Chapter 5

Non-Competitively Bid (NCB) Purchases

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##

Chapter 5

## Non-Competitively Bid (NCB) Purchases

## Overview

Introduction

The state is committed to a policy of competitive procurement and contracting that promotes and provides for open and fair competition when competition is known to exist. This chapter describes the process that must be followed when executing a transaction or amendment without competition.

Also described is the purchasing authority necessary before executing an NCB purchase, the requirements that shall be followed, the necessary forms, and potential consequences when a department has a significant number of repeat NCB purchases.

When executing a transaction that limits competitive bidding to a specified brand or trade name (LTB) and more than one supplier is available, departments are required to follow the LTB process in Chapter 4, Section 4.C3.0.et seq.

**Note:** Requests related to IT Reportable Projects or Telecommunications acquisitions must be submitted to and processed by the California Department of Technology (CDT). Departments should contact CDT at TechnologyProcurements@state.ca.gov

## Topic 1- Non-Competitively Bid (NCB) Purchases and Purchasing Authority

5.1.0 NCB Purchasing

NCB contracts are limited by statute in accordance with PCC section 12102 and 12102.1 for IT Goods and Services to the following conditions:

* Proposed acquisition of goods and services are the only goods and services that meet the state’s need (PCC section 12102 (b)(1)), or;
* Emergencies, where immediate acquisition is necessary for the protection of the public health, welfare or safety (PCC section 12102 (b)(2))

5.1.1 NCB Purchasing Authority

Departments are granted purchasing authority on acquisition methods for which they have applied. If a department elects to apply for IT purchasing authority, NCB authority will be granted for IT Goods, Services, and Leveraged Procurement Agreement (LPA) IT Goods and Services.

A department’s Purchasing Authority Approval Letter (PAAL) designates NCB thresholds for both the justification and contract. There is a distinction between both, since the justification must be approved prior to a contract being approved and executed.

Departments should reference their PAAL for pre-procurement requirements.

5.1.2 NCB Purchasing Authority Threshold

A department’s NCB purchasing authority will typically have a maximum dollar threshold not to exceed $25,000.00 for an NCB Justification (per transaction excluding sales and use tax, finance charges, postage, shipping and handling). While this threshold is for the pre-procurement requirement, it is not necessarily the same threshold for execution of the contract. To that end, the contract threshold for NCBs will always be identical to the department’s IT Goods and Services competitive threshold. See the example below.

Example: Department of Horse Racing has $25,000 threshold for NCB Justification and $100,000 threshold for IT Goods for an NCB contract. The department could execute a contract on their own up to the contract threshold ($100K); however, any contract over $25,000 would require an NCB justification to be submitted to and approved by DGS. A contract up to $25,000 would require the department to complete an NCB Justification and retain it in the procurement file; it would not need to be submitted to and approved by DGS.

Departments without approved purchasing authority for IT Goods and Services must submit the required NCB request forms and purchase documents to DGS/PD/Dispute Resolution Unit (DRU) or CDT (if applicable) for review and approval.

NCB request forms and purchase documents for purchases exceeding the department’s approved NCB purchasing authority for a justification and contract must be submitted to DGS/PD for review and approval.

**Note:** See Chapter 1 for the requirements of applying for IT purchasing authority.

5.1.3 Purchases Under $10,000

Departments with purchasing authority may solicit a bid from a single source for transactions under $10,000 when pricing is determined to be fair and reasonable. In this case, no NCB justification is required if fair and reasonable pricing is established and documented. Examples of fair and reasonable pricing methods are described in Chapter 4. Documentation to support fair and reasonable pricing must be retained in the procurement file.

####

#### Topic 2 – NCB Justification Process

##### 5.2.0 NCB Justification Methods

There are two methods for justifying NCB purchases as follows:

* NCB justifications executed on an individual basis.
* Special Category NCB Request (SCR), where a department determines that a significant number of repeat NCB purchases for a particular category of goods and/or services will occur during a specified period of time.

Refer to Topic 4 of this chapter for additional details regarding SCR.

##### 5.2.1 NCB Justification Documents

Departments must use the following DGS/PD-approved forms when submitting NCB justification documents.

Click here to access the NCB Justification [Word](https://www.dgs.ca.gov/-/media/0F93C99D7E5B454DADFB295FABE4A076.ashx) [PDF](https://www.dgs.ca.gov/-/media/F4839A4B73B544F6A02888C81414562C.ashx)

Click here to access the [SIMM 71B](https://cdt.ca.gov/wp-content/uploads/2018/04/SIMM-71B-Certification_2018-0417.docx)

Click here to search for the [Contract Advertising Exemption Request (STD.821)](https://www.dgsapps.dgs.ca.gov/osp/StatewideFormsWeb/Forms.aspx). This form must accompany all NCB requests for IT services.

