7. MISCELLANEOUS CONTRACTING ISSUES

7.00 INTRODUCTION

This chapter covers miscellaneous contracting issues that arise in various types of contracts.

7.01 TABLE OF CONTENTS
(Rev 04/26)

Drug-Free Workplace Act of 1990	7.55
Equipment Rental Agreements	7.60
Purchase Options	7.61
Lease/Purchase Analysis for Equipment	7.62
Nondiscrimination Program	7.65
Recycled Product Content	7.70
Multiple Year Contracts	7.80
Contract Termination Clauses	7.85
Indemnification	7.86
Disclosure of Proprietary Information by Contractor	7.90

7.05 CIVIL SERVICE CONSIDERATIONS AND UNION NOTICE REQUIREMENTS
(Rev 04/26)

A. Basic considerations are as follows:

Contracting for Personal Services, in lieu of using civil service personnel, is permitted only if the standards outlined in GC § 19130 (a) or (b) are met. (See 2 and 3 below.)

1. Section 19130(a) permits contracting for personal services to achieve cost savings.

   a. Any State agency proposing to execute a contract based on cost savings to the State as justification for not using civil service personnel, must first notify the State Personnel Board of its intention (GC § 19131; 2 CCR section 547.69).

   b. Section 547.73 of the SPB regulations provides that the cost savings achieved shall be either 10% or more of the civil service costs of performance or shall be at least $50,000 in 1988 dollars (as annually adjusted and communicated by SPB) and at least 5% of the civil service cost of performance. Pursuant to SPB Memorandum, as of January 17, 2017, the 1988 dollar equivalent, as adjusted under the California Consumer Price Index, is $105,757.178. (See SPB website for future annual updates.)

c. When submitting a GC §19130(a) contract to DGS/OLS for approval, the contracting department must include a copy of the Notice of Intent filed with the SPB and, if an employee organization requested review, a copy of SPB's decision.

2. GC § 19130(b) permits contracting for personal services when any of the requirements of GC § 19130(b) are met. (See also SPB Regulations 2 CCR § 547.60.)

a. Contracts awarded on the basis of GC § 19130(b) are subject to review at the request of an employee organization representing State employees. For standards of review see PCC § 10337.

b. SPB regulations require that whenever an agency executes a personal services contract under GC § 19130(b), the agency shall document, with specificity and detailed factual information, the reasons why the contract satisfies one or more of the conditions specified in GC § 19130(b).

1) The written justification shall be signed by a person who is authorized to do so and who signs based on his or her personal knowledge, information, or belief that the written justification correctly reflects the reasons why the contract satisfies GC § 19130(b). The date of signing, the representative's name, title, address, email address, and telephone number shall be included and legible. (Tit. 2 CCR § 547.60(a).)

2) The agency shall maintain the written justification for the duration of the contract and any extensions of the contract or in accordance with the record retention requirements of Tit. 2 CCR § 26, whichever is longer. (Tit. 2 CCR § 547.60(b).)

3) If approval from DGS is required for a contract covered by GC § 19130(b), the agency shall include with its contract transmittal the written justification described in Tit. 2 CCR § 547.60. (Tit. 2 CCR § 547.60.1.)

c. Departments must retain all data and information relevant to the contract and necessary for a specific application of the standards set forth in GC § 19130(b) in the event that the State Personnel Board's review is requested. For standards of review see PCC § 10337.

B. GC § 19130(c) requires that all persons who provide services to the State under conditions that constitute an employment relationship shall, unless exempted by Article VII (Section 4) of the California Constitution, be retained under an appropriate civil service appointment. Therefore, State law and policy require that

each State agency's contract for services with individuals be executed and administered in a manner consistent with the establishment of an independent contractor status and not the creation of a civil service appointment. (See Labor Code §§ 2750.3, 3351; Unemp. Ins. Code § 621.)

C. Contract disapproval by the SPB: GC § 19135 provides:

1. If a contract is disapproved by SPB or its delegate, a state agency shall immediately discontinue that contract unless ordered otherwise by SPB or its delegate. The state agency shall not circumvent or disregard SPB's action by entering into another contract for the same or similar services or to continue services that were the subject of the contract disapproved by SPB or its delegate.

2. A state agency ordered to discontinue a contract shall serve notice of the discontinuation of the contract to the vendor within 15 days from the SPB's final action unless a different notice period is specified. A copy of the notice must also be served on the SPB and the employee organization that filed the contract challenge. Failure to serve this notice may be grounds for rejection of future contracts for the same or similar services that were discontinued.

D. When contracting outside state civil service pursuant to one or more of the conditions set forth in Government Code section 19130(b), agencies must comply with applicable statutory, regulatory and MOU requirements to provide notice to unions. This notice is required for original contracts and amendments.

