



## Judicial Council of California

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on June 23–24, 2016

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<b>Title</b>	<b>Agenda Item Type</b>
Judicial Branch Administration: <i>Judicial Branch Contracting Manual</i>	Action Required
<b>Rules, Forms, Standards, or Statutes Affected</b>	<b>Effective Date</b>
Revise <i>Judicial Branch Contracting Manual</i>	July 1, 2016
<b>Recommended by</b>	<b>Date of Report</b>
Hon. Kathleen E. O’Leary, Chair Advisory Committee on Financial Accountability and Efficiency for the Judicial Branch	May 13, 2016
	<b>Contact</b>
	Oliver Cheng, Attorney 818-558-3076 <a href="mailto:oliver.cheng@jud.ca.gov">oliver.cheng@jud.ca.gov</a>

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## Executive Summary

The Advisory Committee on Financial Accountability and Efficiency for the Judicial Branch recommends adopting proposed revisions to the *Judicial Branch Contracting Manual*. The California Judicial Branch Contract Law directs the Judicial Council to adopt and publish a manual incorporating procurement and contracting policies and procedures that must be followed by judicial branch entities. The council adopted the initial manual on August 26, 2011, and revisions to the manual on five subsequent occasions. Additional revisions to the manual are currently being proposed for the council’s consideration.

## Recommendation

The Advisory Committee on Financial Accountability and Efficiency for the Judicial Branch recommends that the Judicial Council, effective July 1, 2016, adopt revisions to the *Judicial Branch Contracting Manual*. The proposed changes are shown in detail in Attachment 1 (in tracked changes).

## Previous Council Action

At the Judicial Council’s regular business meeting on August 26, 2011, the council adopted the initial version of the manual, effective October 1, 2011, the operative date of substantive requirements of the California Judicial Branch Contract Law (JBCL).<sup>1</sup> In December 2011, April and August 2012, December 2013, and June 2015, the council adopted revisions to the manual. The version of the manual adopted by the council in June 2015, effective July 1, 2015, remains in effect as of the date of this report.

## Rationale for Recommendation

### Statutory requirement and development of the manual

The JBCL was enacted on March 24, 2011, and became effective on that date. With certain exceptions,<sup>2</sup> the JBCL requires that superior and appellate courts, the Judicial Council, and the Habeas Corpus Resource Center (referred to collectively as judicial branch entities, or JBEs) comply with provisions of the Public Contract Code applicable to state agencies and departments related to the procurement of goods and services.<sup>3</sup> The JBCL applies to all covered contracts initially entered into or amended by JBEs on or after October 1, 2011.<sup>4</sup> As noted above, the JBCL also requires the council to adopt a manual containing procurement and contracting policies and procedures that must be followed by all JBEs.<sup>5</sup> The policies and procedures in the manual must be “consistent with [the Public Contract Code] and substantially similar to the provisions contained in the *State Administrative Manual* and the *State Contracting Manual*.”<sup>6</sup> Of note, the requirement that JBEs comply with applicable provisions of the Public Contract Code is independent of the requirement that JBEs follow the policies and procedures in the manual.

Since the adoption of the initial *Judicial Branch Contracting Manual*, Judicial Council staff has worked with the *Judicial Branch Contracting Manual Working Group* to revise the manual, and the council has adopted five sets of revisions.<sup>7</sup>

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

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

<sup>3</sup> *Id.*, § 19204(a).

<sup>4</sup> *Id.*, § 19203.

<sup>5</sup> *Id.*, § 19206.

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

<sup>7</sup> The *Judicial Branch Contracting Manual Working Group* currently comprises the following judicial branch personnel: Ms. Charlene Ynson, Clerk/Administrator, Court of Appeal, Fifth Appellate District; Ms. Kimberly Flener, Court Executive Officer, and Mr. Richard Holst, Assistant Court Executive Officer, Superior Court of Butte County; Ms. Tammy L. Grimm, Court Executive Officer, and Ms. Terri Darr, Court Financial Officer, Superior Court of Imperial County; Mr. D. Brett Bianco, Court Counsel, and Ms. Kristin Eriksson, Contracts Administrator, Superior Court of Los Angeles County; Ms. Shunna Austin, Contracts Officer, Superior Court of Orange County; Mr. Patrick Barney, Contracts Attorney, and Mr. Luke McDannel, Assistant Deputy Executive Officer, Procurement, Superior Court of Riverside County; Ms. Karen Brewer, Senior Contract Officer, and Mr. Fred Cabrera, Contract Services Manager, Superior Court of Sacramento County; Ms. Sharon Sundry, Contract Administrator, Superior Court of San Bernardino County; Mr. James Flohrschutz, Business Services Manager,

## Proposed revisions to the manual

Rule 10.63 of the California Rules of Court was adopted by the council, effective February 20, 2014, to establish by rule the Advisory Committee on Financial Accountability and Efficiency for the Judicial Branch (A&E Committee). Under section (b)(4) of this rule, one of the duties of the A&E Committee is to review proposed updates and revisions to the *Judicial Branch Contracting Manual*.

