Judicial Council of California

PROCUREMENT PLANNING

CHAPTER 2

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INTRODUCTION

This chapter describes the preliminary considerations and activities that help ensure the success of any procurement effort. These include determining the type of procurement (non-IT goods, non-IT services, or IT goods and services) and considering numerous other issues that arise in procurement planning.

DEFINED TERMS

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

2.1 FORMULATING THE PROCUREMENT APPROACH

There are several preliminary steps required to determine the approach to be taken in a particular procurement.

A. Competitive or Non-Competitive Procurement

Most Judicial Branch Entity (JBE) procurements are competitive, and require the use of Solicitation Documents, advertising, and Bids. In certain circumstances, however, JBEs can procure non-IT goods, non-IT services, and IT goods and services without a competitive process. These types of procurements are:

- Purchases under 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.

For more information on these types of procurements, see chapter 5 of this Manual. For more information about determining the value of the procurement, see step 1 of chapter 4A, 4B, or 4C of this Manual. For more information on determining whether a purchase qualifies as an emergency purchase, see section F below.

B. Classifying the Purchase

1. Benefits: Properly classifying a purchase enables the Buyer to conduct the procurement by correctly:

- Applying the appropriate laws, regulations, policies, and procedures to the specific purchase; and
- Completing external notices and reviews as applicable.

Improperly classifying a purchase may result in:

- Delaying a JBE's program or project;
- Waste of time and effort, ultimately wasting taxpayer money;
- Loss of funding; and
- Disputes, protests, or lawsuits.

2. Purchase classification: The first step in classifying a purchase is determining whether:

- The purchase involves goods or services; and
- The purchase is for IT or non-IT goods or services.

In most cases, a Buyer will be able to classify a purchase quite simply. If the purchase involves only the purchase of ladders, furniture, or office supplies, the purchase is a non-IT goods purchase. If the purchase involves only the purchase of legal services, the purchase is a non-IT services purchase. If the purchase involves only computer equipment and software, the purchase is an IT goods purchase. In other cases, a single purchase may involve the purchase of both goods and services, or both IT and non-IT goods and services. The sections below provide guidance to Buyers in classifying mixed purchases.

3. Classifying mixed purchases: Classifying a mixed purchase begins by determining the main value or the major objective of the entire purchase. The dollar value associated with the services provided and the dollar value of the goods being supplied are factors that should be considered.

What is the main value of the contract—the goods or the services?

- If the main value is the **goods**, the transaction should be treated as a goods purchase. In procurements of non-IT goods, however, if the value of incidental non-IT services is $10,000 or higher, the non-IT services must be procured separately unless an exemption is obtained. For more information on this topic, see chapter 4A of this Manual.

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

Example: A manager requests new furniture for an office. The Buyer needs to purchase the new furniture and acquire services necessary to position that furniture in the office. The main value is the furniture. The request should be treated as a goods purchase.

4. Non-IT vs. IT: Section 4819.2 of the *State Administrative Manual* (SAM) defines IT as "all computerized and auxiliary automated information handling, including systems design and analysis, conversion of data, computer programming, information storage and retrieval, voice, video, data communications, requisite systems controls, and simulation."

IT goods. The following are examples of IT goods:

- Computers (desktop, notebook, tablet, workstation);
- Data storage (interfaces/controllers, drive arrays, hard drives [desktop, internal, portable, removable], tape backup, tape cartridges, CD/DVD, storage area network [SAN], network attached storage [NAS], media and accessories);
- Memory products (RAM, flash, USB);
- Monitors and projectors (displays, touchscreens);
- Networking products (cables, adapters, switches, routers, hubs, modems, gateways, VoIP, standalone appliances);
- Power, cooling and racks (batteries, uninterruptable power supplies, surge protectors, HVAC equipment (when related to IT equipment spaces));
- Printing devices (laser, ink jet, all-in-one multi-function devices, plotters);
- Scanners (barcode, document, graphics);
- Servers (standalone, rack-mount, blades, associated controllers and interfaces);
- Software (including antivirus, security, backup, business, productivity tools, database, development, education, reference, operating system and management, networking, virtual computing, and web-publishing);
- Special electronics (including automation and control systems, cellular/smartphones and accessories, eReaders, handheld devices and accessories);
- Computer accessories (including video cards, imaging, keyboards and keypads, mice and trackballs);
- Audio equipment.

