State of California

Business, Transportation and Housing Agency

Memorandum

To: DISTRICT DIRECTORS

Date: December 10, 2001

Attention: Region/District Division Chiefs
Right of Way
Project Management
Project Development

File: Local Programs
General

From: **DEPARTMENT OF TRANSPORTATION**
DIVISION OF RIGHT OF WAY
MAIL STATION 37

Subject: Local Agency Guideline for Right of Way Acquisition on State Highway System and Contracting Out

Attached are revised versions dated December 10, 2001, of our July 24, 2001, "Guidelines for Local Agency Involvement in Right of Way Acquisition and Delivery of Projects on the State Highway System" and our September 11, 2001 memo on "Delivering Right of Way Activities on the State Highway System."

Both of these memos have been revised to include an additional delivery option for performing right-of-way activities on the State highway system. Recognizing that the capital dollars and support dollars are separate components of project delivery. This revision allows the local agency, to utilize local agency funds for project right-of-way support costs, thereby allowing the local agency to utilize their own forces or contract out for right-of-way services, regardless of the funding source, including State, for right-of-way capital.

In addition, several of our local partners have expressed concerns with the Department's literal interpretation of Proposition 35, as it relates to right-of-way activities. The Department has therefore committed its Legal Staff to take another look at Proposition 35 and all related statutes. This may or may not result in adding additional delivery tools. It is however hoped that the additional tool, provided with this revision as referenced above, may be useful in certain situations.

BRICE D. PARIS
Chief
Division of Right of Way

c: Right of Way Office Chiefs

State of California | Business, Transportation and Housing Agency

Memorandum

To: DISTRICT DIRECTORS

Date: December 10, 2001

Attention: Region/District Division Chiefs
Right of Way
Project Management

File: LOCAL PROGRAMS
LP 01-1

From: **DEPARTMENT OF TRANSPORTATION**
DIRECTOR'S OFFICE – 49

Subject: Guidelines for Local Agency Involvement in Right of Way Acquisition and Delivery of Projects on the State Highway System

The following supersedes previous guidelines issued dealing with Local Agency involvement in Right of Way (R/W) Acquisition and Delivery of Projects on the State Highway System dated July 24, 2001. The aforementioned guidelines have been revised to allow the funding source for right-of-way support to be the control for performance of right-of-way activities, regardless of the funding source for right-of-way capital.

TRANSPORTATION CONGESTION RELIEF PROJECTS (TCRP) ON THE STATE HIGHWAY SYSTEM

It is the Department's policy that TCRP projects be managed in the same fashion as all projects on the State Highway System. To accomplish this, the California Transportation Commission (CTC) adopted Resolution G-00-23 guidelines for the development and implementation of the TCRP on September 28, 2000. These guidelines provide some flexibility in providing R/W services to ensure timely and cost effective delivery of the TCRP. TCRP guidelines call for the following:

- TCRP funds are allocated by the CTC on a project-by-project basis.
- TCRP funds are allocated only after the Department has reviewed and the CTC has approved an application for the funds.
- The Department or Local Agency may take the lead in preparing the application. The application will identify which agency, the Local or the Department, will act as the implementing agency.
- If the Department is the implementing or lead agency then the TCRP funds will be treated as "State" funds within these guidelines.
- If the Local Agency is the implementing or lead agency then the TCRP funds will be treated as "Local Agency" funds within these guidelines, and the Local Agency has the option of performing the R/W work themselves, if it is a qualified agency, or selecting the Department or other qualified R/W organization (either public or private) to deliver the right-of-way component.

For the purposes of these guidelines:

- "LOCAL AGENCY" funds are funds such as tax measures, property tax, developer fees, Federal subvention, (e.g., Regional Surface Transportation Program (RSTP), Congestion Mitigation and Air Quality Improvement Program (CMAQ), and TCRP Funds where the Local Agency is the designated implementing or lead agency, etc.).

- "STATE" funds are State Transportation Improvement Plan (STIP) funds, which include the Regional Improvement Plan and Interregional Improvement Plan, State Highway Operational Protection Plan (SHOPP), and TCRP Funds when the Department is the designated implementing or lead agency.