1. Government Code section 19132 union notice requirements.

a. Unless a personal services contract pursuant to GC 19130(b) is necessary due to a sudden and 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 contract shall not be executed until the state agency proposing to execute the contract has notified all organizations that represent state employees who perform the type of work to be contracted. (GC § 19132(b)(1).)

b. The notice shall include the following: a full copy of the proposed contract, information to enable employee organizations to determine the type of work to be performed under the contract, applicable exemption criteria under Government Code section 19130(b), estimated value of the contract, the contract term and the employee organizations notified of the contract If the contracting agency cannot determine which employee organizations should be notified or concludes that no represented employees perform or could perform the work, the contracting agency shall notify all employee organizations representing each of the bargaining units within state civil service. To the extent allowed by the California Public Records Act or other law, the notifying agency may redact specific confidential or

proprietary information from the notice. (GC § 19132(b)(2); GC § 7920.000 et seq.; Tit. 2 CCR § 547.60.2.)

c. DGS has established a process for agencies to certify notification compliance. (GC § 19132(b)(3); historical reference: MM 14-01.)

i. Notifications shall be made to the employee organization contacts identified in their respective bargaining unit agreements or as otherwise indicated by the employee organization. CalHR will maintain a list of these representatives on its website: https://www.calhr.ca.gov/state-hr-professionals/Pages/personal-services-contracts.aspx

ii. Contracts requiring DGS approval shall not be submitted for approval until all parties have signed and the appropriate employee organizations notified.

iii. Certification of compliance shall be made by the highest-level official of the contracting agency or his or her designee.

a) For contracts requiring a STD 215, the certification is done as indicated on the STD 215 (check box and signature).

b) For contracts not requiring a STD 215, the certification shall be on a separate signed sheet in the contract file that says: "I hereby certify compliance with Government Code Section 19132(b)(1)."

iv. It is recommended that notice be provided as soon as a fully developed contract is available to enable reasonable time for review. This timing could vary depending on the type, complexity, amount, and method of contract award.

v. The law does not specify the mode of communication. Notice could be done, for example, electronically by email, mailing electronic media, or posting to a website that automatically notifies the union representative(s) and that provides easy access to the full copy of the proposed contract.

2. Bargaining Unit 2 notice requirements: Government Code section 11045 establishes separate notice requirements for legal services contracts. (See SCM 3.07.B and C.)

3. Other bargaining unit notice requirements: Some bargaining unit contracts/MOUs have additional requirements for providing notice of solicitations and/or contracts to affected unions. Agencies should review bargaining unit contracts/MOUs to ensure the agencies are aware of and are complying with these notifications.

7.10 CONFLICTS OF INTEREST
(Rev 6/17)

A. IS THERE A CONFLICT OF INTEREST? The phrase "conflict of interest" covers several subjects. It requires State agencies to closely examine who is doing the work under the contract. Agencies should develop a plan to review conflict of interest issues.

IS OR WAS THE CONTRACTOR A STATE EMPLOYEE? State agencies need to determine whether the contractor is a former or current State employee who is prohibited from contracting under the PCC §§10410 – 10411 or GC 87401 et seq.

1. CONSULTANT CONTRACTS: State agencies must determine whether a consultant's proposed duties create any reporting requirements under the Political Reform Act.

   Under some circumstances, consultants may be required to report economic interests; may be prohibited from receiving gifts; and/or may be disqualified from participating in certain decisions. Covered consultants may include:

   a. Individuals performing services acting as a consultant with authority to:

      - Approve a rate, rule or regulation.
      - Adopt or enforce a law.
      - Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement.
      - Authorize your agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval.
      - Either grant agency approval to a contract that requires your agency's approval and to which your agency is a party; or grant approval to the specifications for such a contract.
      - Grant agency approval to a plan, design, report, study, or similar item.
      - Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision of the agency.

   b. Individuals who serve, under contract, in a staff capacity with the agency and in that capacity participate in making a governmental decision as defined in 2 CCR 18702.2.

c. Individuals who perform the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under GC § 87302.

2. IS THERE A PROHIBITED FINANCIAL INTEREST PRESENT? State employees and certain consultants may be prohibited from participating in decisions or participating in "making contracts" if they have a financial interest. See GC §1090 et seq. and GC § 87400 et seq. Contracts made in violation of GC § 1090 are void (GC § 1092).

3. IS THERE A FOLLOW-ON CONTRACT INVOLVED? Consultants are prohibited from bidding on, or being awarded a contract that is required, suggested, or otherwise deemed appropriate in the end product of a previous consulting contract with them. See PCC § 10365.5 to determine applicability.

B. RESOURCES

1. Fair Political Practices Commission: see Fair Political Practices Commission Homepage

2. Examine your department's Conflict of Interest Code to determine the reporting requirements for covered consultants.

3. Ethics Training: On line training (DOJ), see: www.caag.state.ca.us/consultants/index.htm and www.caag.state.ca.us/ethics/index.htm.

4. Your departmental legal office.

C. AGENCY RESPONSIBILITY

1. Agencies/departments must indicate on the Std. 215 that they have evaluated the proposed contract for any potential conflict of interest issues.

2. It will be presumed that an affirmative ("Yes") indication means that the department has made a determination that there are no facts known or reasonably known that would disqualify the proposed contractor from legally performing the contract.

3. DGS reserves the right to conduct an independent review for conflicts of interest during the course of its standard contract review. However, this does not relieve agencies from performing their review per B.2., above.

7.11 INTELLECTUAL PROPERTY
(New 04/22)

State agency services contracts may include Intellectual Property (IP) components, as described below. By statute, DGS was designated as the agency responsible for

creating and implementing the state's first IP program to help maximize the value of state-owned IP while at the same time promoting the public benefit. (GC § 13988.) When a contract implicates the state's IP interests, the contract should be drafted to include language that protects the state's interests. Additional information about DGS's IP program can be found on DGS/OLS's website.

A. **Intellectual Property**. "Intellectual property" (IP) means intangible assets that are subject to statutory protection under applicable patent, copyright, and trademark law. Intellectual property includes, but is not limited to, inventions, industrial designs, identifying marks and symbols, electronic publications, trade secrets, and literary, musical, artistic, photographic, and film works. (GC § 13988.1(d).)