When completing the NCB Justification form, departments must respond to all questions clearly and concisely and must fully justify:

* why a particular good or service is restricted/unique
* how the background of events prompted the request
* what the consequences are if the good or service is not purchased
* that no competition exists, based on market research efforts

In addition, departments must document how the price is fair and reasonable. This includes providing a basis of the comparison used such as current market rates, historical pricing, LPA pricing, contracts for similar services, etc. Examples of fair and reasonable pricing methods are described in Topic 8 of this Chapter.

Finally, departments must describe any cost savings realized or avoided when selecting a particular good or service. Departments must quantify and substantiate their response.

The NCB Justification form is a set of consistent questions required for all NCBs, however, DGS reserves the right to ask additional questions that would serve to strengthen and clarify the unique circumstance, which has prompted the NCB. Additional questions may not always be consistent since no NCB is identical.

Example: An NCB for a Non-IT Good will generate different questions from an NCB for IT Goods or Non-IT Services. All three (3) will have very unique characteristics, therefor requiring additional questions depending on the circumstance.

##### 5.2.2 Signature Authority

Buyers must secure the proper signature approvals on the NCB Justification. The NCB Justification requires the specified signatures(s) regardless of whether or not the justification is submitted to DGS/PD or CDT (if applicable) for approval. All signatures must be originals.

* **Signature Instructions for Agencies with an Agency Secretary**

The NCB Justification form requires approval by Agency Secretary or Agency Undersecretary and the department director or designee. The Agency Secretary may designate one person, in addition to Agency Undersecretary, to sign on his/her behalf, of cabinet officer level (e.g., Assistant Undersecretary, Deputy Secretary, etc., the actual title is dependent upon the Agency’s organizational structure). The department director may delegate review and approval authority to his/her deputy directors and/or the Procurement and Contracting Officer. The director’s designee shall send ratification notification to their director upon the designee’s approval of the NCB transaction. The typed name and signature must match for both signatures.

* **Signature Instructions for Agencies that do not have an Agency Secretary**

This form requires approval by the highest-ranking executive officer or designee. The highest-ranking officer may designate one person to sign on his/her behalf subject to DGS approval. The highest-ranking officer may delegate review and approval authority to his/her deputy directors and/or the Procurement and Contracting Officer. The designee shall send ratification notification to their highest-ranking executive officer upon their approval of the NCB. The typed name and signature must match.

DGS/PD will maintain a file of the names and titles of designees.

##### 5.2.3 File Documentation

Click here to access the [file documentation list for NCB contracts](https://www.dgs.ca.gov/-/media/F4E9E9FC597840C28C6515B66BB79D0A.ashx).

##### 5.2.4 NCB Submission Timeline

NCB’s require thorough review and analysis and as such, require a minimum of 45 days to process (justification portion only). If an NCB is received by DGS less than the minimum 45 days for review and approval, the submitting agency or department will be notified that goods are not to be purchased prior to determination of NCB approval or non-approval. Any goods or services purchased prior to the approval or non-approval date will require a claim to be submitted to the DGS Government Claims Program.

In addition, to ensure the state’s interests are adequately protected, NCBs are not to be approved when the identified start date of the contract or effective date of the amendment has passed, except under exceptional circumstances as described below (Section 5.2.5). If there is no exceptional circumstance, the agency or department will be advised to notify the business entity to file a claim with the DGS Government Claims Program for compensation for goods or services already received.

##### 5.2.5 Examples of Appropriate and Inappropriate Justifications

Departments should refer to the examples below when submitting an NCB Justification request.

A department has identified during their quarterly review that a specific good or service is needed.

| Appropriate | Inappropriate |
| --- | --- |
| Needs are clearly identified well in advance | Inadequate contract planning that would prevent competition. For example: A contract expiring in 15 days. |
| Market survey reveals no competition other than a single vendor. | Justification responses lack enough detail to substantiate request. |
| NCB is submitted to DGS no less than 45 days in advance of the contract start date. | NCB submittal to DGS is less than 45 days of the contract start date. |
| Consequences are fully explained and impacts identified if unable to contract with proposed supplier. | Insufficient information to establish cost reasonableness. |
| Respond to the questions in the NCB Justification with clarity and detailed responses. | Unwillingness to provide clarification to substantiate the request. |
| Cost breakdown with deliverables are clearly identified and explained on how funds will be expended. |  |

Departments are reminded that poor procurement planning **does not** justify an NCB request.

Repetitive submission of NCBs for products and services by a department (particularly within a condensed time period) is highly discouraged. Such a practice could indicate a serious flaw in the department’s ability to properly manage contracts and acquisitions; thus, potentially putting at risk their purchasing authority and triggering an escalation process to alert their leadership. Repetitive submission of NCBs should not be confused with the Special Category Request, which is an approved acquisition method.