In consultation with the *Judicial Branch Contracting Manual* Working Group, staff has made proposed revisions to the manual. The A&E Committee recommends that the council adopt the following proposed revisions, effective July 1, 2016 (as further set forth in tracked changes in Attachment 1).

## Revisions resulting from audit

The JBCL requires the California State Auditor (CSA) to perform biennial audits of the Judicial Council to assess the implementation of and compliance with the JBCL.<sup>8</sup> On December 10, 2015, the CSA delivered a report to the Governor and legislative leaders regarding its most recent audit.<sup>9</sup>

As part of the audit, the CSA reviewed the extent to which the policies and procedures in the manual were consistent with the Public Contract Code and substantially similar to the *State Administrative Manual* (SAM) and the *State Contracting Manual* (SCM), as required by law.<sup>10</sup> The CSA found that the manual generally met these requirements, but noted that the manual did not include a reference to fuel economy standards recently added to the SAM that are applicable to the judicial branch's vehicle purchases.<sup>11</sup> These standards are required by Public Resources Code section 25722.7, and under this statute, the standards are stated in section 3620.1 of the SAM.<sup>12</sup>

The CSA recommended that the Judicial Council update the manual to include these minimum fuel economy standards for the judicial branch's vehicle purchases.<sup>13</sup> In its response to the CSA's recommendation, the Judicial Council stated that it intended to include a reference to the

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Superior Court of San Joaquin County; and Ms. Rhonda Mobley, Procurement Specialist, Superior Court of Sonoma County.

<sup>8</sup> Pub. Contract Code, § 19210(c).

<sup>9</sup> The full report is available at <https://www.auditor.ca.gov/pdfs/reports/2015-302.pdf>

<sup>10</sup> Pub. Contract Code, § 19206.

<sup>11</sup> The fuel economy standards, which are applicable to judicial branch entities under Public Resources Code section 25722.7(e), were effective July 1, 2015.

<sup>12</sup> Pub. Resources Code, § 25722.7(a), (b), and (e).

<sup>13</sup> California State Auditor, *Judicial Branch Procurement* (December 2015), p.23.

fuel economy standards in the next revision of the manual.<sup>14</sup> Therefore, it is proposed that a reference to the fuel economy standards be added to chapter 4A of the manual (in the Motor Vehicles section on page 12).

### **Other revisions**

- Revisions were recently made to the *State Contracting Manual* to clarify that the exemption from competitive bidding for procurements from local government entities also includes local government entities in states other than California.<sup>15</sup> Therefore, edits are proposed for chapter 5 (in section 5.3, on page 5) of the manual to reflect the clarification in the SCM.
- Public Contract Code section 10295.35, which became effective January 1, 2016, places limitations on contracts with contractors that discriminate in the provision of benefits on the basis of any employee's or dependent's actual or perceived gender identity. Therefore, in chapter 8 (in Appendix A, page 17) of the manual, an edit is proposed to reflect Public Contract Code section 10295.35.

### **Comments, Alternatives Considered, and Policy Implications**

Proposed revisions to the manual were submitted for public comment for two weeks, from March 21 through April 5, 2016. 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. Three comments were received in response to the invitation to comment. A chart providing the full text of the comments and the A&E Committee's responses is attached at pages 6 and 7 of this report.

Members of the Judicial Branch Contracting Manual Working Group have expressed that the manual would be more helpful for judicial branch entities in their procurement and contracting activities if it included a reference to public works contracting and procurement under Senate Bill 854 (Stats. 2014, ch. 28), which added new Labor Code requirements relating to vendor registration with the Department of Industrial Relations. However, adding the foregoing reference to the manual would add to judicial branch entities' compliance requirements under the manual. In addition, information regarding the Labor Code requirements can be provided to judicial branch entities in other ways.<sup>16</sup> Therefore, the A&E Committee has decided not to recommend adding the Labor Code references to the manual.

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<sup>14</sup> Letter dated November 19, 2015, from Martin Hoshino, Administrative Director of the Judicial Council, to the CSA (included as page 27 of the CSA's report).