B. **DGS Intellectual Property Program.** DGS's IP program includes:

1. **Intellectual Property Database.** Developing a database of IP resources to track state-owned IP. The law requires state agencies to cooperate by, among other things, providing an agency list of IP resources to DGS by November 30, 2016, with updates to be provided annually thereafter on a form prescribed by DGS.

2. **Intellectual Property Management Plan.** DGS has created a sample management plan for state-owned IP that includes factors state agencies should consider when deciding whether to sell or license their IP and issues related to placing state-funded IP into the public domain. It is recommended state agencies adopt this plan to better protect IP assets.

3. **IP Outreach Campaign.** DGS is charged with developing an outreach campaign informing state agencies of their rights concerning IP created by their employees.

    a. DGS has formed an IP Advisory Group consisting of representatives of various state agencies to assist in the development of IP policies, procedures, and contractual forms, and to guide the direction of the state's IP efforts.

    b. DGS will also periodically reach out to state agencies and departments about IP rights, abilities, and resources though a variety of channels.

4. **Contractual Provisions Regarding IP.** DGS has developed recommended forms and contractual provisions regarding IP ownership and related issues. With respect to Contractor obligations, it is recommended that each agency or department require the Contractor to represent that it is the owner or authorized user of any third-party IP used in a project, to warrant that it has

    the legal right to use third party IP connected with a project, and to grant the State of California a fully paid license to use third party IP arising from or included in a project.

5. **DGS IP Web Portal**. Further information and resources are located at the DGS IP web portal at https://olsip.apps.dgs.ca.gov/.

7.12 GENERATIVE ARTIFICIAL INTELLIGENCE (GenAI) (Rev 02/25)

A. Executive Order N-12-23 establishes statewide policy for the State's use of Generative Artificial Intelligence (GenAI).

B. GenAI Definition:

"An artificial intelligence system that can generate derived synthetic content, including text, images, video, and audio that emulates the structure and characteristics of the system's training data." (See Govt. Code § 11549.64, SAM 4819.2 and any updates thereto.)

C. Required GenAI Solicitation Language: All written non-IT services solicitations must include the following GenAI notification clause:

"The State of California seeks to realize the potential benefits of GenAI, through the development and deployment of GenAI tools, while balancing the risks of these new technologies.

Bidder / Offeror must notify the State in writing if it: (1) intends to provide GenAI as a deliverable to the State; or (2), intends to utilize GenAI, including GenAI from third parties, to complete all or a portion of any deliverable that materially impacts: (i) functionality of a State system, (ii) risk to the State, or (iii) Contract performance. For avoidance of doubt, the term "materially impacts" shall have the meaning set forth in State Administrative Manual (SAM) § 4986.2 Definitions for GenAI.

Failure to report GenAI to the State may result in disqualification. The State reserves the right to seek any and all relief to which it may be entitled to as a result of such non-disclosure.

Upon notification by a Bidder / Offeror of GenAI as required, the State reserves the right to incorporate GenAI Special Provisions into the final contract or reject bids/offers that present an unacceptable level of risk to the State.

Government Code 11549.64 defines "Generative Artificial Intelligence (GenAI)" as an artificial intelligence system that can generate derived synthetic content, including text, images, video, and audio that emulates the structure and characteristics of the system's training data."

D. Before proceeding with a GenAI purchase, releasing a solicitation that includes the purchase of GenAI, or approving a contract that includes services generated by GenAI, departments must confirm with their department CIO that the purchase/contract may proceed. Confirmation must be kept in the contract file.

CIOs are required to conduct a risk assessment and potential consultation with the California Department of Technology (CDT) before proceeding with a purchase that includes GenAI. Consultation with CDT is dependent upon the risk assessment outcome or upon CDT's request for low-risk transactions (refer to CDT policy for details).

E. Departments are no longer required to include GenAI Contract language in their contracts, these provisions are now in the State's standard General Terms and Conditions (GTCs) available on the DGS/OLS website.

F. All transactions where GenAI is purchased must be identified and reported in FI$Cal State Contract and Procurement Registration System (SCPRS). See SCM volume 2 sections 2200.1 and 2300 for additional instructions.

G. Please see SCM volume 2 section 2300, the State of California GenAI Guidelines, and the GenAI Toolkit (https://www.genai.ca.gov/choose-your-journey/) for additional information and requirements, including when CDT consultation is required.

7.15 REPORTING OF CONTRACTING PRACTICES
(Rev 04/22)

A. PCC § 10111 requires DGS to provide a report on contracting activity. Accordingly, State agencies must report information about the following to DGS's Office of Small Business and Disabled Veteran Business Enterprise Services (OSDS) annually by August 1 (using DGS PD 810 forms):

1. Consulting services contracts (PCC § 10111(a));

2. Noncompetitively bid consulting services contracts (PCC § 10111(a)(4));

3. Consultant contracts (PCC § 10111(b));

4. Disabled Veteran Business Enterprise (DVBE) participation in contracts (PCC §§ 10111(d), 10111(e)(7));

5. Small business (SB) and microbusiness (MB) participation in contracts (PCC § 10111(e)); and

6. Contractor participation by race, ethnicity, gender, and sexual orientation to the extent these characteristics have been voluntarily reported (PCC § 10111(f)).

B. Annual reporting must include but is not limited to the SB/DVBE participation on all state contracts, purchase orders and Cal-Card purchases, to ensure that annual participation goals are met. This report is known as the Consolidated Annual Report (CAR) and is filed using either FI$Cal or the DGS PD 810 forms. When reporting these activities, state agencies must ensure the accuracy of this data by implementing and conducting a thorough review of the proposed report prior to submission to DGS. This review must also include a sampling of the state agency's highest dollar value contracts that included DVBE, MB, SB,

Nonprofit Veteran Service Agencies, Small Business for the purpose of public works, and sub-contracting participation. This sampling must verify and reconcile:

- The amounts awarded.
- The certification status at time of contract award.

