STATE ADMINISTRATIVE MANUAL

MANAGEMENT MEMO

	NUMBER: **MM 07-04**
SUBJECT: GUIDELINES REGARDING FOLLOW-ON CONTRACTS: POLICY AND REVIEW PROCESS	DATE ISSUED: March 2, 2007
	EXPIRES: Until Rescinded
REFERENCES: PUBLIC CONTRACT CODE §10365.5, PUBLIC CONTRACT CODE §10430 SUPERSEDES STATE ADMINISTRATIVE MANUAL (SAM) SECTION 5202 AND SUPERSEDES MM 03-19	ISSUING AGENCY: DEPARTMENT OF GENERAL SERVICES

PURPOSE

This Management Memo has been updated/revised to clarify the policies previously stated in the Management Memo. There has been no change in the statutory requirements previously described. The purpose of this Management Memo is to inform departments of the State law regarding "*follow-on* contracting" to establish policy and guidance for evaluating whether particular contracting engagements might conflict with Public Contract Code section 10365.5.

BACKGROUND

Senate Bill (SB) 1467 was chaptered into law enacted September 2002, and became operative July 1, 2003. SB 1467 amended Public Contract Code section 10430 to extend the prohibitions already contained in Public Contract Code section 10365.5 to Information Technology (IT) contracts.

Public Contract Code section 10365.5 generally prohibits a consultant from bidding on or being awarded a *follow-on* contract based on the product of a previous contract by that consultant. Although this prohibition has been in effect since 1990, only as of July 1, 2003 does this prohibition apply to IT contracts as well, even if the earlier advice or recommendations were provided under an IT contract executed prior to that date. Public Contract Code section 10365.5 does not distinguish between intentional, negligent and/or inadvertent violations. A violation could result in disqualification from bidding, a void contract and/or the imposition of criminal penalties (Pub. Contract Code sec. 10420).

Additionally, SB 1467 extended the prohibitions of Public Contract Code sections 10410 and 10411 to IT contracts. These latter sections contain various prohibitions against State employees and former State employees contracting with the State. This Management Memo does not address those sections, or other conflict of interest statutes, but agencies must be aware of the prohibitions contained in those provisions.

Continued on next page

APPLICABLE LAW

Public Contract Code section 10365.5 provides in part as follows:

"(a) No person, firm, or subsidiary thereof who has been awarded a consulting services contract may submit a bid for, nor be awarded a contract for, the provision of services, procurement of goods or supplies, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract."

Note, however, that Public Contract Code section 10430, subdivision (b)(2), which applies only to IT contracts, excludes from the follow-on requirements, incidental advice, or suggestions made outside the scope of a consulting services contract.

EXCLUSIONS

A subcontract awarded as part of a consulting services contract that is less than 10% of the total monetary value of the services contract is exempt from the prohibitions of 10365.5. (Pub. Contract Code sec. 10365.5, subd. (b).) For example, if a consultant is awarded a $100,000 contract to conduct a study, and the consultant hires a subcontractor to perform a portion of the consulting services, that subcontractor is not subject to the prohibitions of Public Contract Code section 10365.5 unless they are to be paid in excess of $10,000. Thus, even if the subcontractor was the consultant who originally recommended the study as a product of a previous consulting services contract, they can still perform these subcontracted services as long as they are not paid more than $10,000.

Contracts awarded for Architectural and Engineering services pursuant to Government Code section 4525 are not subject to the prohibitions of Public Contract Code section 10365.5. (Pub. Contract Code sec. 10365.5(c).)

Consultants/employees of a firm, which provides consulting advice under an *original* consulting services contract are not prohibited from providing services as <u>employees</u> of another firm on a *follow-on* contract, unless they are named contracting parties or named parties in a subcontract under the original contract (and are being paid in excess of 10% of the value of the contract). Public Contract Code section 10365.5 applies only to persons, firms, or subsidiaries who have been awarded an *original* consulting services contract. For example, if Jane Doe, an employee of ABC Consulting, worked on a consulting contract that recommended additional studies be completed on a project, Jane could also work for BCD Consulting, on the study itself, provided Jane was an actual employee of BCD Consulting and not a named party to the contract. Jane could also work as a subcontractor to BCD Consulting, provided she was not being paid more than 10% of the monetary value of the contract.