##### 5.2.6 NCB Submission Exceptions

NCBs for purchases where goods and services have already been procured or for amendments that have already been executed may be accepted on an exceptional basis only if the contracting agency or department certifies in writing that there is good cause for lateness. A late justification letter is required, which provides a statement of detailed facts and demonstrates it is in the state’s best interest to approve the NCB at the time submitted. Examples of good causes are limited to:

* The underlying purchase is necessary to avoid an unexpected and emergent risk to persons or property and the NCB was processed expeditiously upon discovery of the risk;
* The underlying purchase or amendment is the subject of a judicial order.

**Note:** In no case will an approval be given for goods and/or services that have been procured for a period greater than 30 days.

Urgent risk and good cause late submittals will be evaluated on a case-by case basis upon a review of the facts and the written justification provided by the agency or department. In some cases, an NCB request may be approved prospectively, but not approved for the period that preceded the submittal of the NCB.

The NCB late justification letter must be signed by the Agency Secretary or Agency Undersecretary and the Department Director or Chief Deputy Director.

##### 5.2.7 NCB Fiscal Year Deadline Dates

In order to comply with fiscal year deadlines, NCB, LTB, and SCR requests must be submitted to the Dispute Resolution Unit (DRU) as follows:

Information Technology (IT) Goods and Services Requests

| **Submittal Date** | **Contract Type** |
| --- | --- |
| First Business day in December | NCBs, LTBs, and SCRs |

##### 5.2.9 NCB Denied

If the NCB justification is denied, DGS/PD will contact the department and discuss the following options:

|  **When the purchase** | **Then DGS/PD will** |
| --- | --- |
| Exceeds the department’s NCB purchasing authority butis within the department’s approved competitive purchasing authority threshold. | * Advise the department to conduct a competitive solicitation or,
* Deny the request.
 |
| Is requested by a department without any type of purchasing authority. | * Conduct a competitive solicitation to acquire the same or equivalent product or,
* Deny the request.
 |

#####

##### 5.2.10 NCB Corrective Action Plan

A Corrective Action Plan (CAP) is a tool that aims at reducing the use of NCBs when other acquisition methods could have been used. A CAP also allows a department to plan accordingly and seek other competitive acquisition methods to meet their program needs. The CAP will require departments to commit to specific actions within a timeline. Departments are required to fully answer the CAP question in the Justification form if the NCB is being submitted due to the following reasons:

* insufficient time to complete the competitive acquisition process,
* the goods or services could have been competitively bid or are available through an LPA, or
* is being submitted outside the required NCB Submission Timeline as identified in section 5.2.3 above.

Departments failing to adhere to the CAP actions required by DGS, run the risk of jeopardizing their purchasing authority. Departments are strongly encouraged to fulfill commitments outlined in their CAP.

##### 5.2.11 Escalation Process

The escalation process serves as a tool to manage NCBs being submitted to DGS. The tool aims at encouraging departments to utilize the NCB acquisition method appropriately. While the NCB acquisition method is a valid method for acquiring goods and services, it is not intended to circumvent the competitive process.

Step 1- If a Department submits 20% or more non-compliant NCBs within a quarter.

Step 2- If a Department submits 35% or more non-compliant NCBs within a quarter.

Step 3- If a Department submits 50% or more non-compliant NCBs within a quarter.

| Non-compliance | Consequence  |
| --- | --- |
| Step 1 (20%) | Letter sent to Manager & PCO \*\* |
| Step 2 (35%) | Letter sent to Deputy Director & cc Manager, PCO \* |
| Step 3 (50%) | Letter sent to Agency Secretary & cc Manager, PCO, Deputy Director, PAU \* |

\*DGS will require departments to complete our Basic Acquisition Certification class provided by CalPCA.

\*\*DGS will require or suggest completion of NCB, Contract Management, and Statement of Work workshops provided by CalPCA.

NCB CAP tracking analysis will be done on a quarterly basis. Quarters will begin on the first day of the fiscal year (July 1). DGS will use the intake date to determine which quarter an NCB is recorded. For percentages to be utilized as a metric, a department must have submitted a minimum of 5 NCBs within a quarter. Departments submitting less than 5 NCBs in a quarter will be handled on a case-by-case basis.

##### 5.2.12 LPA Transactions and NCB

Department buyers must carefully review individual LPA User Instructions to determine if the LPA is exempt from competitive bidding.

State Agencies must use the NCB Acquisition Method when only one supplier is known to sell the IT good or services needed and offers cannot be obtained through available LPA contracts.