The following consumable items are considered IT goods, but may also be acquired as non-IT goods:

- Documents (e.g., standards and procedures manuals, Vendor-supplied systems documentation and educational or training manuals);
- Equipment supplies (e.g., printer forms, disk packs, magnetic tape and printer ribbons or cartridges);
- Furniture (IT-related, such as desktop station tables and printer stands).

The following consumable items are IT goods:

- PC keyboards;
- Mice;
- Zip drives;
- Memory cards;
- Personal digital assistants (PDA);
- Software;
- Scanners.

IT services. IT services are those services where information technology knowledge or skills are of primary importance, such as:

- Hardware, software, or system maintenance services;
- IT consulting services (services of an advisory nature that provide a recommended course of action or personal expertise).

Independent verification and validation (IVV) consulting services or independent project oversight (IPO) consulting services are considered IT services because they provide oversight and validation on large IT integration projects.

Example: A JBE buys 10 personal computer keyboards for replacement stock to issue when existing keyboards fail. A personal computer processes data electronically and the keyboard is a critical component to the operation of the computer. The keyboards are considered IT goods and the purchase is an IT-goods procurement.

Example: A JBE purchases a vehicle for business use. The vehicle has been fitted with an electronic mapping system, which is an IT good. The features of the mapping system are secondary to the purpose of the vehicle, which is a means of transportation and a non-IT good. Consequently, the purchase is a non-IT goods procurement.

5. Need help in classifying purchases? Courts needing assistance in determining the classification of a purchase after reviewing the available resources (i.e., this Manual, the Local Contracting Manual) should contact the Judicial Council's Branch Accounting and Procurement office.

C. Initial Review

Planning the purchase should begin at the earliest practicable time. The amount of time necessary for the planning process is dependent on the dollar value, risk, complexity, and criticality of the proposed purchase.

The Buyer's first step in the planning and scheduling of a procurement effort is the initial review of a purchase request. Reviewing the request in terms of the following information will assist the Buyer in determining any impact to the procurement planning and scheduling activities.

1. Internal review and approvals: Consider the following:

- Have the proper approval signatures been obtained to conduct the procurement in conformance with the JBE's Local Contracting Manual?
- Is the request in compliance with applicable equipment standards?
- Is there documentation in sufficient detail to support and justify conducting the procurement?
- Are there any program schedule requirements, special delivery instructions, time constraints, etc.?

2. Funding authority: Is the procurement scheduling and planning effort limited by:

- Federal funding limitations and/or restrictions?
- Availability of current and future year funding?
- Timing constraints impacted by availability of fiscal year funding?

3. External notices and reviews: Are any external notices or reviews required (refer to section 2.2 of this chapter for additional details)?

4. Seeking legal participation: Buyers should seek JBE legal participation as necessary to manage risk. See chapter 8, section 8.4.B of this Manual for more information on legal review.

5. Narrowing procurement alternatives: To assist in determining the procurement approach that best meets the JBE's needs, Buyers should ask the following questions:

- Can other requests for similar goods or services be consolidated into a single purchase to maximize purchasing power?
- What available purchasing approach can effectively meet the JBE's needs at the least cost in terms of time and resources?
- Can the functional requirements of the request be met through an LPA?
- For IT goods and services, can the JBE's needs be met by conducting a procurement using the SB/DVBE option? (See section D in the "Selected Topics Relevant to the Solicitation of IT Goods and Services" portion of chapter 4C of this Manual for additional information regarding the SB/DVBE option.)
- Is there a known supplier market and can the acquisition best be met through open competition?
- What risk factors are inherent to the purchase and what steps can be taken in advance to mitigate them?