<sup>15</sup> SCM (Vol.1), § 3.06, revised April 2015.

<sup>16</sup> For example, in June 2015, information on these requirements was provided by judicial council staff to contracting and procurement staff in the courts on a statewide basis via conference call and email distribution list. Information can also be posted on judicial council websites, or included in bulletins provided to the courts. A court may also include information for its staff in its own contracting/procurement reference materials.

## **Implementation Requirements, Costs, and Operational Impacts**

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

## **Attachments**

1. Comments chart, at pages 6 - 7.
2. Attachment 1: proposed revisions to the *Judicial Branch Contracting Manual* in tracked changes

**ITC Number SP16-05**

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

All comments are verbatim.

*COMMENTS CHART*

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

Commentator	Position	Comment	Committee Response
<p>Shunna R. Austin, Contracts and Collections Manager</p> <p>Superior Court of California, County of Orange</p>	<p>AM / N</p>	<p>Comments are invited on the proposed revisions to the manual and on the following questions:</p> <p>1. Are the revisions clear and understandable? <i>No, it is unclear whether the additions about fuel economy apply to existing fleet vehicles, or only to vehicles purchased on or after the amendment of the PCC provision making them applicable. The language “this requirement does not apply to vehicles purchased prior to X date” should be added in Chapter 4A page 12 of 12.</i></p> <p>2. Do the revisions appear to work from a court operations perspective, <i>Yes from a ‘mechanical’ perspective, but No from the perspective that this is an unfunded state mandate, as the cost of vehicles meeting the fuel standards are probably more expensive.</i> e.g., do they conflict with any aspect of court operations or appear to make any incorrect assumptions? <i>No</i></p> <p>3. Are the revisions user-friendly? <i>Yes</i> Do the revisions appear to work for courts of different sizes and staffing capabilities? <i>No, it assumes courts of all sizes can equally afford the resulting impact of the requirements related to fuel economy vehicle purchases.</i></p>	<p>The revisions to the manual regarding the fuel economy standards are being proposed in accordance with, and in response to the recommendation of the California State Auditor. The proposed revisions reflect statutory requirements under the Public Resources Code. The current fuel economy standards apply to vehicles purchased on or after July 1, 2015.</p>
<p>Service Employees International Union, State Council</p> <p>(submitted by Kimberly Rosenberger)</p>	<p>N</p>	<p>To: Judicial Council of California 455 Golden Gate Avenue. San Francisco, California 94102 3688 <a href="http://www.courts.ca.gov/policyadmin-invitationstocomment.htm">www.courts.ca.gov/policyadmin- invitationstocomment.htm</a></p> <p>From: Service Employees International Union, State Council 1130 K Street Sacramento, California 95814</p> <p><b>Invitation to Comment:</b> Revise Judicial Branch Contracting Manual</p> <p>Proposed change to the Judicial Branch Contracting Manual (JBCM) regarding expanding non-competitive bidding exemptions to other states is highly problematic.</p> <p>Specific proposal:</p> <p>Revisions were recently made to the State Contracting Manual to clarify that the exemption from competitive bidding for procurements from local government entities also includes local government entities in states other than</p>	<p>This comment relates to matters beyond the scope of the Invitation to Comment. Therefore, no substantive response to this comment is required.</p>

Commentator	Position	Comment	Committee Response
		<p>California. Therefore, edits are proposed for Chapter 5 (in section 5.3, on page 5) of the manual to reflect the clarification in the SCM.</p> <p>The JBCM is meant to comply with the Public Contract Code (PCC) in an effort to have standards that are comparable to other state agencies and departments related to the procurement of goods and services in an effort to ensure contracts entered into are fair and reasonable.</p> <p>Although there are subtle variances department to department, the overall intent is to protect Californians from state agencies entering into detrimental contracts. While some exemptions are necessary, the proposed expansion of local government entities to include other states is not only a needed exemption but undermines the very intent of the PCC.</p> <p>California has thorough regulations and standards in place for a myriad of reasons that have been addressed by the Legislature or the regulatory process. Other states may not have the same high standards or thoroughly vetted regulations. California state entities are permitted to contract without competitive bidding as they have similar high standards in place and directly are benefitting the California public, the same cannot be said of other states.</p> <p>The impact of expanding the non-competitive bidding exemption to other states is far more detrimental for the Judicial Branch than other state agencies, as the JBCM is the primary governing language for the Judicial Branch. Other state agencies and departments are held to stricter statutory requirements, such as Government Code 19130, which would limit this exemption to very narrow instances.</p> <p>Service Employees International Union does not object to contracts with other state entities if they go through the same competitive bidding process that the PCC and JBCM currently require, however to open contracting to those state entities without any form of checks and balances is reckless and shortsighted.</p> <p>For the reasons stated above we strongly oppose the expansion of non-competitive bidding process to include state entities outside of California. Such an expansion is not in the public or state's best interest.</p>	
Todd Torr	A	The proposed revisions are clear and understandable, as well as timely.	No response required.

