

2. THE BASIC CONTRACTING PROCESS

2.00 • INTRODUCTION

This chapter describes the basic contracting process and the principal components of the process.

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2.02 • DEFINITION OF A CONTRACT

(Rev 11/12)

“A contract is an agreement to do or not to do a certain thing.” (CC § 1549.) It gives rise to an obligation or legal duty enforceable in an action at law. (CC § 1428.) Contract and Agreement are used interchangeably in the SCM. A contract must clearly identify the parties to the contract, the term of the contract, the contract price (or in-kind value), and a contract sets forth terms, conditions, and the statement of all work to be performed.

2.03 • PRELIMINARY CONSIDERATIONS

(Rev 11/12)

The contracting process starts with the recognition of a need for services. From that point the process varies depending on the type of services needed. Key considerations include:

A. Time

When the services are needed is a critical factor. Sufficient time must be allowed for internal agency process as well as required external review(s). (See SCM 1, chapter 4.)

B. Civil Service

The State Constitution generally requires contracting to be limited to those services that cannot be performed by civil service employees except as provided for in GC § 19130.

C. Authority and Approvals

Many decisions require authorized approval, including final formal approval, either by the agency or by DGS/OLS. Some contracts are legally exempt from DGS/OLS approval. Some may require approval by other agencies. (See SCM 1, chapter 4.)

D. Funding

Funding for the services is a crucial component and must be identified.

E. Competitive Bidding

Services obtained from the private sector are typically subject to a competitive selection process. (See SCM 1, chapter 5.)

F. Management of the Contract

Management of the contract must be anticipated and planned during the contracting process. Deliverables must be clearly described so that they can be evaluated and payments can be approved. (See SCM 1, chapter 9.)

2.04 • OVERVIEW OF THE CONTRACTING PROCESS

(Rev 11/12)

The following Table 2.1 gives a general overview of the State's contracting process. The process necessarily varies greatly depending on the circumstances of the specific contract. Table 2.1 is provided to help in planning your contract.

Table 2.1

	IMPORTANT FACTORS	DECISIONS TO BE MADE
1. Someone within the agency must identify the need for a service, whether the need is for a routine renewal of an existing essential service or the acquisition of totally new or unique services.	<ul style="list-style-type: none">• What is the nature of the service?• What type of service is needed?• How necessary is the service?• When is the service needed?• Is this an ongoing or one-time service?• Is this an existing service or a new service?• Is this service routine or extraordinary?	<ul style="list-style-type: none">• What internal procedures apply to requesting services?• What are the possible or probable sources for the services?• What justifications need to be developed?• Who has the authority to approve the request?
2. Services are required to be performed by civil service employees whenever feasible. Such feasibility must be considered before seeking a contract. (See GC §19130)	<ul style="list-style-type: none">• Is the service available within your department?• Can another State agency perform the service?• Is this routine or extraordinary?• What are the estimated costs of alternatives, including in-house or interagency services?	<ul style="list-style-type: none">• Is a contract with a non-State provider really necessary?• Which is the best alternative? If in-house service, the contracting process stops. If inter-agency service is best, the process continues. If a contract is justified, the process continues.
3. Costs and the availability of funds are always a factor. Alternatives range from using already-budgeted funds for simple services to seeking an appropriation.	<ul style="list-style-type: none">• What funds are available to pay for the services?	<ul style="list-style-type: none">• Who has authority to approve funding?

The Following Considerations Assume a Contract is Justified and Funds are Available

<p>4. The contractor selection method depends on the services involved and/or the circumstances. Different methods impose different requirements and procedures.</p>	<ul style="list-style-type: none"> • What is the nature of the service? • When is the service needed? • Is this an emergency? • What is the estimated cost? • Are the sources for the service limited? • Is a contracted source already available? • Can an existing contract be amended? 	<p>Select by competition, such as:</p> <ul style="list-style-type: none"> • Invitation for Bids (IFB) • Request for Proposals (RFP) • SB/DVBE two quote method (GC §14838.5, 14838.7) <p>Select by other method such as exploring:</p> <ul style="list-style-type: none"> • use of DGS LPAs • use of statutory bid exemptions
<p>5. Formal competitive bidding is generally required by law or policy. The formal competitive bidding process involves numerous factors and decisions.</p>	<ul style="list-style-type: none"> • The contracting opportunity must be publicized, usually by formal advertising. • A solicitation package containing all specifications must be developed and must be available to all competitors. • Competition must not be unnecessarily restricted. • Procedures must be followed to ensure a fair competition. • The competitors' responses must be judged, and a winner must be determined. • The results must be announced, and the contract awarded. • The contract must be written in accord with the specifications and the contractor's response to the solicitation. 	<ul style="list-style-type: none"> • Who develops the technical specifications describing the services to be performed? • Who ensures that the technical specifications are necessary, will achieve the desired results, and do not restrict competition? • Who develops and reviews the specifications describing general contract requirements and the solicitation requirements? • Who conducts solicitation activities, including advertising, dealing with competitors, receiving and safeguarding responses, opening responses, evaluating responses, and notifying competitors? • Who writes and processes the contract?