D. Other Considerations Affecting the Planning Process

1. Requests for reasonable accommodation purchases: A purchase made in response to a request for reasonable accommodation of a disability is not exempt from applicable procurement laws. However, when conducting a procurement to fulfill a reasonable accommodation request, Buyers should be mindful of the need to expedite the purchase. All reasonable accommodation requests should be coordinated with the JBE's human resources department or other department with responsibility for addressing disability accommodation requests.

2. Leasing equipment: Prior to initiating an equipment lease, a JBE should consider whether leasing or purchasing equipment is the more economical option. JBEs may consult SAM section 3700 et seq. for more information on comparison methods and other issues to be considered.

3. Shipping charges: JBEs conducting competitive solicitations should determine shipping terms during the procurement-planning phase. Shipping costs should be addressed in the Solicitation Document. The preferred shipping method is "Free on Board" (FOB) Destination Freight Prepaid (FRT.PPD) where the Vendor is responsible for freight charges and costs and owns the goods while in transit.[1]

[1] An important reason for the preferred shipping method is to avoid the risk of loss in transit.

4. Term purchases: A term purchase establishes a purchasing mechanism for:

- A specified period of time;
- A specified list of products and quantities; and
- Items a JBE acquires on a routine basis, such as office supplies.

When conducting a competitive solicitation for a term purchase:

- A competitive procurement should be conducted whenever the dollar amount of the term purchase exceeds the maximum non-competitively bid procurement (NCB) dollar amount (see Chapter 5, section 5.1);
- The solicitation should identify contract start and end dates;
- The solicitation should state the aggregate amount of the contract; and
- The solicitation should state a maximum number of units that may be purchased.

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

Note: Evaluation and award are based on the total quantities per line item to be purchased during the contract term. Using the above example, the Bid would be evaluated and the contract awarded on the assumption that all 20 units will be purchased.

- The solicitation should clearly define whether pricing is firm over the course of the contract or if allowances will be made for price increases or decreases; and
- The JBE should keep a running total of orders placed against each term purchase contract in the procurement file.

5. Purchases from Community Rehabilitation Programs (CRPs): JBEs may consider purchasing products and services from rehabilitative or sheltered workshops pursuant to Welfare and Institutions Code section 19403. JBEs may purchase non-IT goods, non-IT services, and IT goods and services of any value from a business entity operating a CRP without conducting a competitive procurement, provided that the goods or services meet the specifications and needs of the JBE and are purchased at a fair market price as determined by the JBE.

Note: The JBE should document in its procurement file that the price offered by a CRP is fair and reasonable.

The California Alliance of Rehabilitation Industries (CARI) provides a statewide network of community rehabilitation programs to assist state entities in meeting their needs. Contact CARI at 916-441-5844 for additional information.

6. Socioeconomic Programs: JBEs should consider the socioeconomic and environmental program requirements set forth in chapter 3 of this Manual when planning procurements.

E. Statement of Work (SOW)

1. Determining the need for an SOW: A JBE should include an SOW for all services transactions and all goods transactions that involve a services component. An SOW protects the JBE and the Vendor by identifying and documenting the details of the work to be performed.

2. What to include in an SOW: For information on what to include in an SOW, see chapter 8, section 8.3.A.1 of this Manual.

F. Emergency Purchases

Emergency purchases are exempt from certain competitive bidding requirements. This section will help Buyers identify valid emergency purchases. If the Buyer determines that a purchase should be an emergency purchase, refer to chapter 5 of this Manual.

An emergency purchase is appropriate when immediate acquisition is necessary for the protection of the public health, welfare, or safety.