**ATTACHMENT 1**



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 4A  
Page 1 of 12

## STEP-BY-STEP GUIDE FOR THE PROCUREMENT OF NON-IT GOODS

### CHAPTER 4A

Original Release Date:  
October 1, 2011

Revised Effective:  
July 1, ~~2015~~2016

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## **INTRODUCTION**

The most significant change to Judicial Branch Entity (JBE) procurement required by the California Judicial Branch Contract Law is that JBEs must procure non-IT goods above a threshold amount (\$25,000, unless a higher amount is established by the JBE's Approving Authority) using a "lowest responsible bidder" methodology rather than a "best value" or "highest scoring bidder" approach. JBEs can no longer use these other approaches to procure non-IT goods valued above the threshold amount.

This chapter sets forth a step-by-step guide that Buyers can use when competitively soliciting non-IT goods.<sup>1</sup> For noncompetitive solicitation of non-IT goods, see chapter 5 of this Manual.

## **DEFINED TERMS**

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

## **STEP 1—DETERMINE THE PROCUREMENT VALUE**

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

- Value of the non-IT goods to be procured;
- Value of any associated incidental services (such as installation);
- Delivery costs;
- Taxes (if applicable); and
- Other associated costs, as applicable.

JBEs may not split a single transaction into a series of transactions for the purpose of evading procurement requirements.

See section A in the "Selected Topics Relevant to Solicitations of Goods" section below for additional information on incidental services acquired in connection with the procurement of non-IT goods.

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

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

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

**STEP 3—ASSEMBLE PROCUREMENT TEAM**

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

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

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

**STEP 4—SELECT SOLICITATION DOCUMENT TYPE**

Two types of Solicitation Documents are used in the procurement of non-IT goods:

- Requests for Quote (RFQs); and
- Invitations for Bid (IFBs).

See the table below for information about when each type of Solicitation Document should be used.

Solicitation Document	Procurement Size	Description
RFQ	Up to \$50,000 <sup>2</sup>	Used for straightforward, uncomplicated, and low-risk procurements.

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

Solicitation Document	Procurement Size	Description
		<i>Note: Cannot be used if incidental services included in the purchase (e.g., set-up, installation) exceed \$4,999.99, unless an exemption is granted. See section A in the “Selected Topics Relevant to Solicitations of Goods” section below for additional information.</i>
IFB	Any size	Used for more complicated, higher risk, and higher value procurements.

**Note:** The JBE may use other names for these Solicitation Documents; it does not need to refer to or title them as “RFQs” or “IFBs.”

## STEP 5—DRAFT SOLICITATION DOCUMENT

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

In addition to the required provisions identified in chapter 4 of this Manual, a Solicitation Document for non-IT goods must comply with the following requirement:

- Product specifications must not be written with the intent of excluding goods manufactured, produced, grown, or otherwise originating in California (see PCC 10302.6).

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

### A. RFQs

An RFQ is used for straightforward procurements where Bids may be solicited by telephone or another method of electronic communication. If the Buyer solicits Bids by telephone, the Buyer must prepare and use a script (a narrative of the Bid requirements) so that each Prospective Bidder receives the same information and Bids may be evaluated fairly. Similarly, if the Buyer solicits Bids by e-mail or another written

manner, the Buyer must send the same information to each Prospective Bidder so that Bids may be evaluated fairly.

The RFQ should:

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

## B. IFBs

The IFB must include the JBE's standard terms and conditions for the acquisition of non-IT goods. The JBE should also distribute with the IFB the terms and conditions specific to the procurement, or simply attach the entire proposed contract, including available appendices. The IFB should state that any material exception (addition, deletion, or other modification) to the JBE's terms and conditions will render a Bid nonresponsive. Note that the JBE, in its sole discretion, will determine what constitutes a material exception.

The IFB must state the time and place Bids will be publicly opened. This place must be accessible to Bidders and other members of the public, and may be at the JBE's facilities.

## STEP 6—PREPARE ADVERTISING

A JBE must advertise any solicitation of non-IT goods **in excess of \$50,000**.<sup>3</sup> See chapter 4, section 4.1.D of this Manual for advertising methods.