GUIDELINES FOR ALL PROJECTS ON THE STATE HIGHWAY SYSTEM

Land Acquisition:

- Where all project right-of-way support costs or right-of-way support for specific parcels is funded 100 percent with "Local Agency" funds, the Local Agency may perform all right-of-way work with its own staff, or contract for right-of-way services on the parcels it is funding, regardless of the funding source for right-of-way capital. Included in the work that the Local Agency may perform with its own staff, or contract out, are R/W Engineering, Appraisals, Acquisitions, Relocation Assistance, and Legal Services. All work is to be performed consistent with departmental policies and subject to departmental "Quality Assurance."

  Nothing in the above is meant to preclude the Department from performing right-of-way activities (including legal) on parcels funded in total by a Local Agency when an approved cooperative agreement is in place.

- Where all project right-of-way support costs or right-of-way support for specific parcels is funded 100 percent with "State" funds, the Department is the responsible agency for performing all right-of-way activities on the parcels it is funding, regardless of the funding source of right-of-way capital.

- Where right-of-way capital and support are 100 percent "State" funded, or specific parcels in a jointly funded project are 100 percent "State" funded (both capital and support) the Department is the responsible agency for performing all right-of-way activities.

- Where right-of-way support is a mix of "Local Agency" and "State" funds for particular parcels or projects, the Department is the responsible agency for performing all right-of-way activities.

Prerequisites to Resolution of Necessity - First and Second Level Review Requirement

- Department policy requires a First, and if necessary, Second Level Review prior to seeking a RON.

- This policy applies regardless of whether the R/W effort is performed by the Department and/or a Local Agency, or what body hears the RON request.

- In all cases, regardless of whether the R/W effort is performed by the Department and/or a Local Agency, First and Second Level Reviews will be administered by the Department under the direction of Region/District R/W as outlined in sections 9.01.06.00, 9.01.07.00, and 9.01.08.00 of the Department's R/W Manual and as outlined in Bob Coleman's memo of July 2, 1998, and Chapter 28 of the Department's "Project Development Procedures" Manual. When a Local Agency is involved in the acquisition of right-of-way, Local Agency staff shall participate in the First and Second Level Reviews as necessary.

Adopting Resolutions of Necessity:

The Department is the responsible agency for obtaining RONs for ALL projects on the State Highway system irrespective of funding, who the lead or implementing agency is, or who is performing the R/W work. When a Local Agency is performing R/W work, the R/W Engineering component shall include preparation of RON documents and exhibits for processing by the Department to the CTC.

The CTC is the responsible body for adopting all RONs on the State Highway System. Although the CTC has ultimate responsibility, State statutes do provide for RONs to be passed by a County Board of Supervisors (Board) or a City Council under the specific circumstances stated below. The following applies to STIP and TCRP projects only; it does not apply to the SHOPP. All SHOPP projects must continue to be heard by the CTC.

Regardless of who performs R/W work, prior to the Board or a City Council passing a RON by the required four-fifths (4/5) vote, the following actions must first have taken place:

- Region/District R/W must seek, on a project-by-project basis, written approval to implement this policy from the Chief of the Division of R/W. Approval considerations include timesaving, convenience for property owners, and/or local sensitivity to project. Additional considerations may be added as the Department gains experience with guideline implementation.

- Upon approval, Region/District R/W will communicate in writing to the Local Public Agency (LPA), the Department's recommendation that RONs may be heard by the Board or the City Council. In all cases, right-of-way activities are to be performed consistent with all policies and procedures outlined in the Department's R/W Manual including the requirement for First and Second Level Review Hearings, and shall be a condition of the Department's recommendation.

- The LPA will then seek from the Board or City Council, a resolution passed by a four-fifths vote of its membership, agreeing to hear the RON. The Board or City Council must have determined that the acquisition of the real property or interest be in the best interest of the Department, promotes the interest of the county or city, and be necessary for State highway purposes.

