

4. DGS CONTRACT APPROVAL

4.00 • INTRODUCTION

(Rev 11/12)

This chapter presents the policies and procedures related to obtaining contract approval from DGS/OLS. Exemptions from such approval are also covered.

4.01 • TABLE OF CONTENTS

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4.02 • RESPONSIBILITY FOR CONTRACT APPROVAL

(Rev 11/12)

- A. Each State agency is responsible for making sure that its contracts comply with applicable legal requirements and are based on sound business practices. DGS/OLS provides the final approval if required by law.
- B. In some instances additional approvals may be needed, such as those from the Attorney General, State Personnel Board, State Fire Marshal, DGS/ORIM, DGS/OSP, or other DGS offices. (See SCM I, section 4.11.)
- C. Contract approval by DGS serves to assist State agencies by:
 - 1. Ensuring effective compliance with applicable laws and policies.
 - 2. Conserving the fiscal interests of the State and preventing improvident acts.
 - 3. Applying contract knowledge and legal expertise prior to final approval.

D. Remedies and Penalties:

1. PCC § 10420 - Every contract or other transaction entered into in violation of Chapter 2 of the PCC is void, unless the violation is technical or nonsubstantive.
2. PCC § 10421 - Civil action may be brought in Superior Court to determine a violation of Chapter 2 of the PCC. If a violation is found the contract shall be void.
3. PCC §§ 10422 - 23 - Any State employee or person contracting with the State who corruptly performs an official act or corruptly permits the violation of any contract made under Chapter 2 of the PCC is guilty of a felony.
4. PCC §10424 - provides that a violation of PCC §§ 10422 or 10423 may make the employee or the person contracting with the State liable to the State for double the amount the State may have lost.
5. PCC § 10425 - Willful violation of any other provision of Chapter 2 of the Public Contract Code shall constitute a misdemeanor.

4.03 • CONTRACTS REQUIRING DGS/OLS APPROVAL
(Rev 11/12)

DGS/OLS has statutory authority under several sources to approve contracts. PCC §§ 10295, 10297, 10335 and GC § 11256 are the primary legal authority for DGS/OLS' review and approval of contracts. GC § 14615 is the legal authority for the supervision of the State's financial and business policies, and GC § 14616 is the legal authority for some exemptions from DGS/OLS approval of contracts.

As a general rule, DGS/OLS approval is required on all services contracts over \$50,000; over \$75,000 if an agency has applied for and received this higher exemption level (see SCM 1, section 4.05). The approval requirement applies to all non-IT services contracts, including but not limited to consulting services and interagency agreements, subject to express exemptions identified in section 4.04 below.

Individual agencies may have specific statutes affecting their particular contracting programs. Some specific types of contracts which require DGS/OLS review/approval, *regardless of dollar amount*, include but are not limited to the following:

1. Contracts that limit the contractor's liabilities or require the State to indemnify or to hold the contractor harmless;
2. Contracts that require the State to assume liabilities beyond the State's control;
3. Contracts that provide for advance payment for services or rental;
4. Any provision creating a contingent liability against the State (e.g., those vendors' printed rental contracts obligating the user of rented equipment to serious contingent liabilities);
5. Any hazardous activity such as found under SCM 1, section 3.12; and
6. Contracts that seek to modify the State's standard terms and conditions (GTCs, CCCs, GIAs).

4.04 • CONTRACTS NOT REQUIRING DGS/OLS APPROVAL

(Rev 11/12)

- A. The law requires all non-IT services contracts to be approved by DGS/OLS unless the contract is exempt from approval. (PCC § 10295.) See section 4.03 above.

A services contract is exempt from DGS/OLS approval if:

1. It is specifically exempt from approval by statute (See, e.g., PCC §§ 10295(c) and 10430); or
2. It is \$50,000 or less (subject to exceptions noted in section 4.03 above). (GC §§ 11256, 14616); or
3. It has been exempted from approval by an exemption letter issued by DGS/OLS (PCC §10351); or
4. It is a federally or State-funded grant exempted based on opinion of the Attorney General. Note: This exemption applies when the State is *issuing* a grant, it does not exempt all agreements merely because they are paid for with federal and/or other grant funds.
5. It is an interagency agreement over \$50,000 and less than \$1,000,000 that uses the current GIAs (including SAM 8752 and 8752.1 cost provisions) without modification and that has no direct or indirect subcontracting (GC § 11256), subject also to the following:
 - a. This interagency agreement exemption does not apply when contracting with CSU, UC, or any other state agency exempt from Division 2, Part 2, Chapter 2 of the Public Contract Code (PCC 10290 et seq.);
 - b. Agencies shall not use I/As to circumvent any State law or contracting requirements;
 - c. Agencies shall not use I/As to obtain any third-party IT goods or services nor any third-party non-IT goods or services;
 - d. DGS reserves the right to audit exempt contracts at the contracting agency's expense;
 - e. If DGS determines an agency is failing to abide by the conditions of this exemption, DGS reserves the right to revoke the exemption such that that agency would then be required to submit to DGS for approval all I/As of \$5,000 or more (or such other amount as DGS establishes when revoking or reducing this exemption);
 - f. DGS is establishing this I/A exemption on a pilot basis, and DGS will evaluate outcomes to determine whether to modify, continue, or discontinue the exemption;

Although these exempt contracts do not require DGS/OLS approval, review/approval services are available on request for any contract, regardless of value.

- B. If an exempt contract is amended, the amendment may trigger the DGS/OLS approval requirement for the same reasons noted in 4.03 and 4.04 above (e.g. increase in dollar amount, modifying GIAs, adding subcontracts, etc.).
- C. DGS reserves the right to audit agencies regarding the above-referenced exemptions.

4.05 • EXEMPTION LETTERS

(Rev and renumbered 11/12)

DGS may exempt contracts up to \$75,000 from review if certain conditions are met. Such exemptions are provided through exemption letters.

Table 4.1

Factors	Authority	General Considerations
All Services, Consultant Services, and Interagency Agreements	PCC § 10351 (Services and Consultant Services) GC § 11256 (Interagency Agreements)	<ul style="list-style-type: none">• Under \$75,000• Agency officer responsible and directly accountable for contracting program• Written policies and procedures• Management system• Contract training program• Audit every two (2) years• Reporting procedures

Application for an exemption letter or renewal should be made by written request to the Director of DGS.

4.06 • CERTAIN STATE AND FEDERALLY FUNDED GRANTS EXEMPT FROM APPROVAL BY DGS/OLS

(Rev and renumbered 11/12)

The Attorney General (AG) has opined that certain federally and State-funded grants are not subject to approval by DGS/OLS. The AG opinions are based primarily on the nature of a grant compared with a services contract as described in the law. (See 58 Ops.Cal.Atty.Gen 586 (1974) and 63 Ops.Cal.Atty.Gen. 290 (1980).)

The AG opinions present the following factors as relevant to whether a contract qualifies as an exempt grant:

- A. The grant must fall under specific statutory authority. Without specific statutory authority, a grant is an illegal gift of public funds.
- B. The grant must not benefit the State. Even if the award was made pursuant to an authorized grant program, it is not exempt from approval (unless exempted by specific statute). Common benefits which would indicate a contract rather than a grant include:
 1. Services are provided to the State.
 2. The State obtains title to equipment, copyrights, or patents.
 3. The State is relieved from a statutory obligation to perform the services (usually services to the public).
- C. Performance under the grant must not be controlled by the State. The grant must fund the grantee's program, not the State's program.

Agencies shall not circumvent State contracting requirements by labeling contracts as "grants." In addition, an agreement is not a grant simply because it is paid for with federal and/or grant funds, rather, the above additional factors must be considered for proper characterization of the agreement.

4.07 • APPROVAL OF EMERGENCY CONTRACTS

(Rev and renumbered 11/12)

“Emergency” is defined in PCC § 1102 as “a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services.”

The law recognizes exceptions from competitive bidding in emergencies (PCC §§ 10340 (b)(1) and 10371 (d)), but no exception is provided from contract approval. The basic policy is to respond to the emergency as circumstances demand and then to obtain the formal approval(s) as soon as practicable. However, before the start of the work, the contract must be verbally authorized by someone with authority at the agency to initiate a contract in such situations. If there is any question about whether the circumstances qualify as an emergency, DGS/OLS should be contacted as soon as possible. The contract will be processed on an expedited basis as discussed in SCM 1, section 4.08 C.

4.08 • OBTAINING APPROVAL FROM DGS/OLS

(Rev 11/12)

Below are general guidelines regarding what documents to include when submitting a contract to DGS/OLS for approval.