Because the advertisement should be released before or simultaneously with the Solicitation Document, the Buyer should prepare any necessary advertisement in conjunction with the Solicitation Document.

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<sup>3</sup> All solicitations of non-IT goods in excess of \$50,000 must be advertised, even if the JBE adopts a threshold for use of RFQs that is higher than \$50,000.

**Note:** If incidental services included in the purchase (e.g., set-up, installation) exceed \$4,999.99, the solicitation must be advertised even if the total estimated value of the solicitation is under \$50,000. See section A in the “Selected Topics Relevant to Solicitations of Goods” section below for information regarding exemptions to this requirement.

## **STEP 7—RECEIVE BIDS**

Bids are received and handled as described in chapter 4, section 4.3 of this Manual. Some aspects of receiving Bids depend on the type of Solicitation Document used.

### **A. RFQs**

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

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

### **B. IFBs**

Bids must be submitted in sealed envelopes. A JBE should time/date stamp Bids as they are received.

Bids received pursuant to an IFB solicitation remain confidential until the Bids are publicly opened.

## **STEP 8—OPEN BIDS**

All Bids in response to IFBs must be publicly opened at the time and place specified in the IFB. If any person present at the opening requests that the Bids be read, the Buyer (or designee) must read the Bids aloud. Once opened, the Bids must be made available for public inspection.

**Note:** Because RFQs do not involve sealed Bids, this step is inapplicable to solicitations using RFQs.

## STEP 9—DETERMINE IF COMPETITION HAS BEEN ACHIEVED

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

### A. RFQs

If a Buyer obtains a single Bid, and the Buyer determines that the Bid is fair and reasonable, the Buyer does not need to obtain additional Bids. If a Buyer obtains a single Bid, and the Buyer determines that the Bid is not fair and reasonable, the Buyer should obtain at least one additional Bid.

### B. IFBs

The Buyer should make reasonable efforts to obtain at least two Responsive Bids from Responsible Bidders. Advertising the solicitation constitutes a reasonable effort.

## STEP 10—BID CLARIFICATION

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

## STEP 11—EVALUATE BIDS

The Evaluation Team must evaluate the Bids using the criteria specified in the Solicitation Document. The requirements in this step are in addition to the general requirements set forth in chapter 4, section 4.4 of this Manual.

A Bidder's exception to the JBE's terms or conditions (addition, deletion, or other modification) may constitute a material deviation. A Bid with a material deviation is nonresponsive. JBEs have discretion to determine materiality.

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

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

**Note:** For purposes of determining the lowest Bid, the amount of sales tax must be excluded from the total amount of the Bid (PCC 10301). See chapter 3 of this Manual for more information regarding preferences, incentives, and discounts. See chapter 4, section 4.4.D of this Manual for guidance on determining whether a deviation is material.

## A. RFQs

Under PCC 10301, JBEs must award contracts for non-IT goods above a threshold amount to the lowest responsible bidder. The default threshold amount is \$25,000, but the Approving Authority may establish a higher threshold amount for his or her JBE.<sup>4</sup> If the Approving Authority establishes a higher threshold amount, the JBE should document this higher threshold amount in its Local Contracting Manual.

RFQs less than the threshold amount: JBEs are not statutorily required to award the contract to the lowest responsible bidder if the JBE has a valid business reason to do otherwise.

RFQs equal to or above the threshold amount: The JBE must award the contract, if at all, to the **Responsible Bidder** that submitted the lowest **Responsive Bid** after application of any preference, incentives, or discounts, if applicable.

## B. IFBs

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

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<sup>4</sup> PCC 10301 allows the director of the Department of General Services (DGS) to establish a higher threshold amount applicable to procurements of non-IT goods by state agencies. Within the executive branch, purchasing authority resides primarily with DGS (see, e.g., *State Contracting Manual*, volume 2, section 1.A1.0). Within the judicial branch, however, each JBE possesses its own purchasing authority (see chapter 1, section 1.1.A of this Manual). Accordingly, the authority to establish a higher threshold amount for a JBE resides in the Approving Authority of that JBE. If the Approving Authority establishes a higher threshold amount, the Approving Authority must ensure that (i) the higher threshold amount is reasonable and appropriate, and (ii) the JBE provides adequate oversight for procurements conducted pursuant to the higher threshold amount.

## STEP 12—NOTICE OF INTENT TO AWARD

### A. RFQs

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

### B. IFBs

There are both posting and notification requirements when using an IFB.

#### 1. Posting

The JBE must post a “notice of intent to award” on its website or in a public place in the offices of the JBE at least 24 hours before the contract is awarded. Once the notice has been posted, the time for submitting a protest begins to count down.

