



## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

*Item No. 22-126*

For business meeting on September 20, 2022

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**Title**

Judicial Branch Administration: *Judicial Branch Contracting Manual*

**Agenda Item Type**

Action Required

**Effective Date**

October 1, 2022

**Rules, Forms, Standards, or Statutes Affected**

None

**Date of Report**

September 20, 2022

**Recommended by**

Advisory Committee on Audits and Financial Accountability for the Judicial Branch  
Hon. David Rosenberg, Chair

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### Executive Summary

The Advisory Committee on Audits and Financial Accountability for the Judicial Branch recommends that the Judicial Council adopt proposed revisions to the *Judicial Branch Contracting Manual*. The proposed revisions include new requirements for the Disabled Veteran Business Enterprise program and the addition of a cross-reference to the financial policies manual to facilitate courts' access to information on encumbering funds in connection with contracting and procurement.

### Recommendation

The Advisory Committee on Audits and Financial Accountability for the Judicial Branch recommends that the Judicial Council, effective October 1, 2022, adopt proposed revisions to the *Judicial Branch Contracting Manual*.

The proposed revisions to the manual are indicated in Attachment A.

## Relevant Previous Council Action

At the Judicial Council’s regular business meeting on August 26, 2011, the council adopted the initial version of the *Judicial Branch Contracting Manual* (referred to as the JBCM or manual), effective October 1, 2011, the operative date of substantive requirements of the California Judicial Branch Contract Law.<sup>1</sup> In December 2011, April and August 2012, December 2013, June 2015, June 2016, July 2017, July 2018, September 2019, September 2020, and October 2021, the council adopted revisions to the JBCM. The version of the JBCM adopted by the council on October 1, 2021, effective October 15, 2021, remains in effect as of the date of this report.<sup>2</sup>

## Analysis/Rationale

### Statutory requirement and development of the JBCM

The Judicial Branch Contract Law was enacted on March 24, 2011, and became effective on that date. With certain exceptions,<sup>3</sup> the law requires that superior and appellate courts, the Judicial Council, and the Habeas Corpus Resource Center (referred to collectively as judicial branch entities, or JBEs) comply with provisions of the Public Contract Code applicable to state agencies and departments related to the procurement of goods and services.<sup>4</sup> The Judicial Branch Contract Law applies to all covered contracts initially entered into or amended by JBEs on or after October 1, 2011.<sup>5</sup>

The Judicial Branch Contract Law also requires the council to adopt a manual containing procurement and contracting policies and procedures that must be followed by all JBEs.<sup>6</sup> The policies and procedures in the manual must be “consistent with [the Public Contract Code] and substantially similar to the provisions contained in the *State Administrative Manual* and the *State Contracting Manual*.”<sup>7</sup> Since the adoption of the initial JBCM, Judicial Council staff has continued to receive input from the JBCM Working Group regarding proposed revisions to the JBCM, and the council has adopted 11 sets of revisions.

This report is being submitted by the Advisory Committee on Audits and Financial Accountability for the Judicial Branch under rule 10.63 of the California Rules of Court. Under the rule, the duties of the committee include (1) advising and assisting the council in performing

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

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

<sup>3</sup> Pub. Contract Code, §§ 19204(c), 19207, and 19208.

<sup>4</sup> *Id.*, § 19204(a).

<sup>5</sup> *Id.*, § 19203.

<sup>6</sup> *Id.*, § 19206.

<sup>7</sup> *Ibid.*

its responsibilities and exercising its authority under the Judicial Branch Contract Law and (2) reviewing and recommending to the council proposed updates and revisions to the JBCM.<sup>8</sup>

## **Proposed revisions to the JBCM**

### ***Disabled Veteran Business Enterprise program***

Under the Public Contract Code and the Military and Veterans Code, judicial branch entities must comply with requirements of the Disabled Veteran Business Enterprise (DVBE) program. Chapter 3 of the JBCM currently includes a description of DVBE program requirements. As a result of Assembly Bill 230 (Stats. 2019, ch. 676), Assembly Bill 1365 (Stats. 2019, ch. 689), and Senate Bill 588 (Stats. 2020, ch. 80), there are additional DVBE requirements for California public entities, including JBEs. These requirements relate to certifications that contractors must provide to JBEs regarding DVBE subcontractors, as well as withholding of payments from JBEs to contractors if the certifications are not completed. Therefore, conforming edits are proposed for chapter 3 (pages 9–10) of the JBCM so that it reflects the additional statutory requirements and remains substantially similar to the provisions of the *State Contracting Manual*.

### ***Information on encumbering funds***

To facilitate courts' access to information on encumbering funds in connection with contracting and procurement, an edit is proposed for chapter 11 (Contract Administration), to add a cross-reference to the *Trial Court Financial Policies and Procedures Manual* (FIN 5.01, Section 6.6), which provides information on how to encumber funds for contracts.<sup>9</sup>

## **Policy implications**

The revisions are proposed to enable the JBCM to conform to statutory requirements, and to facilitate access to information in connection with contracting and procurement. There are no policy implications.