State agencies must save and make available upon request to DGS a written statement signed by the Procurement and Contracting Official confirming completion of the review of the CAR, which shall include:

- An itemized list of the sampled contracts.
- A brief explanation of the review sampling methodology applied.

C. For those departments that are transacting business in FI$Cal, reports can be compiled and transmitted through FI$Cal. For departments that are not transacting business in FI$Cal, Volume 2 of the State Contracting Manual and the Procurement Division's web page (https://www.dgs.ca.gov/PD/Services/Page-Content/Procurement-Division-Services-List-Folder/File-a-Consolidated-Annual-Report) contain information and instructions regarding forms to provide in connection with reporting requirements and where to send the reports, as well as the dates by which reports must be submitted.

D. In addition, State agencies are required to report information on the following:

1. Late payments to DGS/OSDS, on an annual basis, within 90 calendar days following the end of each fiscal year (GC § 927.9);

2. Contract award STD 16 (to CRD at CalcivilrightsProgramsCompliance@calcivilrights.ca.gov, within 10 days of contract award (GC § 12990(b); 2 CCR 11114); and

3. Independent Contractors (to the Employment Development Department, on Form DE 542, within 20 days of entering into a contract or contracts that in the aggregate equal or exceed $600 in any year (Unemployment Insurance Code § 1088.8(c)).

E. Post-evaluation of non-IT consulting contracts. (Also see SCM I, § 3.02.5.)

1. State agencies are required to prepare post evaluations on form STD 4 for all completed consulting services contracts of more than $5,000 or more (PCC §§ 10367, 10369).

2. Post-evaluation forms must be prepared within 60 days of completion of the contract (PCC § 10369(d)).

3. Copies of all post-evaluations must be kept on file by the awarding State agency for a period of 36 months (PCC § 10369(e)).

4. One copy of an unsatisfactory evaluation must be placed in the State

agency's contract file, and another copy must be sent to DGS/OLS (PCC § 10369(e)). A State agency's failure to send a negative (unsatisfactory) post-evaluation to DGS may be grounds for rejection of future contracts or modifications of that agency's exemptions (PCC § 10370).

5. An unsatisfactory evaluation must be sent to the contractor within 15 days. The contractor has the right, within 30 days of receipt of an unsatisfactory evaluation, to submit a written response that shall be filed both with the unsatisfactory evaluation in the State agency's contract file and DGS (PCC § 10369(f)).

7.16 REPORTING ANY PROPOSED EXTENSION/RENEWAL OF NO-BID CONTRACTS OF $75,000,000 OR MORE

(New 06/24)

Pursuant to PCC section 10295.8, for a contract awarded without competitive bidding for the acquisition of goods or services of $75,000,000 or more, entered on or after January 1, 2023, the awarding agency shall submit to the Joint Legislative Budget Committee information regarding the terms and conditions of any proposed extension or renewal of the contract on or before the contract end date.

7.20 PROMPT PAYMENT

(Rev 04/22)

A. Prompt Payment Act and late payment penalty. Under GC § 927 et seq., State agencies which acquire property or services pursuant to a contract with a business must pay that business for each complete delivered item of property or services within 45 days from the date set forth in the contract or, if no payment date is specified in the contract, submit a correct claim schedule to the State Controller's Office (SCO) within 30 calendar days after receipt of the undisputed invoice. The SCO must pay the business within 15 days of receipt of the invoice from the State agency. The clock starts to run when an invoice is received by the department, not when it is received by the accounting office. DGS/OLS will not approve any contracts with payment periods longer than 45 days.

If payment is not made within the times specified above, an interest penalty fee at a rate of 1% above the Pooled Money Investment Account earning rate for the previous year must be paid. For non-small businesses, the penalty is waived if the penalty is $100.00 or less. (See GC § 927.6 and SAM § 8474).

B. Small business prompt payment. Additional provisions apply for certified small businesses (GC § 927.6(a) and SCM 1, chapter 8).

7.25 PAYEE DATA RECORD

(Rev 11/12)

A. Each contractor who enters into a contract with the State must provide a taxpayer identification number; i.e., the Federal Employer Identification Number or the Social Security Number that has been assigned to the contractor by the Federal government. The taxpayer identification number is entered on the Payee Data Record – STD 204, which is to be retained in the awarding agency's accounting or business services office. A Taxpayer ID number is not required for a reimbursement contract.

B. The law requires that any agency requesting the disclosure of a social security number must advise the provider as follows:

1. Whether disclosure is mandatory or voluntary

2. By what statutory authority the number is solicited

3. The intended use of the number

7.29 EQUIPMENT PURCHASES
(Rev 11/12)

A. When equipment is purchased or built with State funds as part of the contract the contract must clearly state that title to any equipment purchased or built with State funds will vest in the State. On termination of the contract, the State may:

1. Request such equipment be returned to the State, with costs incurred by the contractor for such return being reimbursed by the State.

2. Authorize the continued use of such equipment for work to be performed under a different agreement or contract.

B. The State may, at its option, repair any damage or replace any lost or stolen items and deduct the cost thereof from the contractor's invoice to the State, or require the contractor to repair or replace any damaged, lost, or stolen equipment to the satisfaction of the State with no expense to the State. In the event of theft, a report must be filed immediately with the CHP (SAM § 8643).