The NCB Acquisition Method must be used for amendments to previously approved LPA transactions when the amendment requires an NCB Justification. These amendments must be executed using the NCB Acquisition Method and adhere to the NCB Justification and NCB contract approval process.

 The NCB Justification and NCB contract approval process is not required if the individual LPA User Instructions state that the contract is exempt from obtaining offers. This exemption typically applies when DGS/PD has competitively bid an LPA, obtained a statewide NCB Justification and NCB contract when creating an LPA, or where DGS has approved a categorical exemption to competition.

Refer to Chapter 6 for further information.

##### 5.2.13 Known Suppliers Outside LPAs

Departments must conduct a competitive solicitation if suppliers are known outside of CMAS contractors or Master Agreement (MA) contracts that can meet the department’s requirements.

#### Topic 3 – Purchase Document Amendments and the NCB Justification

##### 5.3.0 When NCB Process is Applicable

If the original transaction, either competitive or LPA, did not evaluate option(s) for changes, then the amendment must comply with the NCB process. This includes amendments for increases and decreases to quantity, dollar amount, and time.

##### 5.3.1 When an Amendment Does Not Require an NCB

Amendments to existing purchase documents are not subject to the NCB requirements if the following has occurred:

* Competitively bid contracts:
	+ Which included option(s) for changes (e.g., quantity or time) may be amended consistent with the terms of the original contract providing for such amendment(s) if such options were evaluated during the solicitation process.
* LPAs for IT Goods and IT Services:
	+ Original orders, which include options for changes (e.g., quantity or time), that were evaluated and considered in the selection for award during the Request for Offer (RFO) process, may be amended consistent with the terms of the original order, provided that the original order allowed for amendments.
* Competitive contracts and LPA orders amended for incidental omissions, for example:
	+ Transposed numbers
	+ Missing contact names
	+ Mistyped addresses

##### 5.3.2 Amendment Requirements Based on Cumulative Dollar Value

The requirements for amending existing purchase documents are based on the cumulative dollar value of the purchase after including the amendment.

Example:

A $200,000.00 contract plus a $60,000.00 amendment shall be considered a $260,000.00 contract. The processing of an amendment through the NCB approval cycle is based upon the amended total value of the contract.

**Note:** If your amendment and original contract amount (total contract amount) surpasses your purchasing authority threshold, the contract will be executed by DGS PD.

##### 5.3.3 Exceeding the Fair & Reasonable

##### Acquisition Method Dollar Threshold

The NCB process must be followed if an amendment will cause the original transaction amount to exceed $10,000.00 and the original transaction was awarded using the Fair and Reasonable Acquisition Method. The amendment shall be processed using the NCB Acquisition Method and adhere to the NCB process described herein.

##### 5.3.4 SCPRS Reporting Responsibilities

Effective July 2016, departments are required to report all transactions, regardless of the dollar amount, into FI$Cal SCPRS. This reporting requirement applies to IT Goods and Services.

##### 5.3.5  Reporting Amendments in SCPRS

Purchase document amendments must be recorded in the SCPRS.

In SCPRS, amendments are NOT reported as separate transactions independent of the original transaction, unless there is a change in the Acquisition Method (e.g., from CMAS to NCB).

In FI$Cal SCPRS to report an amendment, buyers will be utilizing the “Change Order” functionality.

If there is NO change between the acquisition method of an amendment and the original transaction:

Amendments to increase or decrease the total amount of a transaction registered in FI$Cal SCPRS, require the user to create a new line on the reported transaction, for the change amount. The new line will contain the following additional information:

* The item description will also include a brief explanation for what is being added or taken away.
* For decreases, the line will be a negative amount where users must maintain an accurate Quantity and Unit Price amount.
* For increases, the line will be a positive amount where users must maintain an accurate Quantity and Unit Price amount.

When the acquisition method for the amendment is different than the original transactions, buyers will be required to create a new procurement reporting transaction in FI$Cal SCPRS meeting the following conditions:

* The new “Purchase Document #” must mirror the original agreement number where the suffix end in “- A” (dash A) for the new entry
* Buyers will enter the previous transaction ID in either the “Comments” field
* Buyers will attach a copy of all the original procurement documents in the “Add Comments and Attachments” link
* Buyers will also include a brief description of the amendment again utilizing the “Add Comments and Attachments” link

Each time an Amendment/”Change Order” is made to an existing FI$Cal transaction prior to “Save” user will need to select the appropriate value from the “Change Order Reason” table and be given the option to add in the comments section a description of what amendment/change is being executed.