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

#### 2. Notification

If the contract will be awarded to a Bidder that did not submit the lowest Bid (because, e.g., the lowest Bid was not a Responsive Bid, or the Bidder that submitted the lowest Bid was not a Responsible Bidder), the JBE must notify the lowest Bidder at least 24 hours before awarding the contract. The 24-hour period excludes Saturdays, Sundays, and legal holidays. If the lowest Bidder submits a valid protest, the JBE must not make an award until either the protest has been withdrawn or the JBE’s protest hearing officer has responded to the protest. For more information regarding protest procedures, see chapter 7 of this Manual.

## STEP 13—CREATE THE CONTRACT

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

**STEP 14—CREATE THE PROCUREMENT SUMMARY DOCUMENT**

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

**STEP 15—NOTICES OR REVIEWS**

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

**SELECTED TOPICS RELEVANT TO SOLICITATIONS OF GOODS****A. Incidental Services**

Unless an exemption is granted, incidental services included with the purchase of non-IT goods:

- May not exceed \$4,999.99, and
- Should be directly related to the purchase of non-IT goods, such as setup or installation.

Unless an exemption is granted, the solicitation must be advertised if the value of incidental services included in the purchase exceeds \$4,999.99, even if the total estimated value of the solicitation is under \$50,000.

The Approving Authority, or his or her delegee, may grant an exemption to these requirements if he or she determines, in his or her sole discretion, that the cost of complying with the requirement will likely exceed the savings generated by complying with the requirement.

**B. Motor Vehicles**

In establishing specifications for the purchase of a motor vehicle, and in determining the lowest responsible bidder, a JBE may consider the probable resale value of the vehicle as determined by:

- Recognized published used car marketing guides;
- Other established historical evidence of future used motor vehicle value; or

- Contractual guarantee of the apparent low Bidder that the resale value of the vehicle will be no less in proportion to Bid price than any other comparable vehicle complying with specifications for which a Bid was received.

Under Public Resources Code (PRC) section 25722.7, fleet vehicle purchases by JBEs must meet minimum fuel economy standards. Under PRC 25722.7(a) and (b), fleet vehicle purchases must meet the fuel economy standard in section 3620.1 of the *State Administrative Manual (SAM)*, which sets forth a minimum miles per gallon standard for the combined annual purchases of vehicles by each JBE. Please refer to PRC 25722.7 and SAM 3620.1 for further information.

### **C. Solicitations of Printer or Copier Cartridges**

If a JBE procures printer or copier cartridges, it must include a statement on the cover of the Solicitation Document (or in some other prominent place in the Solicitation Document) informing Bidders that it is unlawful to prohibit a printer or copier cartridge that is sold to a JBE from being recycled or remanufactured, except as noted below.

**Exception:** This requirement does not apply where the Bidder enters into signed agreements with its customers consenting to the return of the used cartridge to the Bidder for (a) recycling and remanufacturing, or (b) recycling.



# Judicial Council of California

Judicial Branch Contracting Manual

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

### CHAPTER 5

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## **INTRODUCTION**

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

The following are the categories of allowed NCB procurements:

- Purchases under \$5,000;
- Emergency purchases;
- Purchases from governmental entities;
- Legal services;
- Certain Leveraged Procurement Agreements (LPAs);
- Purchases from a business entity operating a Community Rehabilitation Program (CRP);
- Licensing or proficiency testing examinations;
- Subvention and local assistance contracts; and
- Sole source.

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

## **DEFINED TERMS**

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

### **5.1 PURCHASES UNDER \$5,000**

For very small purchases, NCB procurements are permitted because the cost of conducting a competitive procurement may exceed the savings expected from the competitive process.

JBEs may purchase non-IT goods, non-IT services, or IT goods and services that cost less than \$5,000 without conducting a competitive procurement so long as the Buyer determines that the pricing is fair and reasonable.

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

**Note:** JBEs may not split a single transaction into a series of transactions for the purpose of evading competitive solicitation requirements.

**Note:** Although not required to do so, JBEs may competitively solicit Bids for purchases under \$5,000. An RFQ is usually used for such procurements.

## **5.2 EMERGENCY PURCHASES**

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

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

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

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

## **5.3 PURCHASES FROM GOVERNMENTAL ENTITIES**

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

**Note:** The procurements covered by this section are those in which the governmental entity directly sells the non-IT goods, non-IT services, or IT goods or services to the

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

JBE. This situation is distinct from when a governmental entity has signed an LPA with a Vendor and allows the JBE to purchase from that Vendor using the LPA. For more information on LPAs, see section 5.5 below.

