

Overview of Changes to Procedures for Administration and Use of Public Contract Code 6611

Summary This document summarizes changes to procedures for administration and use of Public Contract Code (PCC) 6611 related to negotiation with suppliers of goods, services, technology, and telecommunications.

Background Public Contract Code (PCC) Section 6611 sections (a) and (b) set forth the conditions under which the DGS may use negotiations for new and existing contracts and/or procurements. Historically, DGS used the authority to remedy failed procurements or to negotiate savings with existing suppliers during periods of state financial crisis.

In July, 2009, the DGS initiated a plan to make greater use of negotiations under PCC 6611 by developing the state's first ever procurement model to conduct an entire procurement under the authority. This "multi-stage procurement" model was successfully used in major procurements including MyCalPays and Fi\$Cal.

With the success of these initiatives, state agencies, suppliers, and the legislature communicated a desire for even greater use of the 6611 authority. In 2012, the TechAmerica trade group met with DGS and requested increased use of negotiations in IT procurements. Later that year, TechAmerica also published a white paper calling for greater use of the authority and recommending DGS further delineate 6611 related policies and procedures.

As a result, DGS has proposed new procedures for the administration and use of the 6611 authority.

Changes Change in Administration
Historically, procedures related to this authority were established through a Department of General Services (DGS) Administrative Order. Going forward, procedures and guidelines related to the 6611 authority will be established in the State Contracting Manual (SCM) which will provide greater visibility and transparency to these procedures. The first installment will be included in SCM Volume 3 related to Information Technology which will be followed by SCM Volume 2 for non-IT goods and finally SCM Volume 1 for non-IT services.

Change in the Request Process

Requests to use the authority will now be submitted to either the Deputy Director, Office of Legal Services (OLS) for non-IT services, or to the Deputy Director, Procurement Division (PD) for non-IT Goods and IT.

**Changes
(continued)**

Change in Procedures

1. Updated guidance for buyers: The new guidelines include several helpful

- features that will aid state buyers in their efforts to negotiate successfully with suppliers. Chief among them are,
- a. Concrete examples of how to determine when negotiations are justified
 - b. New planning template to set forth the scope, schedule, and procedures for negotiations
 - c. Recommendations for establishing a negotiating team including roles and responsibilities for key participants
 - d. Procedures governing the negotiations process
2. DGS is formally acknowledging negotiations may be used
 - a. At the beginning of a procurement and for the entire duration of the procurement;
 - b. During a procurement when at least one responsive bid has been received; and
 - c. During a procurement where no responsive bids have been received.
 3. Negotiations require the cooperation of three key stakeholders: DGS, CTA, and the buying agency. The new guidelines recognize this dynamic and assign co-approver roles to all three.
 4. The state may determine “best-value” using methods other than those outlined in the original bid. The new guidelines allow negotiators to determine best-value using the procedures that are most appropriate in their judgment. The decision process must be documented and not be arbitrary or capricious.

What Hasn't Changed

DGS Authority: DGS establishes procedures and guidelines for use of 6611 (see PCC 6611(c)). Other than use by the California Technology Agency (CTA) as noted below, all negotiations are subject to DGS approval and must be conducted under the auspices of DGS.

Bases for Negotiating: Use of the authority must satisfy one of the four bases for negotiation in PCC 6611(a).

Planning: Prior to entering into negotiations, the state must develop a plan specific to that negotiation.

Applicability to Industry Feedback

The new procedures are responsive to feedback received from bidders through “lessons learned” debriefings after procurements as well as publications by industry trade groups as follows:

General recommendation 1: Update policies and procedures for negotiations

The updated Topic 5 of SCM Volume 3 provides a major update that accomplishes the following:

- Describes the process for making and documenting decisions to use 6611. Requestors must submit a written request specifying how their procurement meets one or more of the four bases for negotiations. The procedure further explains how the request will be reviewed and approved by DGS.

- Provides consistency of policy between DGS and CTA. Topic 5 articulates the roles both DGS and CTA will play in negotiations.
- Assigns operational responsibility for negotiations to DGS or CTA as applicable. While either DGS or CTA (depending on which of them authorizes a 6611 process) will be responsible for the overall operation of a procurement, DGS, CTA and the purchasing department all have a vital role in the procurement and share responsibility for negotiations—each taking a lead negotiating role on the issues about which they are most expert.

General recommendation 2: Use the 6611 authority more frequently in order to realize cost savings and drive innovative solutions

Adoption of the new procedures and guidelines is intended to produce this outcome. To further encourage its use, however, DGS will recommend to customer agencies that all procurements valued at \$20 million or over will use a negotiation process. Additionally, DGS will use the negotiation process on all statewide contracts valued at \$20 million or more.