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EXCLUSIONS (Continued)

However, consultant-employees should be aware of other conflict of interest statutes, which may, in certain circumstance apply, e.g. Government Code section 87000, et seq.; Public Contract Code sections 10410 and 10411.

ANALYSIS

In completing an analysis of these issues, two contracts must be considered; (1) the original consulting services agreement and its recommendations and (2) the second contract issued to perform the services recommended in the original consulting services agreement. To adequately perform such an analysis, both contracts, including their scope of work should be reviewed carefully.

Factors to be considered include:

I. Initial Contract

Is the initial contract a consultant services contract? If it is not, the prohibitions of Public Contract Code section 10365.5 do not apply.

A consultant services contract is a formal agreement which delivers services which have all of the following characteristics:

(1) Are of an advisory nature.
(2) Provide a recommended course of action or personal expertise.
(3) Have an end product that is basically a transmittal of information, either written or verbal and that is related to the governmental functions of State agency administration and management and program management or innovation.
(4) Are obtained by awarding a contract, a grant, or any other payment of funds for services of the above type.

The product may include anything from answers to specific questions to design of a system or plan, and includes workshops, seminars, retreats, and conferences for which paid expertise is retained by contract. (Pub. Contract Code sec. 10335.5, subd. (a)).

Examples of consulting services contracts include studies, reports, surveys, legal services contracts, expert witness contracts, workshops, seminars, and conferences, as well as the design of systems or plans. Consulting services do not include contracts between State agencies, local agencies, the federal government, and architectural and engineering contracts.

In the life cycle of a typical information technology project, contracts are let for the following activities: Feasibility Study Report, Acquisition Specialist, Design Development and Implementation, Project Management,

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ANALYSIS
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Independent Validation and Verification, Independent Project Oversight Consultant, and Maintenance and Operations. Of these, Design Development and Implementation, Project Management, Independent Validation and Verification, Independent Project Oversight Consultant, and Maintenance and Operations are not considered consulting services contracts because their primary purpose is not the delivery of services having the characteristics outlined in Public Contract Code section 10335.5, subdivision (a).

An Acquisition Specialist contract is one, which cannot typically be determined to be a consulting services contract without an analysis of the specific details of the contract.

A Feasibility Study Report contract is generally considered a consulting services contract. On the other hand, Strategic Planning contracts and business process reengineering/improvement contracts while not included in the lifecycle of a typical information technology project would be characterized as consulting services contracts.

While the foregoing examples are typically characterized as noted, characterization based on contract type will not preclude a factual demonstration that a different characterization is appropriate. The ultimate analysis of contracts for purposes of the *follow-on* statute must be made on a case-by-case basis. The essential issue is what the contract delivers, not how it is labeled.

Evaluation of Work and Deliverables

Even though the contract may be categorized as something other than “consulting” services, as stated above, a case-by-case analysis is usually necessary. Following are some guidelines to use in completing this analysis.

First, are consulting services present? Does the contract call for services that are advisory in nature, providing a recommended course of action or personal expertise and having an end product that transmits information or analysis related to the governmental functions of a State agency? An analysis of the scope of work with these criteria in mind should suggest an answer.

Second, are there deliverables described in the scope of work that are advisory in their nature? If so, then further analysis is required. If there is no “end product” or deliverable which embodies the characteristics of a consultant services contract, a follow-on situation will not exist.

Continued on next page

ANALYSIS
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Multipurpose Contract

The above inquiry does not deal with the situation in which the initial contract is not "primarily" a consultant services contract, but nevertheless includes, in the contract's deliverables, work that is "consulting services" in nature. Neither the statute nor the legislative history provides explicit guidance for this circumstance. The statute is silent with regard to contracts, which do not provide consulting services as their primary deliverable, but include them as part of the contract. No definitions are provided.