<p>6. The contract must be processed for signature, approval and distribution.</p>	<ul style="list-style-type: none"> • The contract must be signed by the contractor. • The contract must be signed by the person authorized to sign for the agency. • The Std. 215 must be signed certifying availability of funds and indicating the encumbrance of funds. • Additional approvals must be obtained depending on the contract. • The contract must be distributed. 	<ul style="list-style-type: none"> • Who approves the contract? • Are special approvals required? • Is final approval by agency authorized or is final approval reserved to DGS? • Who distributes copies of the contract?
<p>7. Management of the contract must be built into the contract to facilitate measurement of achievement and measurement of contractor performance.</p>	<p>Management includes:</p> <ul style="list-style-type: none"> • Identifying the deliverables and ensuring satisfactory delivery • Monitoring progress, especially for quality and performance deadlines • Providing for audit, especially for critical compliance issues • Reviewing invoices for contract compliance, accuracy, and prompt payment if invoice is undisputed • Tracking State deadlines and use of funds • Identifying contract and contractor problems and communicating these to the contractor 	<ul style="list-style-type: none"> • Did the contractor satisfactorily perform all required services? • Should the contractor be paid or should the invoice be disputed? • Is a formal evaluation required or needed? • Should the services be stopped or continued? • Should the contract be renewed or rebid? • How can the contract or contracted services be improved? • Should the encumbered funds be adjusted?

2.05 • ELEMENTS OF A VALID CONTRACT (Rev 11/12)

Each contract must contain the following information:

- Identification of the parties.
- Term for the performance or completion of the contract (dates or length of time).
- Encumbrance of funds when required.
- Consideration (The contract must clearly express the maximum amount to be paid and the basis on which payment is to be made: e.g., a fixed amount regardless of time spent, billing based on time spent at a specified rate plus actual expenses, or cost recovery.)
- Scope and deliverables (The work, service, or product to be performed, rendered, and/or delivered.) Clear and concise language must be used to describe the scope.
- Other general or unique terms and conditions of the agreement.
- Signature by a person for each party who is authorized to bind that party.

2.06 • AUTHORITY TO SIGN A CONTRACT

(Rev 11/12)

- A. A State agency’s authority to contract is limited to those officers who either have statutory authority or have been duly authorized in writing by one who has statutory authority.

Anyone who signs a contract should have sufficient knowledge and expertise in the area of contracting and the goods or services being procured. If an individual with statutory authority does not have sufficient knowledge or expertise in these areas, that individual should have the contract reviewed by a knowledgeable person prior to final signature.

Some important considerations for granting signature authority or assessing one’s ability to effectively review a contract for approval are:

1. Training and/or certification in accordance with guidance provided by DGS.
2. The procurement approach used.
3. The goods and/or services for which the department is contracting.
4. The complexity and value of the contracts or procurements.
5. The purchasing authority of the department.
6. The knowledge, experience, and expertise of the individual signing the contracts.
7. Experience with the principles of sound contracting and procurement.
8. Familiarity with the process of contract formation, execution and administration.

Agencies must maintain a written record of all persons authorized to sign contracts and transmittals.

- B. State boards and commissions either have statutory authority for the executive officer to sign contracts, or the authority of the executive officer to sign contracts is provided by resolution, order, or motion. Contracts in excess of \$5,000 must be accompanied by evidence of the applicable authority to sign the contract. Contracts under \$5,000 are generally deemed to pertain to ministerial duties and do not need to be accompanied by evidence of the applicable authority to sign the contract.
- C. Local public entities authorize and approve execution of contracts through a resolution, order, motion, or ordinance. A copy of such authority must be required by State agencies unless payment will be made after performance is complete. A copy of such authority should be retained in the contract file. (See SCM 1, section 3.05.)

