments require Judicial Branch Contracting Manual (JBCM) requirements in addition to the requirements proposed by SB 682. This change is the opposite of what we requested and does not address the concern that some provisions of SB 682 are in conflict with JBCM (as well as the Public Contract Code sections upon which the JBCM provisions are based). In these instances, the JBCM should prevail over the conflicting SB 682 provisions.]

To the extent ~~*The contract shall also comply with any additional requirements imposed by*~~ *is subject to* ~~*the Judicial Branch Contracting Manual adopted*~~ *by the Judicial Council* ~~*pursuant to Section 19206 of the Public Contract Code, the contract shall comply with the applicable provisions of the operative manual to the extent those requirements are applicable to the contract.*~~

5. Government contracts. The courts must have the ability to contract with all other government entities, including the Judicial Council, and not just local governments and this flexibility should apply to existing contracts courts have with counties, for example, even when the counties themselves have subcontracted for the work. [Note, the June 24, 2015 amendments strike local which would allow courts to contract with more government entities, however, the bill continues to prohibit contracts with government entities where the work is not performed by employees.]

(2) The contract is between a trial court and another trial court or government entity ~~*for services to be performed by employees of the other trial court or employees of the government entity.*~~

Senate Bill 682 (Leno), as enrolled September 4, 2015

Courts: personal services contracts

The Judicial Council **OPPOSES SB 682** (Leno) as an overreach into the operation and sound management of California's local trial courts, and an unnecessary restriction that will significantly increase court costs and reduce access to justice for the public.

Opposition Points:

- **FISCAL IMPACT:** Given the level of concern regarding the large fiscal impact of SB 682 and the potential for significant reductions to staff and services to the public as a result, the presiding judges and court executive officer leadership asked for a statewide survey, twenty-five courts responded:
 - Twenty courts estimated budget impacts; the costs over and above current contract costs as high as \$25.7 million;
 - Thirteen courts anticipate impacts on current staff (eliminated positions), as many as 74 positions at these courts could be at risk with the passage of SB 682;
 - Fourteen courts expect a combined decrease in public service per week of 1,096 hours; and
 - Fourteen courts expect an increase in delays of 998 days for everything from processing court documents to setting trials.

The 25 courts that have responded thus far represent an impressive cross section of northern and southern California, small-medium-large courts, coastal and inland, and urban and rural courts.

In addition to increased costs of operations is the potential negative impact of SB 682 on the collection of delinquent court-ordered debt. Currently, 48 of the 58 trial courts contract with vendors for delinquent collections.

Given the bill's restrictions on contracting, it is likely that revenue courts currently collect may be at risk if fewer sources are eligible to undertake the collections work. That's because collections by other courts (called intra-branch agreements), counties and the Franchise Tax Board are more expensive than collections undertaken by private professional collections vendors. In 2013-14, private vendors collected \$224 million in delinquent court-ordered debt.

- **CATCH 22:** SB 682's contradictory and conflicting provisions requiring that personal services contracts demonstrate savings while forbidding those savings from significantly lower contractor pay rates presents a literal *Catch-22*; a services contract that cannot demonstrate savings from lower contracting rates will have no savings and thus be prohibited. Ironically, contracts that save a little might be permissible, however, contracts with significant savings would be prohibited.

- **OVERLY BROAD:** Unlike existing law for other entities, SB 682 extends to contracts for services “customarily performed by trial court employees.” Not only is this language overly broad, it’s also vague and would claw-back services that have already been contracted, when those contracts come up for renewal or extension. Since customarily is not defined in the bill, there is no guidance as to how far back in time “customarily” would extend. Is it customary if the court provided that service last year? Three years ago? Five years ago? This vagueness makes SB 682 unworkable and places the courts at substantial risk for noncompliance.
- **HARMFUL:** Courts will be forced to convert functional and cost-effective contract positions to more costly staff positions, necessitating significant cuts to other court services and staff, thus limiting public access to the courts on an even greater scale than currently faced.
- **DISPARATE TREATMENT:** SB 682 is more restrictive than existing law for state agencies, K-12 school districts, and community college districts. When enacted, these statutes all applied prospectively, in fact, the law for schools and community college districts includes a grandfather clause to ensure that the restrictions and prohibitions on contracting applied prospectively and did not claw-back existing services that have already been contracted. SB 682, however, does NOT contain a grandfather clause and applies to all contracts, including services that have already been contracted when these contracts are renewed or extended.
- **CONFLICTS WITH EXISTING LAW:** SB 682 conflicts with the recently enacted Judicial Branch Contract Law that requires all courts to comply with provisions of the Public Contract Code that are applicable to state agencies and departments related to procurement and contracting policies and procedures. SB 682 undermines the goals of fair competition and efficiency embodied in the law and burdens courts with a whole new layer of procurement and contracting obligations, making it nearly impossible to comply with existing contracting requirements.
- **UNNECESSARY:** As already required by law, court contracts are subject to disclosure, reporting (including a comprehensive report detailing every judicial branch contract, submitted to the Legislature twice each year), and audit requirements, all of which are produced regularly and made public. Furthermore, a large number of trial courts already have contracting out provisions that have been collectively bargained with their local bargaining units.
- **FLEXIBILITY:** Local courts must have the flexibility to make local staffing and management decisions in order to serve the public as effectively as possible.

Judicial Council proposed amendments that, if adopted, would have removed council opposition to the bill. However, in its enrolled form, SB 682 goes too far by requiring courts to meet overly detailed and nearly impossible requirements when entering into or renewing personal services contracts.