General recommendation 3: Take care not to limit the scope of what can be negotiated

The new procedures allow agencies to negotiate most of the terms of the contract including price, schedule, requirements, or other terms. They also allow negotiators to alter assumptions and positions, engage in give and take, and discuss aspects of the Bidder's proposal that could be altered or explained to enhance the proposal's potential for award.

General recommendation 4: Obtain supplier feedback and input on the proposed procedures and guidelines

DGS' is obtaining supplier involvement by soliciting input on the proposed procedures over a specified number of weeks.

General recommendation 5: Collect and report information on use of 6611 to assure transparency and accountability

SB1006 amended PCC 6611 to add a new section (f) requiring annual reporting by DGS and CTA on CTA's use of 6611 authority. DGS is considering additional measures to expand that report to include information about all requests for negotiations.

Risks and Mitigation

Approval by Deputy Directors

With increased flexibility comes the risk of loss of oversight. This risk will be mitigated by designating that Deputy Director or higher-level authority is required for approval. Additionally, all requests will be processed by staff who will make an initial determination to be ratified (or not) by the Deputy Director. All decisions will be documented to file and available for public review making the process transparent.

Negotiating When No Responsive Bids are Received

The Department has traditionally taken the position that at least one responsive bid must have been received in order to negotiate. Negotiating

when no responsive bids are received can significantly reduce the costs to bid, shorten award timelines, and reduce bureaucracy. The new procedures establish fair and equitable requirements for using the authority in this circumstance as follows,

1. The bid document must clearly notify all bidders of the possibility of negotiations with non-responsive bidders.
2. The bid must also clearly set forth a fair and equitable process for determining which bidders will be chosen to negotiate.
3. Establishing the possibility of negotiating with non-responsive bidders in advance creates a “rule-of-the-bid” which enjoys significant deference in legal challenges.
4. Negotiations cannot commence unless one of the four bases in 6611(a) is satisfied.
5. Negotiations with non-responsive bidders may not occur if any responsive bids exist.
6. Competition will ensure that bidders take care not to risk being found non-responsive as doing so will preclude them from an award if another bidder is responsive.

Awards Based on Factors Other than the Original Bid

Traditionally, the award process required that after finalizing negotiations, bidders would submit their final offer to be evaluated against the original bid criteria. While this approach is still available to buyers, the practice has proven cumbersome and expensive for bidders and time consuming for evaluation teams. It can also prevent negotiators from crafting the most favorable agreement possible by inhibiting real-time negotiations in parallel with multiple bidders.

Allowing negotiators to make the final award using an assessment method that differs from that initially intended in the bid presents potential risks including the risk that immaterial, subjective, or even conflicted criteria may form the basis for award. The state can mitigate such risks by ensuring that all award decisions are,

1. The result of evaluation by a team of stakeholders and not by a single individual.
2. Based on objective criteria that directly relate to the business problem at hand.
3. Documented in the file and made available for public review.

Impact of Current Efforts to Negotiate Terms and Conditions

DGS has announced its intention to conduct negotiations in keeping with its obligations under PCC 12101.2 to negotiate the repetitively used terms and conditions of the state’s model contract with interested bidders. There is a precedent for this activity as the state conducted similar negotiations in 2004 and 2007.

DGS initiated the current process by soliciting input from state buyers across all interested agencies. Next, DGS will meet with all interested bidders in a series of meetings beginning August 29, 2012 where attendees will have an

opportunity to describe their requested changes to the state's model terms. Over the next two to three months, DGS and the suppliers will propose alternative language, engage in give and take, consult with their various stakeholders, and finally draft a proposed new set of contract terms. The draft will be circulated and ultimately adopted by DGS.

This round of negotiations is not regulated by the 6611 authority and emanates from the specific requirements of PCC 12101.2. However, the success with which DGS is able to craft new model terms and conditions during these negotiations, will have a direct and beneficial impact on the frequency and intensity of future PCC 6611 negotiations with suppliers. It has been DGS' experience that some of the most frequent requests for use of the 6611 authority have been due to the need to negotiate the model terms for specific procurements.

Implementation

The process for adopting the proposed procedures and guidelines for PCC 6611 will be as follows:

1. Finalize and publish new procedures and guidelines
 - 3 weeks: Sharing with industry, state agencies, and interested 3rd parties
 - 2 weeks: Adopt feedback, produce final draft
 - 1 week: Final review w/CTA
 - Publish by late-October, 2012
2. Develop and publish all required templates: 3 weeks (simultaneous with step 1)
3. Update CalPCA training materials: 5 weeks
4. Jointly issue initial report, January 31, 2013 w/CTA