#### Topic 4 – Special Category NCB Request (SCR)

##### 5.4.0 Special Category NCB Request Definition

A Special Category NCB Request (SCR) represents categories for the purchase of goods or services necessary to achieve a department’s program objectives in a timely manner. DGS has determined in advance and in writing, that for a specific type of category of goods or services there is no viable competition, or that due to critical time requirements such competition cannot be completed by the exercise of reasonable efforts prior to the time such goods or services are required. In essence, an SCR could be viewed as a blanket (with parameters) for multiple NCBs approved all at once and utilized as necessary over a specified timeframe, instead of submitting repetitive stand-alone NCBs for the goods and services.

All SCRs must use the Special Category NCB Request form.

Refer to Topic 1 of this chapter for approval signature requirements.

##### 5.4.1 Individual SCR for Each Category

An SCR must be completed and approved for each category of IT Goods and Services, being requested and submitted to DGS/PD or CDT (if applicable) for consideration and approval.

**Note**: The SCR form is not to be used for emergencies, nor is it to be used to aggregate requests on behalf of other departments.

##### 5.4.2 SCR Dollar Threshold and Duration

All SCRs have a maximum authorized dollar limit and a maximum “window of approval” not to exceed three (3) calendar years from the date of DGS/PD approval unless renewed by submission of a new SCR. The expiration date is identified in the box labeled “For DGS Use only” on the SCR form.

Example: A department submits an SCR for eight (8) $1,000.00 purchases per year over a three (3) year period for a maximum of $24,000.00. The SCR cannot exceed $24,000.00.

**Note:** SCRs must be re-requested 45 days prior to expiration, as they cannot be amended.

##### 5.4.3 SCR Reference Number Assigned

Each approved SCR will be assigned an SCR reference number by DGS/PD. This SCR number must be recorded on any purchase order executed under the SCR approval. This is in addition to the department’s approved purchasing authority number.

##### 5.4.4 Executing the Purchase

Departments with purchasing authority may proceed with execution of purchase documents in accordance with an approved SCR.

DGS/PD must execute all approved SCR purchase documents for departments without purchasing authority and for transactions exceeding a department’s purchasing authority. In these instances, the requesting department will submit purchase requests on a Purchase Estimate (STD.66) for IT Goods and Services and by submitting a memo to DGS/PD OTA.

**Note:** Unless otherwise required by a department’s internal process, transactions placed against an approved SCR do not require approval signature on the purchase document by the Department’s Director and Agency Secretary or immediate next ranking official since these signatures are obtained during the initial SCR approval process.

##### 5.4.5 Tracking Purchases

Departments must track all SCR purchase documents executed under an approved SCR authority, including transactions processed on a purchase estimate by DGS, and provide reports to DGS/PD as requested.

Information to be tracked will include, at a minimum, the following:

* SCR approval number issued by DGS/PD,
* Purchase order number issued by DGS and/or agency’s order number (STD.65),
* Dates of transactions,
* Dollar amounts of transactions,
* Supplier names.

##### 5.4.6 SCR Usage Oversight

Purchase documents executed under an approved SCR may be reviewed during the department’s triennial accreditation review.

#### Topic 5 Acquisition of New Proprietary Software and Existing

#### Proprietary Software

## Maintenance/Upgrade Renewals

5.5.0 Applicability

The policy and procedures for this topic are to be applied to acquisitions for new proprietary software and existing proprietary software maintenance/upgrade renewal contracts when competition does not exist. Alternative acquisition methods must be chosen when competition exists (such as the Software License Program, or Small Business Option, etc.). Competition exists typically in the form of resellers or when another proprietary software is able to meet the business need.

If competition does exist (i.e. resellers exist or another proprietary software is available) but the awarding agency needs to execute a non-competitively bid contract due to business needs, then the transaction must be processed using the Non-Competitively Bid (NCB) Acquisition Method which requires an approved NCB Justification form.

See section 4819.2 of the State Administrative Manual (SAM) for definitions of the following items applicable to this policy:

* Cloud Software as a Service (SaaS)
* Maintenance
* Proprietary Software
* Software

5.5.1 Competition & Advertising

Acquisitions meeting the criteria noted above (when competition does not exist) for:

* New proprietary software
* Existing proprietary software maintenance /upgrades renewals

are exempt from advertising and competitive bidding up to $1,000,000.00 and may be executed without an approved NCB Justification.

5.5.2 Pre-Procurement Requirement Dollar Threshold

An NCB Justification is a pre-procurement requirement. For acquisitions conducted under this policy and procedure, the dollar threshold used to determine whether the acquisition requires an NCB Justification is $1,000,000.00. Acquisitions require an approved NCB Justification when the dollar value exceeds $1,000,000.00.

Amendments to contracts that result in the cumulative dollar value of the contract to exceed $1,000,000.00 must adhere to this policy (require an approved NCB Justification when the dollar value exceeds $1,000,000.00).

State agencies may not request an increase in their purchasing authority for this dollar threshold; the maximum is $1,000,000.00. The Procurement Division must not exceed this dollar threshold when executing contracts on behalf of customer state agencies.