C. The contractor should maintain an inventory record for each piece of non-expendable equipment purchased or built with funds provided under the terms of a contract. The inventory record of each piece of such equipment should include the date acquired, total cost, serial number, model identification (on purchased equipment), and any other information or description necessary to identify said equipment. Non-expendable equipment so inventoried are those items of equipment that have a normal life expectancy of one year or more and an approximate unit price of $5,000 or more. In addition, theft-sensitive items of equipment costing less than $5,000 should be inventoried. A copy of the inventory record must be submitted to the State on request by the State (SAM § 8600).

D. Procedures for the handling and accounting of equipment through contracts are

the same as those for handling through regular State purchasing.

7.30 CONTRACT BUDGETS
(Rev 6/23)

A. All contracts should have clear budget and payment provisions. This helps to:
   1. Ensure a meeting of the minds between contracting parties
   2. Avoid disputes
   3. Establish the applicable rate(s) and total(s) a contractor can invoice for
   4. Establish the timing and amounts for invoicing any progress payments

   5. Establish if a percentage will be withheld from each payment and when the withhold will be paid (see SCM section 7.33 and Pub. Contract Code §10346)
   6. Establish a clear correlation between what the state is receiving in exchange for amounts paid

B. Agencies should create budget and payment provisions that are appropriately tailored to the type of work or project. Factors to consider also include, for example, contract length, deliverables, complexity, overall cost, and any funding restrictions or requirements. Note: Advance payments cannot be made without statutory authority (see SCM section 7.32).

C. Lump sum vs. Unit rate approach -- Contracts must be clear as to whether payment(s) will be made as a lump sum or based on unit rates.

   1. Lump sum/fixed price approach
      a. This is when the state pays a specified amount for a fully completed deliverable.
      b. A lump-sum payment approach should only be used if the agency can clearly and fully describe the entirety of the deliverable in the scope of work. I.e. what exactly will the state receive in exchange for the lump sum payment?

   2. Unit rate approach
      a. Examples of a unit rate approach include: per test, per pick-up, and as-needed per hour services
      b. If a competitively bid contract will involve more than one type of unit (e.g. different types of tests), agencies should use a cost bid sheet that includes estimated volumes of each unit type, to allow a realistic and apples-to-apples evaluation of competing bidders' unit pricing.

D. Consulting contracts (see SCM section 3.02). When preparing solicitations and contracts for consulting services, agencies must follow applicable Public Contract Code provisions, including but not limited to section 10371(c) which requires:

   1. "detailed criteria and a mandatory progress schedule for the performance of the contract" and

2. that each contractor "provide a detailed analysis of the costs of performing the contract."

E. Agencies need to pre-plan their budget and payment provision approach prior to issuing solicitations to ensure the solicitation, bid cost sheet, bids/proposals, and resulting contract all align.

7.31 AVAILABILITY OF FUNDS
(Rev 3/03)

A. If the contract funding spans more than one fiscal year's appropriation, the contractor must be advised in writing as follows:

This contract is valid and enforceable only if sufficient funds are made available by the Budget Act of the appropriate fiscal year for the purposes of this program. In addition, this contract is subject to any additional restriction, limitations or

conditions enacted by the Legislature, which may affect the provisions, terms, or funding of this contract in any manner.

B. Services should be paid for out of the funding for the fiscal year during which they are rendered.

7.32 ADVANCE PAYMENTS
(Rev 04/22)

Advance payments by the State are permitted only when specifically authorized by statute and should be made only when necessary. Contracts or agreements containing provisions for advance payments by the State should preferably provide for small periodic payments rather than the total contract price or lump-sum advances (GC §§ 11256 – 11263, 11019 and 12502).

7.33 PROGRESS PAYMENTS
(Rev 3/03)

A. A progress payment is a partial payment for a portion or segment of the work needed to complete a task.

B. Not less than 10% of the contract amount shall be withheld pending final completion of the contract. If a contract consists of the performance of separate and distinct tasks, then any funds withheld for a particular task may be paid upon completion of that task (PCC § 10346).

Note: Separate and distinct tasks do not usually occur when the contract is for a finished project report or plan. To determine whether a particular task is separate and distinct you must decide if later tasks build on it. For example, if the contract requires the writing of a manual the completion of each chapter is not a separate and distinct task. The 10% withhold should

not be paid until the manual is completed satisfactorily.

C. No State agency shall make progress payments on a contract unless it first has established procedures approved by DGS/OLS, to ensure that the work or services contracted are being delivered in accordance with the contract (PCC § 10346).

D. Recommended policy for State agencies:

1. Discourage progress payments whenever possible.

2. Do not allow progress payments on contracts of less than three (3) months.

3. If progress payments are to be made, they should be made not more frequently than monthly in arrears or at clearly identifiable stages of progress, based upon written progress reports submitted with the contractor's invoices.

4. Progress payments should be based on at least equivalent services rendered. (Hours worked should not be the sole basis for progress payments.)

5. Progress payments shall not be made in advance of services rendered.

6. Contracts shall require a withhold of 10% of each progress payment either pending satisfactory completion of the contract or completion of a separate and distinct task.

   Note: If the contract is competitively bid this term should be noted in the bid

7. Establish a procedure to indicate the amount to be withheld on invoices.

8. Establish a procedure to obtain the amounts withheld.

7.34 CONTRACT PAYMENT BY STATE PURCHASE CARD, CAL-CARD
(Rev 6/17)

Cal-Card is a payment mechanism only. It shall not be used to circumvent service contracting rules.

If you intend to use Cal-Card as a payment mechanism, place this information in your solicitation document and contract.