A. Required Supporting Documents

1. The Contract

Under the State’s standardized contract format, the contract contains:

- a. STD 213: Contract page 1, which should identify the following attachments and number of pages:
- b. Exhibit A: Scope of Work
- c. Exhibit B: Budget Provisions
 - 1) Include sufficient budget detail to describe expenditures and justify the costs of the contract;
 - 2) Include budget contingency language. Sample language:

Budget Contingency Clause

It is mutually agreed that if the Budget Act of the current year and/or any subsequent years covered under this Agreement does not appropriate sufficient funds for the program, this Agreement shall be of no further force and effect. In this event, the State shall have no liability to pay any funds whatsoever to Contractor or to furnish any other considerations under this Agreement and Contractor shall not be obligated to perform any provisions of this Agreement.

If funding for any fiscal year is reduced or deleted by the Budget Act for purposes of this program, the State shall have the option to either cancel this Agreement with no liability occurring to the State, or offer an agreement amendment to Contractor to reflect the reduced amount.

- d. Exhibit C: General Terms and Conditions.
 - 1) Reference the current version of the State’s standard terms and conditions (e.g., “GTC 610” or subsequent version; use the GIAs for I/As.)

- 2) The GTCs should be incorporated in the contract by reference to the DGS/OLS website location.
 - 3) Some GTCs are mandated by statute and some are policy based.
 - 4) The GTCs incorporate by reference certain mandated contractor certification clauses (“CCC’s”). A copy of the current CCC’s must be separately executed by the contractor and retained in the contract file.
- e. Exhibit D [optional]: Typically a department’s own special terms and conditions.
 - f. Other Exhibits/Attachments (optional, as needed).
2. Contract Transmittal form, STD 215. This form must be fully completed and must contain an explanation sufficient to afford a basis for approval, including:
 - a. The purpose and necessity or desirability of the contract or interagency agreement;
 - b. The reasonableness of the price or cost of the services; and
 - c. Any other relevant information necessary to understand the proposed transaction.
 - d. The form STD 215 shall also contain the name, telephone number, and email address of the contact person in case questions arise or additional information is needed by DGS/OLS reviewing attorney. The contact person is the staff member who regularly deals with DGS/OLS on contract matters. A copy of the STD 215 will be retained on file at DGS/OLS.
 - e. Within ten working days of an award, an agency must report the award of each contract over \$5,000 to the Department of Fair Employment and Housing (DFEH), including contracts with the University of California. Information required is specified in 2 CCR § 8117.5. (This requirement does not apply to contracts with other California State agencies or with the Federal government.) Use STD 16 for reporting purposes. Check the box on the reverse side of the STD 215 that this requirement has been complied with.
 3. Payee Data Record form STD 204. This form must be completed by the vendor (except for State and other governmental entities). The form should accompany the contract to final approval or a note should be made of it on the STD 215. The STD 204 must be retained in the agency’s accounting or business affairs office.
 4. Bidding documents (i.e. IFB/RFP). If the contract was awarded by competitive bid, all bids or proposals received, together with the documents comprising the IFB or RFP and related correspondence, must accompany the contract to final approval. If fewer than three (3) bids or proposals were received, document the awarding agency’s efforts to obtain at least three (3) competitive bids. (See SCM I, section 5.70.B)
 5. The California State Contracts Register (“CSCR”) ad. The ad as well as all other ads used to advertise the contract must accompany the contract to final approval. A printout of the electronic version of the CSCR ad or a copy of the confirmation printout is sufficient substantiation of that ad.
 6. A Statement of Compliance form, STD 19. This form must accompany bids or proposals submitted by contractors for nonexempt State contracts of \$5,000 or

more. (See 2 CCR § 8113.) State agencies may attach a copy of the STD 19 to their solicitations for bids or proposals. The STD 19 must be fully executed by the bidder and returned to the agency with the bid before the bid deadline.

- a. Agencies may include the following provision in bid forms in lieu of using STD 19:

Statement of Compliance

The prospective contractor's signature affixed hereon and dated shall constitute a certification, under the penalty of perjury under the laws of the State of California, that the bidder has, unless exempted, complied with the nondiscrimination program requirements of GC §12990 (a - f); and of Title 2, CCR § 8103.