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

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

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

#### **5.4 LEGAL SERVICES**

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

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

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

#### **5.5 CERTAIN LPAs**

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

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

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

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

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

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

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

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

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

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

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

## **5.9 SOLE SOURCE**

JBEs may purchase non-IT goods, non-IT services, and IT goods and services of any value without conducting a competitive procurement if (i) the goods, services, or goods

and services are the only non-IT goods, non-IT services, or IT goods and services that meet the JBE's need, or (ii) a grant application submittal deadline does not permit the time needed for a competitive procurement of services.

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

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

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

The sole source request should include the following information:

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

The sole source approver is:

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

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

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

in the Local Contracting Manual, the sole source request may take the form of a memorandum.

### **5.10 SPECIAL CATEGORY NCB CONTRACT REQUEST**

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

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

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

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

### **5.11 AMENDMENTS**

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

#### **A. Amendments Covered**

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

- Amendments to a competitively-solicited contract where the type of change contemplated in the amendment was not evaluated in the selection process;
- Amendments to an LPA purchasing document where the type of change contemplated in the amendment was not evaluated during the LPA review process; and

- Amendments to a small purchase (originally under \$5,000) which increase the value of the purchase to \$5,000 or more, if the original purchase was completed pursuant to section 5.1 above.

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

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

**Example:** The JBE purchases 40 chairs, each costing \$100. The value of the purchase (\$4,000) is below \$5,000, and the purchase was completed as an NCB procurement pursuant to section 5.1 above. The JBE wishes to purchase an additional 20 chairs, each costing \$100, through use of an amendment. Because the new value of the contract (\$6,000) will be over \$5,000, the JBE should submit the amendment to an NCB process.

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

## B. NCB Process for Amendments

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

The NCB amendment request should include the following information:

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

## **5.12 TRIAL COURTS: PUBLIC INPUT REQUIREMENT**

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

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

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

## **5.13 CERTIFICATION AND OTHER REQUIREMENTS IN NCB PROCUREMENTS**

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

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

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

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



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## CONTRACTS

### CHAPTER 8

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## INTRODUCTION

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

## DEFINED TERMS

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

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

## 8.1 BASIC PRINCIPLES

### A. Writing Requirement

All contracts entered into by JBEs must be in writing.

### B. Roles and Responsibilities

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

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

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

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

## 8.2 CATEGORIES OF CONTRACTS

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

### A. Purchase Orders (POs)

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

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

### B. Standard Agreements

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

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

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

### C. Short Form Agreements

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

### D. Intergovernmental Contracts (IGCs)

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

## 8.3 PREPARATION OF CONTRACTS

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

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

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

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

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

## A. Content of Contracts

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

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

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

- Contract elements

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

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

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

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

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

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

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

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

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

## **2. Pricing and payment**

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

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

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

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

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

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

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

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

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

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

The most common types of insurance include:

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

Notes for contracts requiring insurance:

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

- all required current and complete Certificates of Insurance are properly endorsed and on file with the JBE.
- The JBE should require that Certificates of Insurance include a provision that requires at least 15 days' written notice to the JBE in the event that insurance coverage is cancelled or materially changed.
  - The contract should state that insurance will be issued by an insurance company that is acceptable to the JBE.
  - If a Solicitation Document is used, the JBE should ensure that the required types and levels of insurance are specified in the Solicitation Document.

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

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

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

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

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

In some instances a single contract may fit into more than one of these types of contracts. For example, an MOU between a court and a county fits types 5, 6, and 7

(and possibly others, depending on the content of the contract). A JBE should ensure that it has consulted all relevant information in appendix C before finalizing a contract.

## **8.4 APPROVAL OF CONTRACTS**

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

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

### **B. Legal Review**

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

The following are circumstances where legal review should be required.

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

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

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

## **2. Contract template**

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

## **3. Contract Modifications**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **8.5 EXECUTION OF CONTRACTS**

### **A. Authority**

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

### **B. Process**

- Contracts may be either manually signed or digitally signed:
  - If the contract is signed manually, the JBE should create at least two originally signed counterparts of each contract—one for the JBE and one for each contractor. Other than purchase orders, contracts should first be provided to the contractor for signature and then delivered back to the JBE, who will countersign the document and return an original to the contractor. Contracts may be executed in multiple counterparts if the contract so provides. If a manually signed document is delivered to the other party electronically (e.g., by fax or a PDF file attached to an e-mail), receipt should be confirmed and the originally executed counterparts exchanged promptly.
  - If the contract is signed digitally, the JBE must ensure compliance with California Code of Regulations, title 2, sections 22000–22005 (Digital Signatures), promulgated under GC 16.5.
  