## **Comments**

Following review by the JBCM Working Group, the proposed revisions to the JBCM were submitted for public comment from May 31 through June 15, 2022. The invitation to comment specifically sought input on whether the revisions were clear and understandable, appeared to work from a court operations perspective, and were user-friendly. The public comments that were received during the public comment period and the committee's responses are set forth in the comment chart in this report.

Under Government Code section 68511.9, all administrative and infrastructure IT projects of the Judicial Council or the courts with total costs estimated at more than \$5 million "shall be subject

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<sup>8</sup> Cal. Rules of Court, rule 10.63(c)(2) & (c)(3).

<sup>9</sup> The *Trial Court Financial Policies and Procedures Manual* is available at <https://www.courts.ca.gov/7460.htm>.

to the reviews and recommendations” of the California Department of Technology (CDT).<sup>10</sup> To conform to current Judicial Council Information Technology division practice and the stated preference of the CDT, a proposed revision to the JBCM would have clarified that courts “should” notify the Director of Judicial Council Information Technology during the early stages of IT projects that are estimated at more than \$5 million.<sup>11</sup> The committee understands that staff would like to have additional time to consider feedback received regarding this revision and to seek additional input. Therefore, the committee has decided to exclude this revision from the current recommended JBCM revisions.

### **Alternatives considered**

None.

### **Fiscal and Operational Impacts**

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

### **Attachments and Links**

1. Attachment A: *Judicial Branch Contracting Manual*
2. Chart of comments, at pages 8-9.

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<sup>10</sup> Section 68511.9 refers to the office of the State Chief Information Officer, which subsequently became the California Technology Agency, and then the California Department of Technology.

<sup>11</sup> The use of the word “should” is defined in the JBCM as a word signifying reasonable discretion. Use of “should” indicates the action is recommended, and is not mandatory, but favored unless there is a good business reason for variance. See the JBCM’s Introduction, pages 8–9.

- Fraudulently obtaining, attempting to obtain, or helping another to obtain public monies to which there is no entitlement under the laws establishing the DVBE program; and
- Establishing or exercising control over a firm that has engaged in such activities. (See PCC 10115.10 for a complete list of violations and associated penalties.)

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

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

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

The prime contractor must provide the post-contract certification no later than the date of submission of prime contractor's final invoice to the JBE. Pursuant to Military & Veterans Code section 999.7, the JBE shall withhold \$10,000 from the final payment, or withhold the full payment if it is less than \$10,000, until the Contractor submits a complete and accurate post-contract certification.<sup>4</sup> The JBE shall allow the prime contractor to cure the deficiency after written notice of the prime contractor's failure to complete and submit an accurate post-contract certification form.

<sup>4</sup> JBEs must withhold this payment for contracts entered into on or after January 1, 2021, where a commitment to achieve a DVBE goal was made by the prime contractor, the prime contractor used a DVBE subcontractor to meet those DVBE commitments, and the prime contractor failed to provide the JBE with a complete and accurate post-contract certification by the date of submission of the prime contractor's final invoice.

Notwithstanding the foregoing and any other law, if after at least 15 calendar days, but no more than 30 calendar days, from the date of the written notice the prime contractor refuses to comply with these certification requirements, the JBE shall permanently deduct \$10,000 from the final payment, or the full payment if less than \$10,000.

The JBE must keep this certification on file for a minimum of six (6) years.

#### **4. Other Considerations**

Effect on Contracts of Failure to Meet DVBE Goals: Failure of a JBE to meet the goals established under MVC 999 et seq. and PCC 10115 et seq. does not affect the validity or enforceability of any contract (PCC 10115.6, MVC 999.8).

No Goals Reporting Requirement: There are no DVBE goals-reporting requirements in either the PCC or MVC applicable to JBEs.<sup>5</sup>

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

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

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

### **3.2 AMERICANS WITH DISABILITIES ACT CONSIDERATIONS**

In compliance with the Americans with Disabilities Act (ADA) and similar California statutes, JBEs must make reasonable efforts to ensure that their programs, activities,

<sup>5</sup> MVC 999.7 and PCC 10115.5, which required state agencies to provide annual reports to the Governor and DGS with respect to meeting DVBE goals, were repealed effective January 1, 2007.

### 11.3 ROLE OF CONTRACT ADMINISTRATORS

Contract Administrators are those JBE staff who perform contract administration functions. Each Contract Administrator must understand all aspects of the contract.

Contract Administrators must ensure that:

- The procurement of goods and services is appropriately documented;
- Vendors comply with the terms of their contracts as well as applicable laws, rules, and regulations;
- Contract performance progresses satisfactorily;
- Problems that may threaten performance are promptly identified; and
- Contractual disputes are addressed and resolved appropriately, applying sound administrative practice and business judgment.

Contract Administrators are responsible for the following:

- Acting only within the limits of their authority;
- Authorizing contractual actions that are within authorized budgets or available funding;
- Ensuring Vendor and JBE compliance with the terms of the contract;
- Safeguarding the JBE's interests in its contractual relationships; and
- Ensuring that Vendors receive impartial, fair, and equitable treatment.