5.5.3 Contracts

Contracts executed in accordance with this policy and procedure must not exceed approved purchasing authority dollar thresholds.

The acquisition method applicable to acquisitions conducted under this policy and procedure is as follows:

* **Exempt by Policy – Proprietary - Software – NON-COMPETITIVELY BID**

Acquisitions exceeding $1,000,000.00 that require an NCB Justification must be conducted using the following acquisition method:

* **NCB Contract (as a result of an approved NCB or SCR Justification)**

See Chapter 1 for purchasing authority policy and procedures and applicable dollar thresholds for contracts.

5.5.4 Approval/ Signature Requirement

The Information Technology (IT) Purchasing Authority Contact (PAC) must approve acquisitions conducted pursuant to this policy and procedure that are under $1,000,000.00. Approval can be accomplished in the FI$Cal system, on the contract, or via a Memorandum.

5.5.5 Procurement Approach

Proprietary software acquisitions (new & maintenance) must adhere to instructions found in Topic 7 of this chapter. In addition to information provided in Topic 7, when acquiring proprietary software or maintenance it may be necessary to include the: State Model Cloud Computing Services Special Provisions (SaaS) as applicable.

5.5.6 Proprietary Document Requirements

A signed letter from the software publisher/manufacturer stating that the software and/or subsequent maintenance being acquired is not available through any other source must be:

* Dated within 12 months of the solicitation.
* Maintained in the procurement file.
* Submitted with the NCB Justification (in instances where an NCB Justification is required).
* Submitted to DGS/PD with requests to conduct acquisitions on behalf of the state agency (in instances where an acquisition exceeds the purchasing authority dollar threshold).

The procurement file must also contain sufficient documentation to support the non-competitively bid nature of the contract (i.e. no resellers exist, no other software exists to meet the business need, etc.). This documentation can be a written note by the procurement professional in the file.

5.5.7 Cost Reasonable Documentation

Purchases although exempt by statute or policy, must still be reasonable in cost and justification. Procurement files shall include documentation to support reasonable pricing for all proprietary software acquisitions (new & maintenance), regardless of value.

State agencies are encouraged to refer to section 5.8.1 of this Chapter to use the “Techniques to determine Fair and Reasonable pricing” when documenting reasonable pricing for proprietary software acquisitions (new & maintenance).

#### Topic 6 – Purchases Exempt from the NCB Process

##### 5.6.0 Purchases Exempt by Statute

Purchases may be awarded without advertising or competitive bidding because of being exempt by statute.

Purchases exceeding a department’s purchasing authority or for departments without any type of purchasing authority, must be submitted to DGS/PD/OTA for review, approval, and execution.

The following purchases may be awarded without advertising or competitive bidding, and without seeking NCB approval, subject to the restrictions noted:

* Emergency contracts, which are necessary for the immediate preservation of life or state property, are exempt from the NCB justification process. Contracts issued because of an emergency may be entered into immediately. However, such contracts are subject to otherwise applicable statutory approval requirements and the reporting requirements.
* IT Goods and Services for which the state has entered into an LPA. Note: This is limited to those LPAs that have been competitively bid or that have been determined to be required for essential services and which have been established by a methodology that assures the state of a reasonable price for the IT Goods/Services offered.

##### 5.6.1 Purchases Exempt By DGS Policy

There are purchases that may be awarded without advertising or competitive bidding and without an NCB, because of being exempt by policy. Although exempt by statute or policy, the purchasing authority dollar thresholds still apply. For purchases that exceed a department’s purchasing authority or for departments without any type of purchasing authority, purchase requests must be submitted to DGS/PD for review, approval, and execution of the purchase.

Purchases that exceed departments purchasing authority or departments without any type of purchasing authority must submit these purchases to DGS for review, approval, and execution. The following purchases may be awarded without advertising or competitive bidding subject to the restrictions noted:

* Proprietary subscriptions, proprietary publications, and/or technical manuals (manuals, law books, technical manuals, technical services related to publications, etc.) regardless of media format, up to $250,000.00.
* Maintenance agreements for equipment that is under documented warranty, or where there is only one authorized or qualified representative, or where there is only one distributor in the area for parts and services. This exception applies only in circumstances where services to be provided are less than $250,000, per year; if over $250,000 per year– an NCB is required.
* Contracts with business entities operating Community-Based Rehabilitation Programs (CRP), which meet the criteria established by Welfare and Institutions Code Section 19404. Note: Exception does not apply to contracts justified pursuant to GC section 19130(a).

##### 5.6.2 Amendments Exempt from Advertising and Competitive Bidding by DGS Policy

Amendments where a protest or other legal action delays the award of a new contract are exempt from advertising and competitive bidding, when the same terms at equal or lower rates apply.