Example of emergency: A courthouse is flooded and staff must make an immediate purchase of supplies to clean up the water.

Example of a nonemergency: A JBE wants to purchase used copy machines for office use at a total cost of $12,000. The purchase saves the JBE an estimated $6,000 when prices are compared to new copy machine prices. Although it may be in the JBE's best interest to purchase the used equipment, the opportunity to get a good deal does not constitute an emergency.

G. Negotiations

A JBE may negotiate with Bidders either before or after award of a contract to ensure that the JBE receives the most favorable terms possible. Generally, a JBE will have more negotiating leverage prior to the award of a contract.

Example: A JBE wishes to avoid awarding a contract to a Bidder that transfers substantial risk to the JBE through the contract. Therefore, the JBE wishes to finalize the contract with the Bidder before award while the JBE has both (i) negotiating leverage with the leading Bidder and (ii) an opportunity to negotiate exceptions taken by lower-ranked bidders before the final score and ranking are determined. The JBE states in the RFP that the JBE may clarify or negotiate contract terms and conditions with one or more of the Bidders based on the Bidders' preliminary rankings following initial scoring of their Bids. When Bids are scored, the Evaluation Team notes that the Bid with the highest score includes exceptions to the JBE's contract terms and conditions. The Evaluation Team wishes, therefore, (i) to seek clarification from or negotiate with the leading Bidder on contract terms and conditions before making the award, or (ii) if scores are close enough that changes to exceptions to contract terms and conditions may affect ranking, to seek clarification from or negotiate with the leading Bidder and one or more of the other Bidders with the highest preliminary scores. Final scores and ranking will reflect the negotiated terms and conditions, and, if the final rankings change which Bidder is highest-ranked, the formerly leading Bidder will not be awarded the contract.

H. PCC 6611 Special Negotiation Process

1. When Allowed: Consistent with PCC 6611, JBEs may use special negotiation processes,[2] including a process whereby the JBE receives supplemental bids after the initial bids are opened (i.e., a "best and final offer" process). These special negotiation processes may be used only in procurements involving the following circumstances:

- The business need or purpose of a procurement or contract can be further defined as a result of a special negotiation process.
- The business need or purpose of a procurement or contract is known by the JBE, but a special negotiation process may identify different types of solutions to fulfill this business need or purpose.
- The complexity of the purpose or need suggests a Bidder's costs to prepare and develop a solicitation response are extremely high.
- The business need or purpose of a procurement or contract is known by the JBE, but the negotiation process is necessary to ensure that the JBE is

[2] PCC 6611 allows the Department of General Services (DGS) to use special negotiation processes on behalf of executive branch entities. 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 ability to use special negotiation processes resides in each individual JBE. The JBE must ensure that (i) any special negotiation process it adopts is reasonable and appropriate, and (ii) the JBE provides adequate oversight for procurements conducted using a special negotiation process.

receiving the best value or the most cost-efficient goods, services, information technology, and telecommunications.

2. Procedures and Guidelines: If the JBE uses a special negotiation process, the JBE must include procedures and guidelines regarding the process in its Local Contracting Manual. These procedures and guidelines must include the methodology that will be used by the JBE to evaluate affected Bids. If the process allows for the use of supplemental bids, the procedures and guidelines must specify the conditions under which supplemental bids may be received by the JBE.

2.2 EXTERNAL NOTICES AND REVIEWS

Depending on the type and size of a procurement, the JBE may be required to provide notice or allow review of a transaction. Details of the different notices and reviews are set forth below.

A. CRC 10.620

CRC 10.620 requires a trial court to provide public notice of:

- Any solicitation of non-IT goods, non-IT services, or IT goods and services that exceeds the greater of $400,000 or 10 percent of the total trial court budget; and
- The execution of a contract that exceeds the greater of $400,000 or 10 percent of the total trial court budget.

For detailed requirements regarding this notice, see CRC 10.620.