In the absence of specific statutory guidance, an analysis should be conducted to determine the primary or predominant purpose of the initial contract. Again, Public Contract Code section 10335.5 provides some guidance. Is the primary or predominant purpose of the contract "advisory in nature;" does it "recommend a course of action or personal expertise?" Is the end product of the contract "basically a transmittal of information . . . related to the governmental functions of a State agency?" If the primary or predominant purpose of the initial contract is not that of a consultant services contract, a *follow-on* situation will not exist.

For example, in a large system integration contract, the contractor's principal work is to design a new data processing system. This contract would not reasonably be considered a consulting services contract even if, in the course of contract performance, the vendor makes recommendations regarding the new system, which it is implementing.

Although not based explicitly in statutory language, this approach can be viewed as a reasonable attempt to harmonize the Legislature's clear purpose to effectuate the State's best interest in IT contracting, while guarding against the potential dangers inherent in the *follow-on* contracting situation. Please be advised, however, that this is an administrative interpretation, which has not been tested in the courts. Both contracting agencies and vendors are urged to exercise caution in this area

II. Subsequent Contract

If the initial contract is determined to be a consulting services contract, the analysis must turn to the causal link, if any, between the initial contract and the subsequent contract. The purpose of the causal inquiry is to determine whether there is a sufficient connection between the end product(s) [deliverables, recommendations] of the first contract and the deliverable(s) to be procured by the subsequent contract to fall within the prohibitions of Public Contract Code section 10365.5.

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ANALYSIS
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Does the new contract or the solicitation for the new contract call for goods, services, or supplies that were "required, suggested, or otherwise deemed appropriate" in the end product [deliverables, recommendations] of the initial consulting services contract?

If the solicitation for the new contract or the new contract itself does not reflect the advice or recommendations of the initial contract, the prohibitions of Public Contract Code section 10365.5 are not applicable. However, if the causal relationship does exist, the initial contractor is prohibited from participating in the subsequent contract as (1) a prime contractor or (2) a subcontractor to the prime contractor or (3) a subcontractor to any subcontractor to the prime contractor.

In order to assist departments and vendors in determining whether there may be potential *follow-on* issues, the Department of General Services (DGS) recommends that in all procurements, bidders should be required to disclose the following information:

Whether they, or any subcontractor they intend to use, are currently providing consulting services to the State under a State contract (or as a subcontractor providing more than ten (10) percent of the dollar value of a consulting services contract with the State) or have provided such services within five (5) years prior to the release of the solicitation document (RFI, RFP) which are related in any manner to the goods, services, or supplies to be acquired pursuant to the solicitation document.

Note:

The fact that services were provided more than five (5) years prior to the release of the solicitation document does not create a blanket exception.

The *follow-on* analysis outlined above must still be performed.

PRACTICAL RECOMMEN-DATIONS

Since the determination of *follow-on* issues is dependent on the services rendered pursuant to the scope of the initial contract, care must be exercised in the drafting of the scope of services anticipated by these engagements. The awarding department and potential bidders should give serious consideration at the time that an initial contract is being developed to whether there may be potential future contracting opportunities that could fall within *follow-on* prohibitions. Solicitations for all consulting services contracts should advise of the application of Public Contract Code section 10365.5.

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PRACTICAL RECOMMEN-DATIONS
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Before determining to either reject a potential bidder or withhold an award of a contract, a department or agency should analyze the issues considering the information provided in this Management Memo and applicable statutes, and in particular, Public contract Code section 10365.5. Consultation with departmental counsel is strongly recommended.

For questions regarding this Management Memo, please contact the DGS Procurement Division, Scott Norton at (916) 375-4503.

SIGNATURE

Original signed by Will Bush, Interim Director

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Will Bush, Interim Director
Department of General Services