**Note:** These amendments should only apply during the protest period or while legal action is pending. A new purchase document can be executed, but in no case shall this exemption extend beyond six (6) months for a particular amendment.

Amendments to existing IT contracts which were originally competitively bid (including contract executed against a Leveraged Procurement Agreement) which included options for changes (e.g. quantity or time), may be amended consistent with the terms of the original contract providing for such extension(s) if such options were evaluated during the solicitation process.

##### 5.6.3 Purchasing Authority Thresholds

Although exempt from advertising and competitive bidding by policy, purchasing authority dollar thresholds still apply. See Chapter 1 for purchasing authority dollar thresholds.

##### 5.6.4 Supporting Statement

Procurement files must include a statement indicating the basis for exemption from advertising or competitive bidding either by policy or by statute. Documentation must be provided in sufficient detail to support how the exemption is authorized.

Example #1

“This purchase is exempt from advertising and/or competitive bidding based on DGS policy as identified in SCM Volume 2, item 5.5.1.

Example #2

“This purchase is exempt from advertising and/or competitive bidding based upon the use LPA # .

Example #3

“This purchase is exempt from advertising and/or competitive bidding based upon the use of existing law.” Departments shall specify the law being utilized for this exemption within the justification.

##### 5.6.5 Cost Reasonableness

Purchases although exempt by statute or policy, must be reasonable in cost and justification. Departments must provide the basis of the comparison to include items such as market rates, contract pricing, historical pricing, cost breakdown, etc. Procurement files must include documentation to support fair and reasonable pricing.

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#### Topic 7 – Procurement Approach for Exempt and NCB Contract Activities

##### 5.7.0 Acceptance of State Terms & Conditions

When conducting IT purchasing activities that are exempt from competitive bidding or advertising or that are NCB contract purchases, a written offer and acceptance of the state’s terms and conditions shall be obtained when transacting business with the only known supplier.

##### 5.7.1 Creating a Solicitation

The written offer and acceptance may be obtained by having the supplier respond to a solicitation document that is only provided to the one supplier. Buyers should use the Request For Quotation (RFQ) format as provided in Chapter 4, Section B, Topic 3. Conversely, a buyer also has the option to develop their own solicitation document that contains the following elements:

* Date and time the response is due,
* Details of the purchase, including quantities, description, support coverage, coverage dates, etc.,
* Fill-in space or a cost sheet for the supplier to provide pricing, purchasing standard, EPP and SABRC (see chapter 3 for - Socio-Economic),
* Request for the signature of the authorized supplier representative that can bind the company contractually,
* Reference or hardcopy the applicable state General Provisions and any additional contract modules (specific to IT Goods and Service) or special provisions applicable to the department (i.e. Cloud, etc.).

When using this solicitation approach to conduct business with the only known supplier, the supplier must be provided with an opportunity to review and accept the state’s terms and conditions prior to the state executing the purchase document. This practice avoids the possibility of a dispute with suppliers once the purchase document is executed.

##### 5.7.2 Supplier Contracts and Forms

Contract forms, license agreements, or ordering forms provided by suppliers shall not be signed by state employees. These most often contain inconsistent terms and conditions, and results in conflict with the state’s contract terms and conditions.

Buyers must seek department legal advice and may contact PAMS at PAMS@dgs.ca.gov for assistance.

##### 5.7.3 Signing Suppliers’ Software Licenses is Prohibited

Signing a supplier’s software license agreement is prohibited. A review of the supplier’s software license must take place before a supplier’s software license agreement may be considered for incorporation into a purchase document.

Buyers must seek department legal advice and contact DGS/PD/OTA for assistance.

#### Topic 8 – Fair and Reasonable (F&R) Acquisition Method Purchases

##### 5.8.0 Fair and Reasonable Acquisition Method

State agencies may conduct acquisitions and execute contracts using the Fair and Reasonable Acquisition Method for transactions valued less than $10,000.00. An NCB is **not** required when using the F&R acquisition method.

When using this acquisition method, it is required that the pricing be evaluated and determined fair and reasonable by following one of the techniques outlined in 5.8.1 below.