- If the project in question requires a cooperative agreement, the agreement will contain language documenting the above. A copy of the resolution from the Board or City Council is to be attached to the fully executed cooperative agreement.

- If no cooperative agreement is required, the Department's written request and resolution from the Board or City Council shall be maintained in the Right of Way project file.

- If a RON is to be contested before the CTC, the presentation will be delivered by the Department's Office Chief for the RON in the Division of Design. All similar appearances before a Board or City Council shall be presented by the Department's District Director or designee, regardless of which agency performed the right-of-way activities.

Utility Relocation:

- Where all utility relocations are, or a specific utility relocation is 100 percent funded with "Local Agency" funds, the Local Agency may perform the utility relocation coordination activities they are funding, regardless of the overall funding of the project. All work is to be performed consistent with Department policies and subject to Departmental oversight.

- Where utility relocations are 100 percent "State" funded or specific utility relocations in a jointly funded project are 100 percent "State" funded, the Department is the responsible agency for performing the utility relocations.

- Where particular utility relocations are to be funded with a mix of "Local Agency" and "State" funds, the Department is the responsible agency for performing those utility relocation coordination activities.

- The Department may have agreements currently in force with one or more utility entities, which shall correspondingly bind the Local Agency in those circumstances. Such agreements are pursuant to statute and may prevail over other existing statute if so included in each agreement. If any such agreement is applicable to freeway projects, such applicability may extend beyond the actual freeway right-of-way "footprint" to include those utility relocations reasonably caused by the influence of the freeway portion of the project. If the Local Agency and any such utility entity cannot come to agreement on such applicability, the Department's Project Manager or equivalent, after consultation with both parties, Department's R/W Utility Relocation branch and Department's Legal Division, will make such final determinations of applicability.

Department Policy and "Quality Assurance" (Oversight) Responsibilities:

- When right-of-way activities (including R/W Engineering) are performed by other than the Department, the Department must approve legal descriptions and the condition of title for the right-of-way required for the project, as well as accept title prior to the Department accepting completion of the construction project and opening the project to the public. These requirements shall be so stipulated in the cooperative agreement.

- In ALL cases, R/W, R/W Engineering, and Utility Relocation activities shall be performed consistent with Federal and State law and in accordance with the Department's R/W policies and procedures as outlined in its R/W Manual, the Plans Preparation Manual, and the Land Surveyors' Act. These requirements shall be so stipulated in any required cooperative agreement.

- In ALL cases if R/W, R/W Engineering, Utility Relocation, or Survey activities are performed by an organization other than the Department, the Department will perform "Quality Assurance" reviews on those activities performed in conjunction with the project. Generally, the cost of the Department's "Quality Assurance" for a project shall be funded as agreed to in the cooperative agreement. The cost of the Department's "Quality Assurance" for TCRP projects shall be funded with the TCRP funds as a project cost and shall be so stated in the cooperative agreement.

- When R/W Engineering activities are performed by other than the Department's R/W Engineering units, the Department must approve the R/W Record Map for right-of-way required for the project prior to the Department accepting completion of the construction project. Any final payment will not be released until a Record of Survey of the monumentation effort is filed with the county surveyor, relinquishment and/or vacation documents are prepared, and legal descriptions and maps for disposal have been approved by the Department. These requirements shall be so stipulated in the cooperative agreement.

- When utility relocation activities are performed by other than the Department's R/W staff, the Department must approve the Local Agency prepared relocation plans required for the project prior to advertising the project. In addition, Local Agency's as-built plans of the completed utility relocation must be accepted by the Department prior to the Department accepting completion of the construction project and opening the project to the public. These requirements shall be so stipulated in the cooperative agreement.

- Prior to opening a project to the public when R/W activities are performed by others, the Department must formally accept title to the R/W. In the event that the items specified above have not been completed, title will not be accepted until an amendment to the Cooperative Agreement has been executed. The amendment must identify the work to be completed, the agency responsible, contain appropriate financial guarantees of completion and a completion timetable.

DOCUMENTATION AND EXCEPTIONS

The respective responsibilities that the Department and local agencies have in delivering projects on the State Highway System shall be addressed in the authorizing document (project report, project study report, TCRP application, etc.), and clearly documented in the cooperative agreement.