CAL-Card Payment Provisions are required to follow this basic format:

"CAL-Card PAYMENT PROVISIONS":

Upon receipt of an itemized invoice, in arrears, stating the goods/services provided, time period covered, detailed costs and the contract number, the

Contract Manager will notify the Contractor of payment authorization. The Contractor will provide the Contract Manager a copy of the itemized, transaction receipt showing payment was received, the invoice, the contract number and the CAL-Card card verification number charged.

Contractor to send invoices to:

Name, mailing address and phone number of the Contract Manager/Cardholder.

Name, mailing address and phone number of Contractor payment authorization contact.

Additional information regarding the CAL-Card Program is located on the DGS/PD website.

Questions regarding the CAL-Card Program may be directed to the Statewide CAL-Card Contract Administrator, Department of General Services, Procurement Division, 707 Third Street, 2nd Floor, West Sacramento, CA 95605, http://www.dgs.ca.gov/pd/Programs/CALCard.aspx.

7.40 INSURANCE REQUIREMENTS
(Rev 04/26)

A. For most types of services contracts, departments retain responsibility for assessing the need for and the amount of insurance, obtaining proof of insurance, and including appropriate solicitation and contract language as applicable.

B. Contracts for hazardous activities are required to have insurance (See SCM 1, section 3.12). Insurance for hazardous activities shall meet the following requirements:

1. The insurance must be issued by an insurance company acceptable to DGS/ORIM or be provided through partial or total self-insurance acceptable to DGS/ORIM.

2. The contractor must furnish to the State a certificate of insurance showing that a limit of liability of not less than $1,000,000 per occurrence for bodily injury and property damage liability combined, is presently in effect for the contractor.

   Note: $1,000,000 per occurrence is the minimum acceptable limit of insurance; higher limits should be required in cases of higher-than-usual risk.

3. At a minimum, the certificate of insurance shall show that the contractor is protected through commercial general liability insurance. Additional insurance may be required. Please refer to the following list of examples:

- Automobile Liability – if motor vehicles are used in the performance of the work.
- Aircraft Liability – if an aircraft is used in the performance of the work.
- Crime Coverage – if work involves handling of State money or securities.
- Pollution Liability – if work involves the handling of hazardous waste or the application of chemicals.
- Professional Liability – if work is of a professional nature such as physicians, architects, engineers, accountants, or consultants.
- Watercraft Liability – if watercraft is used in the performance of the work.
- Workers' Compensation – a statutory requirement for contractors with employees.

4. Contractor is responsible to notify the State within 5 business days of any cancellation, non-renewal or material change that affects required insurance coverage.

5. The policy(ies) must provide additional insurance language as follows:

   The State of California, its officers, agents and employees are included as additional insured, but only with respect to work performed for the State of California under the contract. The additional insured endorsement must accompany the certificate of insurance.

6. The certificate of insurance shall meet such additional standards as may be determined by the contracting State agency, either independently or in consultation with DGS/ORIM, as necessary for protection of the State.

   Note: DGS/ORIM is available to provide additional consultation on all insurance and liability matters.

7.45 CONTRACTS WITH NO DOLLAR AMOUNT

In agreements in which only in-kind services are used and in which the performance is other than monetary, the consideration must be valued on a monetary basis for the purpose of determining whether DGS/OLS approval is required.

7.50 AUDITS
(Rev 04/22)

A. **Audit Requirement:** All contracts for expenditure of public funds in excess of $10,000 must contain a clause stating that the contract is subject to audit by the State Auditor (GC § 8546.7). Also, federally funded contracts are often subject to audit in accordance with Federal regulations. In addition, the awarding agency has the general responsibility for determining compliance with the terms and conditions of its contracts and may have need of contractual audit authority.

B. **Records Keeping and Retention:** To facilitate being able to conduct an audit, if needed, the contractor must agree to maintain the records involved with the performance of the contract and to make those records reasonably available for audit. The minimum period of time for retention of contract records is three years after final payment of the contract (GC § 8546.7). In the event of a contract performance or payment dispute, this minimum is extended until the dispute is resolved. The awarding agency should not impose a longer records retention requirement or more detailed record keeping requirements unless there is a specific need to do so. If there is a need for longer retention or more detailed records, a clause covering these subjects should be tailored for the contract in a fashion that does not conflict with the clauses below. The Attorney General recommends a record retention of seven (7) years.

C. **Contract Audit and General Records Keeping Clause:** The following clause meets the above requirements and must be included in all contracts of $10,000 or more regardless of the form of contract used. This clause should be sufficient to meet most State and Federal needs. If your agency has a need for a different standard audit clause, the clause should be submitted to DGS/OLS for review with an explanation as to the necessity of the differences.

"Contractor agrees that the awarding department, the Department of General Services, the Bureau of State Audits, or their designated representative shall have the right to review and to copy any records and supporting documentation pertaining to the performance of this Agreement. Contractor agrees to maintain such records for possible audit for a minimum of three (3) years after final payment, unless a longer period of records retention is stipulated. Contractor agrees to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employees who might reasonably have information related to such records. Further, Contractor agrees to include a similar right of the State to audit records and interview staff in any subcontract related to performance of this Agreement (GC § 8546.7, PCC § 10115 et seq., CCR Title 2, §1896). Contractor shall comply with the above and be aware of the penalties for violations of fraud and for obstruction of investigation as set forth in PCC § 10115.10."