B. Information Technology (IT) Procurements over $5 Million

All administrative and infrastructure information technology projects of the Judicial Council or the courts with total costs estimated at more than $5 million are subject to the review and recommendations of the California Department of Technology, as specified in GC 68511.9.[3]

C. Other Procurements over $1 Million

The JBE must notify the State Auditor of certain contracts for purchases estimated to be more than $1 million. See chapter 12, section 12.2 of this Manual for additional details.

[3] Note that GC 68511.9 refers to the Office of the Chief Information Officer (OCIO). However, the OCIO was renamed the California Technology Agency in accordance with Chapter 404, Statutes of 2010 (AB 2408), and then became the California Department of Technology.

2.3 CREATING THE PROCUREMENT FILE

The Buyer should create a procurement file for each transaction. This section provides guidance on what should be included in the procurement file. Please note that the following list is not exhaustive. A JBE may adopt policies respecting the creation and contents of procurement files in its Local Contracting Manual.

Document decisions: Buyers should develop a strategy of how the procurement activity will be accomplished, and document the rationale for developing that strategy. In simple terms, Buyers should maintain a diary of the events and decisions that lead up to and complete the purchase transaction, providing a timeline and history of the actions and decisions made throughout the procurement process.

Provide the basis of the decisions: Buyers should also describe how competition will be sought, promoted, and sustained throughout the course of the purchasing activity. If open competition is not the method of choice, document the basis of the decision.

Degree of detail: The degree of documentation detail is determined by the cost, risk, complexity, and criticality of the purchasing activity.

Take notes: Buyers should make notations of meetings held and decisions made, and create a phone log to record phone conversations impacting the procurement effort. Consistent, high quality file documentation helps the transaction be easily understood by a reader who is unfamiliar with it and makes documents easy to locate. It will also assist the JBE during audits by the State Auditor.

Public record: Buyers should create and maintain their procurement files keeping in mind that most procurement records are subject to disclosure under CRC 10.500.

2.4 GENERATIVE ARTIFICIAL INTELLIGENCE (GenAI)

“Artificial Intelligence” or **“AI”** means technology that enables computers and machines to reason, learn, and act in a way that would typically require human intelligence.

“**Generative Artificial Intelligence**” or “**GenAI**” means an Artificial Intelligence system that can generate derived synthetic content, including text, images, video, audio, code, and data visualizations, that emulates the structure and characteristics of the system’s training data.

A. GenAI Disclosures

All written solicitations by JBEs regardless of acquisition type (e.g., IT, non-IT, goods or services) should include language regarding the following:[4]

- In its Bid or offer, the Bidder or offeror must notify the JBE if the Bidder's/offeror's goods or services contain or utilize GenAI (or will contain or utilize GenAI), or if GenAI is or will be included in any services, goods, or deliverables that materially impact:
  - (i) *functionality of a JBE system* (i.e., the work using GenAI could have a significant, substantial effect on the system's data integrity, availability, confidentiality, or security, and failure to perform such work in accordance with the contract could cause major disruptions to JBE operations);
  - (ii) *risk to the JBE* (i.e., the work using GenAI could have a significant, substantial effect on the JBE's operations, finances, security, or reputation, and failure to perform such work in accordance with the contract would constitute a high likelihood of damage to the JBE); or
  - (iii) *contract performance* (i.e., when failure to conduct work that uses GenAI in accordance with the contract would constitute a material breach of contract).
- A Bidder's/offeror's failure to disclose GenAI to the JBE may result in disqualification, and the JBE reserves the right to seek any and all relief it may be entitled to as a result of such nondisclosure.
- The JBE reserves the right to incorporate GenAI-related provisions into the final contract or to reject bids/offers that present an unacceptable level of risk to the JBE, as determined by the JBE in its sole discretion.

Non-competitively bid (NCB) procurements should also require disclosure of GenAI, consistent with the guidance above.