Any request for exception to the above-stated guidelines shall be in writing, and must be reviewed by Headquarters' R/W Local Programs and Headquarters' R/W Project Delivery prior to being approved by the Chief of the Division of R/W. Included in the request for exception will be a statement as to the unusual circumstances requiring deviation from these guidelines. Exceptions shall be granted on a case-by-case basis. As above, respective responsibilities for delivering the project shall be addressed in the authorizing document (project report, project study report, etc.), and clearly documented in the cooperative agreement.

BRENT FELKER
Chief Engineer

bc: Brice Paris, Office Chiefs, Barry Cowan, Phil Scott – R/W
Bruce Behrens, Brelend Gowan, Rich Williams, Joel Phillipp - Legal
Karla Sutliff, Linda Fong, Mary Beth Harrett, Muhaned Aljabiry - Design
Debbie Mah – TCRP
Bob Buckley, Mark Turner, Roland Swirsky – Engineering Services
Mickey Horn - Project Management
Terry Abbott - Local Assistance

BCowan:lss
Expanded guidelines+TCRP+RON2.doc
H:Appraisal & Local Programs/Cowan

State of California | Business, Transportation and Housing Agency

Memorandum

To: DISTRICT DIRECTORS

Date: December 10, 2001

File: LOCAL PROGRAMS
LP 01-2

Attention: Deputy District Directors,
Right of Way
Project Management Single Focal Points

From: **DEPARTMENT OF TRANSPORTATION**
DIVISION OF RIGHT OF WAY
MAIL STATION 37

Subject: Delivering Right-of-Way Activities on the State Highway System - Revised

The memorandum concerning the above referenced subject dated September 11, 2001, is hereby re-issued for clarification purposes with revisions in bold.

The intent of this memorandum is to address questions that have arisen concerning the Department's ability to contract out, or utilize Local Agency staff, to deliver State funded right-of-way activities on the State highway system when the Department is the responsible agency for performing the work. General information, resources and options are provided, **including options for delivering right-of-way activities on multi-funded projects**.

Many of the questions have centered on the applicability of Proposition 35 to contract out right-of-way activities. Proposition 35 added Article XXII to the Constitution allowing the State, et al., the ability "...to contract with qualified private entities for architectural and engineering services for all public works of improvement." However, Proposition 35 also added Section 4529.10 to the Government Code. This Section states, "For purposes of Article XXII of the California Constitution and this act, the term 'architectural and engineering services' shall include all architectural, landscape architectural, environmental, engineering, land surveying, and construction project management services." Right of Way Engineering is considered the only right-of-way activity included in this definition and, therefore, is the only right-of-way activity impacted by Proposition 35.

However, existing Government Code Section 19130 provides authority for the Department to contract for personal services under specific and limited conditions. Please refer to the attached June 28, 1993, memorandum, "Contracting Out Justification – G.C. 19130." An example of when these conditions may apply to right-of-way activities is:

- Government Code Section 19130(b)(3) states: "The services contracted are not available within civil service, cannot be performed satisfactorily by civil service employees, or are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service system." This section may apply to entering into a personal service contract for specialty appraisals (e.g. goodwill, machinery and equipment, or other highly specialized/technical appraisals).

You are encouraged to work closely with the Department's Division of Procurement and Contracts (DPAC) and your Division of Right of Way (R/W) functional liaison to answer questions or provide assistance. DPAC's web site may be accessed through http://adsc.caltrans.ca.gov.

Senate Bill 45, the State Transportation Funding Act, added Section 14520.3 (b) and (c) to the Government Code. This Section states in part, "The Department is responsible for the planning, design, construction, maintenance, and operation of the State highway system...In addition to other responsibilities established by law, the Department is the responsible agency for performing all State highway project components specified in subdivision (b) of Section 14529 of the Government Code except for construction." Section 14529(b)(3) includes, "The acquisition of rights-of-way." However, Streets and Highways Code Section 114 states, "(a) When the commission or other public entity has allocated any funds for the construction, improvement, or maintenance of any portion of a State highway within a city or a county, the department may enter into a cooperative agreement with the city or the county or other public entity, for the performance of the work by the department or by the city or the county or other public entity, or for the apportionment of the expense of the work between the department and the city or the county or other public entity. (b) The department shall enter into a cooperative agreement with a city, county, or other public entity to perform professional and technical project development services, if the department determines that the city, county, or other public entity in which the project is located has qualified and available staff to perform the necessary project services."