D. All contracts containing DVBE participation goals as discussed in SCM 1, chapter 8 must contain an audit clause (CCR § 1896.77.) The minimum period of time for retention of DVBE records provided by a contractor pursuant to Military and Veterans Code section 999.5 is six years after collection. (Mil. & Vets. Code § 999.55.) Contracts involving DVBE participation should include a provision with this retention requirement.

7.55 DRUG-FREE WORKPLACE ACT OF 1990
(Rev 6/17)

The Drug-Free Workplace Act of 1990 (GC § 8350, et seq.) requires State contractors and grantees to certify that they will provide a drug-free workplace.

The certification language is set forth in State standard form STD 21.

Alternatively, the required certification appears in the State's standardized Contractor Certification Clauses (CCCs) which are incorporated by reference in the State's standard General Terms and Conditions (GTCs).

7.60 EQUIPMENT RENTAL AGREEMENTS

A. Unless it has specific statutory authority, a State agency cannot agree to:

1. Indemnify a contractor;

2. Assume responsibility for matters beyond its control;

3. Agree to make payments in advance;

4. Accept any other provision creating a contingent liability against the State; or

5. Agree to obtain insurance to protect the contractor.

B. The contract must clearly provide that the State does not have responsibility for loss or damage to the rented equipment arising from causes beyond the control of the State. Any provision obligating the State to return the equipment in good condition, subject to reasonable wear and tear, also must except or exclude loss or damage arising from causes beyond the control of the State. The contract must clearly restrict the State's responsibility for repairs and liability for damage or loss to that made necessary by or resulting from the negligent act or omission of the State or its officers, employees, or agents.

C. If the State does not elect to maintain the equipment, the contract will place the obligation on the contractor, as lessor, to keep the equipment in good working order and to make all necessary repairs and adjustments without qualification, with a clear right in the State to terminate or cease paying rent should the contractor fail to maintain the equipment properly. For this purpose, the contractor's representatives shall be given full and adequate access to the equipment at reasonable times.

D. Personal property taxes are not generally reimbursed when leasing equipment (See SAM § 8736).

E. For the purpose of determining whether contracts containing renewal options are subject to the approval of DGS, the total cost and term of the rental shall be

computed by including the cost and term of all renewal options included in the contract.

7.61 PURCHASE OPTIONS
(Rev 10/98)

A. To avoid paying hidden interest and carrying charges, the State agency should consider purchasing the equipment outright rather than entering into an "installment purchase" or "rental agreement with option to purchase." Funding problems should be discussed with DOF budget staff.

B. Approval by DGS of the rental agreement does not include approval for the exercise of the option to purchase. Any exercise of the option and purchase of the equipment must be processed through DGS, Procurement Division, in accordance with the procedures set forth in SAM § 3500, et seq.

C. Agencies shall not circumvent State purchasing policies through use of contracts

containing options to purchase.

D. Whether an equipment rental transaction, which includes an option to purchase, should be processed in accordance with the SCM 1 or should be processed in accordance with the "Purchases" chapter of SAM § 3500 et seq., is dependent upon the acquisition of title to the equipment.

1. If the contract provides for automatic transfer of title to the State upon completion of the so-called "rental" payments, or upon payment of a nominal consideration after completion of such "rental" payment, the transaction would be more in the nature of a "conditional sale" or "installment purchase" rather than a "rental of equipment" and should be processed in accordance with SAM § 3500 et seq.

2. If the rental payments will be the same whether or not the lessor's offered option to purchase is included in the rental agreement, and the State agency includes the option as an unobjectionable and possibly desirable feature, the contract may be processed in accordance with the SCM.

7.62 LEASE/PURCHASE ANALYSIS FOR EQUIPMENT

A. A lease/purchase analysis shall be prepared (See SAM § 3700) for each contract to lease equipment where the contract exceeds $1,000 or the duration of the lease exceeds three (3) months. This requirement does not apply to contracts for equipment rented in accordance with PCC § 10108, from other State agencies, or equipment obtained under a Master Rental Agreement.

B. A Lease/Purchase Analysis is required as follows:

1. Dollar amount exceeds $1,000 or the duration of the lease exceeds three (3) months. A copy of the analysis and the contract or amendment shall be retained by the agency.

2. Submit a copy of the analysis with the contract or amendment to DGS/OLS for approval when approval is required based on the agency's delegated approval amount.

C. If the lease/purchase analysis indicates that it is more economical to purchase, it will be necessary to include a justification explaining how it is in the State's best interest that the equipment be leased. A lease/purchase analysis based on a "zero" salvage value of the equipment will normally be acceptable only when mechanical useful life and program useful life are the same. When bids are obtained, prices for both leasing and purchasing will be secured to facilitate the making of the analysis.

D. The director of the requesting department should give prior concurrence to proposals in which the lease/purchase analysis indicates purchase but the requesting unit proposes to lease.

7.65 NONDISCRIMINATION PROGRAM
(Rev 06/24)

A. All employers who are, or wish to become, contractors with the State must develop and implement a nondiscrimination program as defined in Title 2, CCR § 11103; unless specifically exempted pursuant to Title 2, CCR § 11111, which includes contracts under $5,000 and contracts with licensed Community Based Rehabilitation Program (CRP) (See GC §§ 12935(a) and 12990(d); and Title 2, CCR § 11102).

B. A contractor shall include the nondiscrimination clause in its contracts and with all subcontracts to perform work under the contract, either directly or by incorporation by reference. Any such incorporation by reference shall be specific and prominent (See Title 2, CCR § 11102; and GC §§ 12935(a) and 12990(d)). Applicable contract language appears in the State's standard General Terms and Conditions (GTCs).