- b. Agencies may include the following provision in the contract in lieu of using STD 19 in non-bid contracts:

Statement of Compliance

The contractor's signature affixed hereon shall constitute a certification, under the penalty of perjury under the laws of the State of California, that the contractor has, unless exempted, complied with the nondiscrimination program requirements of GC §12990 (a-f); and of Title 2, CCR § 8103.

Note: An offer by a contractor to enter into a contract on a noncompetitive basis, when permitted, cannot be accepted unless such contractor furnishes a Statement of Compliance as a part of its final offer.

- c. The Statement of Compliance is included in the document, "Contractor Certification Clauses" (CCC), found on the DGS/OLS website.
7. Drug-Free Workplace Certification. State contractors and grantees must certify that they will provide a drug-free workplace by signing a Drug-Free Workplace Certification STD 21. The Drug Free Workplace Certification is included in the document, Contractor Certification Clauses (CCC), found on the DGS/OLS website.
 8. The Expatriate Corporation, Domestic Partnerships and Sweatfree Code of Conduct Certifications. These certifications are included in the Contractor Certification Clauses (CCC), and found on the DGS/OLS website.
 9. DVBE documentation. When participation goals are required in the bidding documents, as discussed in SCM 1, chapter 8, documentation supporting the commitment to meet the goals must accompany the contract.
 10. Documentation of other required approvals. (See, e.g. SCM 1, section 4.11.)
 11. Mission Critical Certification. Following Executive Orders S-01-08 and S-09-09, effective February 11, 2010, and until further notice, agencies and departments are required to provide a written document identifying the contract and signed by an Agency Secretary or Department Director, or their designees as follows:
"I certify that this purchase is vital and mission critical for this agency or department." Name, Title, Date. (See DGS Broadcast Bulletin dated February 18, 2010.)
 12. Any documents that would assist DGS/OLS in approving the agreement.

B. Number of Copies

1. Under the standardized contracting process, when approval by DGS/OLS is required, the following information should be submitted according to the chart below:

STD 215	For all agreements and amendments: Send two copies.
STD 213, exhibits and backup	Four (4) of the STD 213 face sheets as indicated below: One STD 213 with original signatures, attached to a complete copy of the agreement, plus all relevant back up. One STD 213 with original signatures, no attachments. Two copies of the STD 213 , no attachments.
STD 213A, exhibits and backup	Four (4) of the STD 213A face sheets as indicated below: One STD 213A with original signatures, attached to a complete copy of the amendment, plus all relevant backup. One STD 213A with original signatures, no attachments Two copies of the STD 213A, no attachments. One reference copy of the original Agreement and STD 215 transmittal, along with copies of all prior amendments and STD 215 transmittals, regardless of whether or not they were exempt from DGS/OLS review.

NOTE: At least two (2) of the STD 213s or 213As must bear original handwritten signatures. Stamped replicas of signatures are not acceptable as original signatures. Generally, no more than four (4) copies of the agreement will be signed by DGS/OLS.

After approval by DGS/OLS, the copies will be distributed as follows:

- a. One copy of the STD 215 and STD 213 or 213A face sheet will be forwarded to the State Controller’s office. This step is not required for contracts submitted by district agricultural associations or for contracts in which payment is not from funds in the State treasury.
- b. DGS/OLS will retain only one copy of the STD 215 and STD 213 or 213A face sheet. In some instances, at the discretion of DGS/OLS, a complete agreement will be retained at DGS/OLS.
- c. The remaining two (2) STD 213s or 213As with original signatures will be returned to the submitting agency.

C. Contract Approval Review Time

DGS strives to complete the review and approval process in ten working days or less.

Note: Expedited review is available in **exceptional** circumstances on request.

D. In addition to the above requirements, DGS/OLS asks individuals involved in the preparation and transmittal of documents to DGS/OLS to consider the following:

1. Ensure that all information on the STD 215 is complete and specifically relates to the contract being submitted.

2. When completing the forms, review by an DGS/OLS attorney is made easier and more efficient if the form can be easily read. Reducing the type font in order to squeeze in an explanation is not recommended. If your narrative requires more space, enter “see attached” and include additional pages as needed. This way, the length of your explanation is not limited by the size of the box, and it makes it easier to complete the contract review.
3. When amending a contract by replacing entire sections, review is made more efficient by highlighting the changes being made. For example, if replacing an entire scope of work that is contained in several pages and only a few items are being changed, please boldface or underline the actual changes. This will expedite the review process, and focus the attorney’s review on the actual changes involved in the amendment.