2.07 • STANDARD LANGUAGE

(Rev 11/12)

The provisions noted in Table 2.2 are generally required. Many of the provisions are contained in the State’s standard general terms and conditions (GTCs) which should be incorporated by reference to the DGS/OLS website. Agencies should submit a basis for non-use of clauses.

Table 2.2

Contract Provisions	When Required	Law/Statute
Audit by State Auditor	All contracts over \$10,000	GC § 8546.7
Audits and access to records	For contracts subject to DVBE goals	PCC § 10115, et seq. 2 CCR § 1896.60, et seq.
Nondiscrimination clause	All contracts	GC § 12990
Antitrust Claims	All competitively bid contracts	GC § 4550, et. seq.

Contract Provisions	When Required	Law/Statute
Statement of compliance	Contracts \$5,000 or over when not in bid documents	2 CCR § 8113
Americans with Disabilities Act (ADA)	All contracts	42 USC § 12101, et seq.
National Labor Relations Board certification	All contracts	PCC § 10296
Drug-free workplace	All contracts	GC § 8350, et seq.
Progress payments	All contracts where progress payments will be made	PCC § 10346
Recycled Content Products	All contracts	PCC §§ 6615, 12201(c), 12205
Termination & Amendments	All contracts	GC § 11010.5
Expatriate Corporations	All contracts	PCC § 10286.1
Priority hiring considerations	Contracts in excess of \$200,000	W&I §§ 11200, 11349, PCC § 10353, 2 CCR § 1896.30
Resolution of contract disputes	All service contracts should; consulting services must; public works contracts may	PCC §§ 10381, 22200, et seq.
Validity	All contracts requiring DGS approval	PCC §§ 10295, 10335
Subject to availability of funds	All contracts signed before approval of budget	State and Federal budgets
Convict/Forced labor/or sweatshop labor Sweatfree Code of Conduct	All contracts for purchase of goods or commodities. All contracts for purchase or laundering of apparel or garments.	PCC § 6108
Child support compliance	All contracts exceeding \$100,000 (Interagency Agreements are exempt from this requirement)	PCC § 7110
Non eligible alien certification	All sole proprietor contracts	8 USC § 1621, et. Seq.
Insurance requirements	All contracts doing hazardous works	State policy
Air/Water pollution violation certification	All contracts over \$10,000	GC § 4477
Domestic partners	All contracts \$100,000 or over	PCC § 10295.3
Indemnity	All contracts	State policy
Prompt Payment	All contracts	GC § 927, et seq.
Consultant Services – Note: Needed in addition to “Contract Provisions” listed above.		
Amendment	Consultant contracts	PCC § 10335
Evaluation of Contractor	Consultant services	PCC § 10367

Contract Provision	When Required	Law/Statute
Evaluation criteria	Consulting services of \$5,000 or more	PCC § 10371
Progress schedule	Consulting services of \$5,000 or more	PCC § 10371
Consultant résumés	Consulting services of \$5,000 or more	PCC § 10371
Detailed cost analysis	Consulting services of \$5,000 or more	PCC § 10371
Project coordinator	Consultant services	
Progress reports/meetings	Consultant services	PCC § 10371
Legal Services - Note: Needed in addition to “Contract Provisions” listed above.		
Legal cost and billing guidelines	Contracts for legal services	PCC § 10353.5
Legal litigation plans	Contracts for legal services	PCC § 10353.5
Case phasing of activities	Contracts for legal services	PCC § 10353.5
Legal budgets	Contracts for legal services	PCC § 10353.5
Legal malpractice	Contracts for legal services	PCC § 10353.5
Legal bill & law firm audits	Contracts for legal services	PCC § 10353.5
Subvention Contracts – Note: Needed in addition to “Contract Provisions” listed above.		
State purchase of equipment	Subvention aid or local assistance	State policy
Prior authorization for reimbursement over \$2,500	Subvention aid or local assistance	State policy
Prior State approval for training seminars, etc., and material	Subvention aid or local assistance	State policy
Contracts with Federal funding – Note: Needed in addition to “Contract Provisions” listed above.		
Termination 30 days	Contracts funded in whole or in part by Federal government, State government, and other public entities	State policy
Fund availability	Contracts funded in whole or in part by Federal government, all contracts	State policy
Other Contracts – Note: Needed in addition to “Contract Provisions” listed above.		