- Contracts (other than POs) should be mutually executed and delivered before work under the contract begins. Any work performed under a contract before

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

it is fully executed and delivered is at the contractor's own risk. If a contract is not mutually executed and delivered before work begins, the contractor may not be paid for that work unless the effective date of the contract is no later than the date work begins.

**C. Payee Data Record**

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

## APPENDIX A

### CONTRACTOR CERTIFICATION CLAUSES

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

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

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

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

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

	CCC	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
7.	Compliance with laws	R	R	R	R	
8.	Drug-free workplace		R			
9.	No harassment		R	R		
10.	Nondiscrimination	M	M	M		
11.	Domestic partners, spouses, gender, <a href="#">gender identity</a>	M (see note 3)	M (see note 3)			
12.	National Labor Relations Board	M (see note 4)	M (see note 4)	M (see note 4)		
13.	Expatriate Corporations	M (see note 5)	M (see note 5)	M (see note 5)		
14.	Sweatshop Labor	M (see note 6)	M (see note 6)	M (see note 6)		
15.	Child Support Compliance Act	M (see note 7)	M (see note 7)			
16.	Iran Contracting Act	M (see note 8)	M (see note 8)			

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

Note 2: Mandatory if (i) Vendor is a corporation, limited liability company, or limited partnership, and (ii) the contract will be performed in California.

Note 3: Applies only to contracts for \$100,000 or more. This CCC may be omitted if, after the JBE has taken all reasonable measures to find a contractor that complies with this CCC, the JBE determines that: (i) there is only one prospective contractor willing to enter into a specific contract with the JBE; (ii) the contract is necessary to respond to an emergency, as determined by the JBE, that endangers the public health, welfare, or safety, or the contract is necessary for the provision of essential services, and no entity that complies with the requirements of this CCC capable of responding to the emergency is immediately available; or (iii) the requirements of this CCC violate, or are inconsistent with, the terms or conditions of a grant, subvention, or agreement, provided that a good

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faith attempt has been made by the JBE to change the terms or conditions of any grant, subvention, or agreement to authorize application of this CCC.

- Note 4: Not applicable to purchases of goods by credit card for an amount less than \$2,500 from any one Vendor, not to exceed in the aggregate \$7,500 per year from the Vendor.
- Note 5: Not applicable to purchases of goods by credit card for an amount of \$2,500 or less from any one Vendor, not to exceed in the aggregate \$7,500 per year from the Vendor. In addition, the Approving Authority, or his or her designee, may waive this requirement upon a written finding that the contract is necessary to meet a compelling public interest. "Compelling public interest" includes, but is not limited to, ensuring the provision of essential services, ensuring the public health and safety, or an emergency as defined in PCC 1102.
- Note 6: Mandatory only if the contract provides (i) for furnishing equipment, materials, or supplies (except related to the provision of public works), or (ii) for the laundering of apparel, garments, or corresponding accessories. Not applicable to purchases by credit card for an amount less than \$2,500 from any one Vendor, not to exceed in the aggregate \$7,500 per year from the Vendor.
- Note 7: Mandatory only if the contract is in excess of \$100,000.
- Note 8: Mandatory only if (i) the JBE is entering into a contract for \$1,000,000 or more and the JBE did not receive an Iran Contracting Act certification as part of the solicitation process, or (ii) the JBE is renewing a contract for \$1,000,000 or more. For additional information, including a sample certification form, see chapter 4, section 4.4.C.2 of this Manual.

## APPENDIX B

### MANDATORY AND RECOMMENDED CONTRACT PROVISIONS

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

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

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

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

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

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

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

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

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

## APPENDIX C

### ADDITIONAL INFORMATION FOR CERTAIN TYPES OF CONTRACTS

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

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

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

#### 1. CONSULTING SERVICES CONTRACTS

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

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

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

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

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

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

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

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

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

## **3. EQUIPMENT PURCHASE CONTRACTS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 6. IGCs WITH CALIFORNIA GOVERNMENTAL ENTITIES

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

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

## 7. IGCs WITH LOCAL GOVERNMENTAL ENTITIES

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

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

## 8. INFORMATION TECHNOLOGY CONTRACTS

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

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

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

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

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

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

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

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

## **10. LEGAL SERVICES CONTRACTS**

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

The contractor shall:

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

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

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

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

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

## **11. PRINTING CONTRACTS**

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

## **12. EQUIPMENT RENTAL CONTRACTS**

A JBE should not agree to:

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

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

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

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

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