4.09 • APPROVAL AND COMMENCEMENT OF WORK
(Rev 11/12)

A. Legal Requirements

The approval by DGS/OLS is the final, formal approval of the contract. When DGS/OLS’ approval is required, contracts for services should not begin before receipt of approval; payment for services may not be made until the contract is approved by DGS/OLS or, in the case of an exempt contract, until it is formally approved by the agency. (See PCC §§ 10295 and 10335.)

B. Necessity of Time Management

In light of the legal requirements for contract approvals, it is important for contracting departments to timely execute and timely submit contracts.

Contracts should be submitted to DGS/OLS for approval a sufficient time in advance of the contract start date to afford the opportunity for adequate review and discussion as may be needed. Guidelines for timely submittal of contracts and late justification exceptions are outlined in DGS Administrative Order 06-05.1 (available by contacting DGS/OLS).

C. Consultant Contracts

The law does not permit consultants to start work before formal contract approval, except in an emergency. When it is necessary for a consultant to start work before approval of the contract, the circumstances must be noted in the contract file as an emergency in accordance with PCC § 10371(d).

D. Warning to Contractors

1. Contracts are not valid unless and until approved by DGS/OLS if such approval is required by law. (PCC §§ 10295, 10335.)
2. The contractor should be warned not to start work before receipt of the approved contract. The warning can be provided in the IFB or RFP, at the time of the award, or at the time the contract is sent to the contractor for signature.
3. If the contract is not approved and the contractor has begun work, the contractor may be considered to be a volunteer or the contractor may have to pursue a claim for payment by filing with the Victim Compensation and Government Claims Board. The State has no legal obligation unless and until the contract is approved.

Note: If a late contract is approved, authorized services provided by the contractor can be paid from the beginning date of the contract.

4.10 • APPROVAL OF AMENDMENTS

(Rev 11/12)

- A. If the original contract was approved by DGS/OLS, any amendment must be approved by DGS/OLS except for the following:
 - 1. If an amendment only extends the original time *for completion of performance* for a period of one year or less, the amendment is exempt from approval by DGS/OLS. This exemption can only be used once. (PCC § 10335(d)(1).) Note: this exception only covers extensions of time “to complete performance,” such as extending a final report due date. It does not cover other types of amendments, such as amendments that extend time to use the contractor for additional as-needed or hourly rate type services, or amendments that change (increase, decrease, alter) the scope of work, budget, or terms and conditions. (See PCC § 10335(d)(3).)
 - 2. Even though the extension cited above is exempt from approval, upon completion of the amendment, a fully executed copy of the amendment and a form STD 215 explaining the reason for the extension must be sent to DGS/OLS if the original contract was subject to DGS/OLS approval. (PCC § 10335(d)(1).)
- B. To obtain DGS/OLS approval of an amendment, the amendment should be submitted to DGS/OLS with a STD 215 and all supporting documentation, along with a copy of the original agreement, any intervening amendments and the STD 215s for each.
- C. See SCM 1, chapters 3 and 5 for other information about amendments.

4.11 • OTHER REQUIRED APPROVALS

(Rev 11/12)

The following are examples of additional approvals required for certain types of contracts. Documentation of the approval must be included as supporting documentation when submitting the contract package to DGS/OLS for approval.

- A. GC §19130(a) cost savings contracts – copy of Notice to SPB and the SPB determination if a union requested review.
- B. Legal Services contracts – copy of DOJ approval memo (or statutory authority to contract out); other pre-approvals as required.
- C. Hazardous Activities – DGS/ORIM approval stamp.
- D. Fiscal Agent contracts – DOF approval.
- E. Financial Compliance Audits– prior written approval of the Controller and DOF for contracts for financial or compliance audits, unless the agency is required by State law to obtain an annual audit. (Govt. Code § 8546.4(e).)
- F. Waste Recycling Agreements - Agreements for waste recycling services require prior approval by the Department of Resources, Recycling and Recovery (CalRecycle). (PCC § 12165(d); PRC § 40400 et seq.)
- G. Public Entities - May require a resolution.
- H. Printing Services – DGS/OSP approval.