Contract Provisions	When Required	Law/Statute
Prevailing wages	Moving services over \$2,500	SAM § 3810 GC § 14920
Prevailing wages	Public works	LC § 1770, et seq.
State's responsibilities for repairs, liability	Contracts for equipment rental	State policy
Equipment maintenance	Contracts for equipment rental	State policy
Interagency Agreements		
How charges are computed	All interagency contracts	SAM §§ 8752 and 8752.1
Audit	All interagency contracts over \$10,000	GC § 8546.7
Advancing of funds	Any interagency contract	GC § 11257
Non-payment Transaction Request	All interagency contracts	GC § 11255; BL 10-10

CHAPTER 2 - APPENDIX

A DGS/OLS REVIEW CHECKLIST

(Rev 1/14)

[Note: This checklist is provided to inform State agencies of the typical areas of review and/or analysis performed by DGS/OLS. It should not be viewed as a limitation of DGS/OLS contract review activities.]

A. THE CONTRACT COMPLIES WITH THE LAW.

1. Authority to contract out
 - a. Specific statute
 - b. GC § 19130 consideration
 - (1) Cost savings 19130(a) -- State Personnel Board (SPB) process required (2 CCR § 547.69 and §547.70)
 - (2) Other reasons 19130(b) (2 CCR § 547.60)
 - (a) See 19130(b)(1) Exempt under Constitution
 - (b) See 19130(b)(2) New State function and legislative authority
 - (c) See 19130(b)(3) Service not available: highly specialized or technical
 - (d) See 19130(b)(4) Incidental to the purchase or lease
 - (e) See 19130(b)(5) Conflict of interest; need unbiased findings
 - (f) See 19130(b)(6) Emergency appointment
 - (g) See 19130(b)(7) Private Counsel, with Deputy Attorney General (DAG) approval. Notice provided to Bargaining Unit 2 representatives of contract
 - (h) See 19130(b)(8) Contractor will provide things that are not feasible for the State to provide
 - (i) See 19130(b)(9) Training when civil service is not available
 - (j) See 19130(b)(10) Urgent, temporary, or occasional services when civil service delay would frustrate the purpose
2. Budget authority
3. Legal method of procurement
 - a. Bidding generally required
 - (1) IFB
 - (2) RFP
 - (3) Two SB or DVBE quotes (GC §§14838.5, 14838.7)

- b. Bidding exemptions
 - (1) Statutory
 - (2) DGS policy or NCB
 - 4. Legal requirements met for type of contract
 - 5. Authority to amend
- B. THE CONTRACT MAKES GOOD BUSINESS SENSE AND THE COST IS REASONABLE.
 - 1. Good business sense
 - a. Drafted to obtain desired results
 - b. Scope of work specific and realistic
 - c. Maximum use of dollars
 - d. Deliverables clear, measurable, and concise
 - e. Realistic timetable
 - 2. Reasonable cost
 - a. Consider whether:
 - (1) Bid is within estimate
 - (2) Bids cover a wide range
 - (3) Low bid is too low
 - (4) Low bid is too high
 - b. Has re-bidding been considered if bids are out of line?
- C. THE CONTRACT USES CLEAR AND CONCISE LANGUAGE CONSISTENT WITH THE TERMS OF SOLICITATION AND BID.
 - 1. Term
 - a. Within fiscal year appropriation; and
 - b. If for multiple years, contingency language as appropriate
 - 2. Scope of work
 - a. Specifications, requirements
 - b. Personnel, staffing
 - c. Coordination
 - d. Measurable results, deliverables
 - e. Timelines, progress reports
 - f. Evaluation, acceptance
 - 3. Total amount and payment method, progress payments, withhold
 - 4. Terms and conditions—standard and special
- D. SECONDARY ISSUES AND SUPPORTING DOCUMENTATION ARE REVIEWED.
 - 1. Social issues (as appropriate)
 - a. Certified small business
 - b. Certified DVBE
 - c. TACPA
 - 2. Drug-free workplace, other required certifications
 - 3. Statement of compliance

4. Check of corporate standing
5. Other approvals (as applicable)
 - a. AG
 - b. SPB
 - c. DGS Office of Fleet Administration
 - d. DGS/ORIM
 - e. Records Management
 - f. DGS/OSP
 - g. CalRecycle
6. Std. 204 noted
7. Resolution
8. Bonds
9. Ads, STD 821, or exemption noted
10. Negative evaluations