C. Any bid, proposal, or offer for a contract which is submitted by a contractor who has been decertified from contracting with the State by CRD, shall be deemed to be nonresponsive and shall be rejected. Refer to the California Regulatory Notice Register published by the Office of Administrative Law for a list of decertified contractors. (Tit. 2 CCR § 11110.)

D. Any person who submits a bid or proposal or otherwise proposes to enter into or renew a contract with the State valued at $100,000 or more must certify their compliance with the Unruh Civil Rights Act (CC § 51 et seq.) and the California Fair Employment and Housing Act ("FEHA") (commencing with Government Code section 12920), as required by PCC section 2010. If a contractor has an internal policy against a sovereign nation or peoples recognized by the United States government, the Contractor shall certify that such policies are not used in violation of the Unruh Civil Rights Act or FEHA.

1. These certifications must be made at the time a bid or proposal is submitted, or a contract renewal is executed.

2. These certifications are required regardless of the award method or solicitation format used, including but not limited to: RFPs, IFBs, NCBs and other non-competitive awards, and the SB/DVBE option.

3. These certifications are required when using a DGS LPA, unless the User Instructions for a particular LPA indicate otherwise.

4. For purposes of these required certifications, "renewal" shall mean the exercise of any option to extend an existing contract or an amendment to add time to an existing contract.

7.70 RECYCLED PRODUCT CONTENT
(Rev 11/12)

A. Effective September 1, 1999, per administrative policy, the following service contracts must contain language requiring the use of post-consumer recycled content products:

1. Janitorial contracts must contain terms requiring the use of janitorial supplies containing post-consumer recycled paper products only;

2. Printing contracts must contain terms requiring post-consumer recycled paper only, unless the proposed printing job cannot be done on recycled paper;

Contracts included in the above categories, subject to DGS/OLS approval, must contain the required terms or they will not be approved.

B. Contractors must certify in writing under penalty of perjury the minimum percentage, or the exact percentage, of post-consumer material in the product, materials, goods, or supplies provided under the agreement (PCC § 12205(a)-(b)) regardless of whether the product meets the requirements of PCC section 12209. Applicable certification language appears in the State's General Terms and Conditions (GTCs).

7.80 MULTIPLE YEAR CONTRACTS
(Rev 6/17)

A. Contracts for services should generally not exceed three (3) years, absent a substantial written justification for a longer term, based on business reasons. The written justification should be stated on the STD 215 #25 (or on an attachment thereto).

B. Approval by DGS/OLS must be obtained prior to releasing any RFP or IFB for a contract term beyond three (3) years. A justifiable business reason must support such a request for approval. Prior approval for multiple year contracts is not required for contracts not subject to DGS/OLS review. Prior approval is not required on a 5-year term for elevator maintenance contracts (see SCM volume 1, section 3.26).

Agencies who wish to get prior approval from DGS/OLS should contact the

attorney assigned to their department on how to proceed. Failure to obtain prior approval from DGS/OLS may be cause for non-approval of the contract.

Approval of a multiyear term request does not constitute DGS/OLS approval of the actual contract or amendment document, it is merely approval to use a multiyear term.

C. If the additional option years are considered in the method for selecting the contractor, an agency will not need to get an NCB exemption when amending the contract to exercise the option years so long as all terms, conditions, and costs are those evaluated in the bidding procedure. Contracts with option years are multiyear contracts, therefore advance approval is required for the multiyear term length (e.g. 3+1 = 4-year term, so preapproval is required for the 3+1) prior to going out to bid.

D. For services such as fiscal audit or quality audit, it is desirable to obtain a different contractor after three (3) years.

7.85 CONTRACT TERMINATION CLAUSES
(Rev 11/12)

A. Agencies should carefully consider the types of termination clauses to be used in each contract.

1. TERMINATION FOR CAUSE. The standard language in the GTCs available on the DGS/OLS webpage is satisfactory for a termination for cause. Agencies should not change or modify this language due to the possibility of accidentally changing a legal requirement. If agencies wish to supplement for cause termination language by adding their own provisions, they should consult their own counsel and their DGS/OLS attorney in advance.

2. TERMINATION WITHOUT CAUSE. It is recommended that contracts contain a termination clause to allow the State to terminate the contract, without cause, with advance written notice provided to the contractor.

7.86 INDEMNIFICATION
(New 11/12)

A. State agencies cannot indemnify another party unless there is express statutory authority to do so and only to the extent necessary to obtain the services. Any such code authority must be identified in the contract file along with a written justification of the legal and business analysis supporting use of the provision under the circumstances. Agencies are advised to obtain preapproval of such clauses from DGS/OLS, rather than risk nonapproval of contracts.

7.90 DISCLOSURE OF PROPRIETARY INFORMATION BY CONTRACTOR (PCC § 10426)

(Rev 04/26)

Disclosure of proprietary information by a consulting services or IT contractor may give rise to criminal penalties. Per PCC § 10426, contractors may be subject to criminal prosecution if they disclose proprietary information obtained in the negotiation, execution, or performance of a consulting services or IT contract when the contracting party knew or should have known that the disclosure was likely to cause harm. This requires the state agency to have specified in the contract the information considered to be proprietary under PCC 10426, which states that for purposes of the criminal action, the state agency shall only designate information as proprietary where it has reason to believe that the release of this information poses an immediate threat to the health, safety or welfare of the public or the state agency has reason to believe that the contracting party intends to sell the information. (See PCC § 10426 for details.)

Intentional disclosure of information designated by the State as proprietary during negotiation, execution or performance of a consulting services or IT contract, is unlawful and punishable as a misdemeanor.