For superior courts, see the *Trial Court Financial Policies and Procedures Manual*, FIN 5.01, Section 6.6 (at <https://www.courts.ca.gov/7460.htm>) for information on encumbering funds for contracts.

### 11.4 ETHICAL DECISIONMAKING AND CONTRACT ADMINISTRATION

Contract Administrators must adhere to and conduct business by maintaining high ethical standards.

Contract Administrators must:

- Conduct themselves in a professional manner, refrain from mixing outside relationships with business, and not engage in incompatible activities, conflicts of interest, or unethical behavior;
- Accurately account for expenditures and goods and services received;
- Be aware that perceptions can override reality; and

## COMMENT CHART

### Invitation to Comment SP22-06

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

Positions: A = Agree; AM = Agree if modified; N = Do not agree

Commentator	Position	Comment	Committee Response
<p>Sherri R. Carter</p> <p>Court Executive Officer/Clerk of Court</p> <p>Superior Court of California, County of Los Angeles</p>	AM	<p>In several places in the proposed text of the Manual, the following language appears:</p> <p>“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 GC68511.9.3 For administrative and infrastructure information technology projects with total costs estimated at more than \$5 million. courts should notify the Director of Judicial Council Information Technology at: jcitsupport@jud.ca.gov during the early stages of the project, before vendor contract execution.”</p> <p>Consistent with the comments submitted by the Los Angeles Superior Court, I suggest that the following language be removed and replaced as follows:</p> <p>Remove: “For administrative and infrastructure information technology projects with total costs estimated at more than \$5 million. courts should notify the Director of Judicial Council Information Technology at: jcitsupport@jud.ca.gov during the early stages of the project, before vendor contract execution.”</p> <p>Replace with: “Courts may request the JCC to facilitate this communication by notifying the Director of Judicial Council Information Technology at: jcitsupport@jud.ca.gov during the early stages of the project before vendor contract execution.”</p> <p>Thank you for your consideration.</p>	<p>Pursuant to Government Code section 68511.9, a revision had been proposed to the JBCM to facilitate communication with the California Department of Technology (CDT) and provide a consistent communication process for the courts when they have IT projects over \$5 million. The committee understands that staff would like to have additional time to consider feedback received regarding this revision and to seek additional input. Therefore, the committee has decided to exclude this revision from the current recommended JBCM revisions.</p>
<p>Bryan Borys, Ph.D.</p> <p>Director of Research and Data Management</p> <p>Superior Court of California, County of Los Angeles</p>		<p>In response to the Judicial Council of California’s (JCC) “Invitation to Comment SP22-06 Judicial Administration: <i>Judicial Branch Contracting Manual</i>” (JBCM), the Superior Court of California, County of Los Angeles, objects to using wording that may be construed as establishing as a best practice a non-statutory notice to the JCC regarding information technology projects subject to state review under GC 68511.9.</p> <p>GC 68511.9 mandates review by the State Chief Information Officer of courts’ IT projects with cost estimates exceeding \$5 million. The proposed revision</p>	<p>Pursuant to Government Code section 68511.9, a revision had been proposed to the JBCM to facilitate communication with the California Department of Technology (CDT) and provide a consistent communication process for the courts when they have IT projects over \$5 million. The committee understands that staff would like to have additional time to consider feedback received regarding this revision and to seek additional input. Therefore, the committee has decided to exclude this</p>



Commentator	Position	Comment	Committee Response
		<p>to the JBCM would add a nonmandated notice to the JCC regarding such projects. In several places the proposed JBCM revision would add the following:</p> <p><i>For administrative and infrastructure information technology projects with total costs estimated at more than \$5 million, courts should notify the Director of Judicial Council Information Technology at: <a href="mailto:jcitsupport@jud.ca.gov">jcitsupport@jud.ca.gov</a> during the early stages of the project, before vendor contract execution, in order to facilitate communication with the Department of Technology.</i></p> <p>This notice to the Director of Judicial Council Department of Technology is not mandated by GC 68511.9. In addition, it is a local court responsibility – not a JCC responsibility – to notify the state CIO of such local court procurements.</p> <p>The JBCM gives guidance on the interpretation of the word “<i>should</i>,” specifically, that “<i>should</i>” signifies a court may use reasonable discretion in whether to take the action, or not. However, auditors conducting JBCM/Procurement audits have indicated they feel the word “<i>should</i>” indicates a Procurement Best Practice, and failure to do a “<i>should</i>” is to fall short of Procurement Best Practices. Therefore, it is important to be very thoughtful about “<i>should</i>” vs. “<i>may</i>” on new tasks and responsibilities included in the JBCM. Notice to JCC IT is not a best practice: If a court feels there is no need for the JCC to “facilitate communication” with the state CIO, then that is the appropriate course of action for that court and it is not a violation of Procurement Best Practices.</p> <p>The word “<i>should</i>” be replaced by the word “<i>may</i>” wherever the section quoted above occurs, specifically in the JBCM Introduction, pp. 6-7; Chapter 2, p. 13; Chapter 8, p. 14; and the proposed Note on Chapter 12, p. 5.</p>	<p>revision from the current recommended JBCM revisions.</p>