B. Assessment of GenAI

Before proceeding with a GenAI purchase, releasing a solicitation that includes the purchase of GenAI, or approving a contract that includes GenAI (or if during the contract term, additional GenAI components are included or proposed to be included in the goods, services, or deliverables), a JBE should engage its Chief Executive Officer or Chief Information Officer (or their equivalent, or their designee) (collectively, "AI Officer")

[4] Please note: If prior to commencing a solicitation, JBE staff is aware that the solicitation will include the purchase of GenAI or that GenAI will be used in the performance of a contract, then the solicitation should be conducted in writing.

to conduct a risk assessment. If the CIO or their department is both requesting the purchase and responsible for the GenAI procurement, the JBE must avoid even the appearance of impropriety by (i) ensuring the risk assessment is conducted or independently validated by a neutral party such as the JBE's Approving Authority, Chief Executive Officer, or Chief Risk/Compliance Officer; and (ii) documenting the foregoing procedures in the procurement/contract file.

After conducting a risk assessment, the AI Officer should confirm in writing that the GenAI-related procurement may proceed. The confirmation should be kept in the procurement/contract file, and it can be an email or a form created by the JBE. For GenAI procurements that involve significant potential risks, the JBE may consider consulting with the Judicial Council's Information Technology Office (JCIT) before proceeding. For more information on risk assessments, please see: https://courts.ca.gov/genai-resources

For all GenAI procurements, a JBE should conduct a privacy assessment to assess GenAI-related potential impacts and risks regarding privacy. After the privacy assessment has been completed, the JBE's procurement/contract file should be updated to reflect the completion. The JBE must implement measures to ensure that the JBE's use or procurement of GenAI complies with applicable laws, rules, and ethics guidelines. JBEs should maintain an inventory of high-risk uses of GenAI.

Please note: under CRC 10.430, if a superior court, Court of Appeal, or the Supreme Court does not prohibit the use of GenAI by court staff or judicial officers, that court must adopt a GenAI use policy in accordance with CRC 10.430. For Judicial Council staff, please see the Judicial Council's GenAI use policy.

JBEs should establish internal procedures for the JBE's evaluation of GenAI during the competitive bidding process so that the evaluation complies with procurement policy and procedures, including confidentiality compliance.

C. GenAI Contract Provisions

For JBE contracts (and amendments), regardless of acquisition types (IT, non-IT goods, non-IT services, etc.) or solicitation method, the JBE should include GenAI contract language when appropriate and feasible. Please see the following link regarding GenAI-related contract provisions: https://courts.ca.gov/genai-contract-provisions

D. Purchases Exempt from GenAI Risk Assessment

The following purchases are exempt from the GenAI risk assessment procedures in section 2.4(B) above:

- Mandatory IT services provided by the Judicial Council or the California Department of Technology.
- Intrabranch agreements (agreements between JBEs) that do not include third-party contracts.
- Procurement of commodity types that do not include a technology or service component. Examples include: (i) office, medical, and cleaning supplies; (ii) office furniture; and (iii) non-IT hardware.
- Licenses/subscriptions to access online content, including news, training, or digital publications, that do not include the ability to independently create content.

E. Contract Management

JBEs must monitor, assess, and validate GenAI contract deliverables for equitable outcomes, output inaccuracies, fabricated content, hallucinations, biases, and the need for human action for all decision-making processes to ensure applicable laws and policies are followed. JBEs should work closely with their GenAI subject matter expert (or other JBE designee) to assess and validate contract deliverables. JBEs should enforce GenAI contract language by monitoring for any previously unreported GenAI, including any additions to or modifications of previously reported GenAI. Upon discovery and/or when contractors disclose previously unreported GenAI or an intent to provide or use new GenAI in the performance of the contract, JBEs should engage the AI Officer to determine how to proceed.

F. GenAI Training

JBEs should consider requiring GenAI training for their procurement staff and staff involved with using or deploying GenAI.