##### 5.8.1 Techniques to Determine Fair and Reasonable Pricing

Buyers must use one of the following five techniques to determine whether or not a supplier’s price can be determined to be fair and reasonable:

| **Technique** | **Description** |
| --- | --- |
| Price comparison | A buyer has obtained and documented quotes or offers within the prior 18-month period from other responsible suppliers, which provides evidence that a price obtained is deemed fair and reasonable. |
| Catalog or market pricing | The price offered is supported by an established and verifiable catalog or market pricing media issued by a responsible supplier and/or through an established reputable forum. In addition, the pricing structure provided is one that a prudent buyer would accept as a reasonable representation of existing market value. |
| Controlled pricing | The price offered is set by law or regulation; competitively bid master agreement or statewide contracts, etc. |
| Historical pricing | A buyer is able to demonstrate that other transactions occurring within a prior 18-month period, which shows that historical prices for similar acquisitions have yielded no material change in cost. **Note:** The definition of “material change” for this technique is deemed greater than a 15% increased difference between current and historical pricing. |
| Cost/benefit analysis | A buyer can demonstrate that their level of experience in the procurement field provides a sufficient knowledge base, which clearly indicates that the acquisition cost is low. The cost to the state of verifying the pricing fairness would most likely be more than any potential benefit that could be reasonably gained from searching the marketplace for lower price comparable acquisitions. |

##### 5.8.2 Compare Identical Situations

When evaluating fair and reasonable pricing using price comparisons, catalog/market price, and/or historical pricing, buyers must base the comparisons on identical situations or those with small variations that do not affect pricing.

##### 5.8.3 Exceptions

State agencies shall not use the F&R Acquisition Method to purchase customized IT goods requiring detailed specifications. Below are examples:

* Customized Servers
* Customized Workstations

##### 5.8.4 File Documentation

By using the F&R Acquisition Method, state agencies shall document the technique used to support the F&R pricing. Documentation shall be maintained within the procurement file.

#### Topic 9 – Interagency Agreements

##### 5.9.0   Introduction

An Interagency Agreement (IAA) is an agreement between two or more state departments (GC § 11256) with one furnishing services, materials or equipment to, or performing work for the other state department(s). This topic provides information on when IAAs are used, special provisions, and requirements.

##### 5.9.1  When IAAs are Used

IAAs are used when contracting with:

* Another state department,
* A California State University, or
* A University of California campus (UC) if the UC agrees to calculate cost based upon the provisions of the State Administrative Manual (SAM)

##### 5.9.2  Unique Considerations

IAAs:

* Are exempt from
	+ Advertising in the California State Contracts Register
	+ Competitive bidding
* Do not include the DVBE participation requirement if the department is using its own personnel
* May provide for advancing of funds (GC §§ 11257 – 11263 and the SAM section 8758.1)

##### 5.9.3  When IAAs are Not Used

IAAs may not be used for contracts with:

* Campus Foundations
* The Federal government
* Local entities
* Other states

Additionally:

* Agencies shall not use IAAs to obtain third party goods or services from any third parties (for example: State Agency A and B need to purchase new computers. State Agency A cannot purchase the computers for both Agencies then enter into an IAA to sell them to Agency B.);
* Agencies shall not use IAAs to circumvent any state law or contracting requirements.

##### 5.9.4  Dollar Thresholds

Routine computer processing and related IT services that the California Department of Technology (CDT) is required to provide to “customer” departments are without dollar limits.

Departments should refer to their approved PAAL for the dollar threshold applicable to all other IT IAAs.

Please contact the Purchasing Authority Unit at: purchasing authority management section for assistance.

##### 5.9.5   Authority to Conduct Purchasing Activities Using IAAs

Executing IAAs for services is part of a department’s approved purchasing authority. Departments with IAA purchasing authority may execute an IAA subject to the following:

* The current General Terms and Conditions for Interagency Agreements (GIA), including SAM 8752 and 8752.1 cost provisions, are used without modification and
* The agreement has no direct or indirect subcontracting (GC 11256).

Although these acquisitions can be conducted under purchasing authority, review/approval services are available on request for any contract, regardless of value or complexity.

If the department does not have purchasing authority or if an IAA exceeds the department’s approved purchasing authority dollar threshold, and is not part of a reportable IT project, departments must workflow the IAA to DGS/PD One Time Acquisition Unit for review and approval.

When the contract is part of a reportable IT project and exceeds the delegated purchasing authority dollar threshold issued by DGS/PD, the state department must contact CDT in accordance with PCC § 12100.

##### 5.9.6   Requirements for Executing

The requirements to execute an IAA are:

* Departments must use the current General Terms and Conditions for Interagency Agreements.
* The department requesting and paying for the services shall be the “State Agency” and the department rendering the services shall be the “Contractor.”
* The Purchasing Authority number and the contract number shall be that of the State Agency.

##### 5.9.7   Additional IT Considerations

All pre-procurement rules must be followed including the signed Certificate of Compliance with state IT Policies (SIMM 71B), in accordance with SAM §§ 4819.41 and 4832.

If the IT/IAA is to procure services from a consolidated data center in support of multiple projects, the following must be certified (SAM § 4832):

* The funding level is appropriate for the nature and scope of the services to be supplied;
* The services are consistent with CDT policy; and
* Project reporting for the various projects is current.