Government Code Section 14520.3 does not restrict the authority of the Department under Streets and Highways Code Section 114. Therefore, the Department may enter into a cooperative agreement with a qualified Local Agency whereby their staff would perform the right-of-way activities for a State funded project on the State highway system. However, these activities may not be contracted out to private consultants. While performing these activities with their own staff, there may be a specific situation when the Local Agency is required to consider a personal service contract. If this situation should arise, the Local Agency shall obtain approval from the appropriate Deputy District Director Right of Way, or his/her delegatee. The approval considerations shall be consistent with the Department's authority to contract for personal services to perform right-of-way activities, examples of which are listed above and in the June 28, 1993, memorandum.

Options for delivering right-of-way on multi-funded projects may include the following:

- **Where all project right-of-way support costs or right-of-way support for specific parcels is funded 100 percent with "Local Agency" funds, the Local Agency may perform all right-of-way work with its own staff, or contract for right-of-way services on the parcels it is funding, regardless of the funding source for right-of-way capital. Included in the work that the Local Agency may perform with its own staff,**

or contract out, are R/W Engineering, Appraisals, Acquisitions, Relocation Assistance, and Legal Services.

Nothing in the above is meant to preclude the Department from performing right-of-way activities (including legal) on parcels funded in total by a Local Agency when an approved cooperative agreement is in place.

The Department as the responsible agency is required to perform necessary "Quality Assurance" activities, which shall be defined in the cooperative agreement.

"Local Agency" funds and "State" funds used herein are as defined in the **December 10, 2001, "Guidelines for Local Agency Involvement in Right of Way Acquisition and Delivery of Projects on the State Highway System." The definitions read, "'Local Agency funds are funds such as tax measures, property tax, developer fees, Federal subvention, (e.g., Regional Surface Transportation Program (RSTP), Congestion Mitigation and Air Quality Improvement Program (CMAQ), and TCRP Funds where the Local Agency is the designated implementing or lead agency, etc.).** 'STATE' funds are State Transportation Improvement Plan (STIP) funds, which include the Regional Improvement Plan (RIP) and Interregional Improvement Plan (IIP), State Highway Operational Protection Plan (SHOPP), and TCRP funds when the Department is the designated implementing or lead agency."

In summary, when State funds are used on the State highway system and the Department is the responsible agency for performing the right-of-way activities:

- Government Code Section 19130 provides authority to the Department to contract for personal services for State funded right-of-way activities on the State highway system under specific and limited conditions, examples of which are listed above and in the June 28, 1993, memorandum.

- Streets and Highways Code Section 114 provides authority to the Department to enter into a cooperative agreement with a qualified Local Agency to perform State funded right-of-way activities on the State highway system with their own staff. The Department as the responsible agency shall perform "Quality Assurance."

R/W Management is encouraged to consider all available options for delivery of right-of-way activities, particularly when entering into cooperative agreements with Local Agencies. For example, if the overall project is multi-funded then there may be flexibility when deciding the **capital and/or support** funding source (e.g. State funds or other type) for a particular parcel, or the project's right-of-way activities as a whole, during the cooperative agreement stage. Maximizing this flexibility will increase your options for delivery of the right-of-way

activities. For additional information, please refer to the December 10, 2001, guidelines referenced above.

If you have any questions, please contact Patricia Jones at 916-654-5728.

BRICE D. PARIS
Chief
Division of Right of Way

Attachment

c: HQ Office Chiefs
HQ Appraisals and Local Programs Seniors
Legal – Joel Philipp
DPAC – Jan Smelser
R/W Local Programs' Managers Statewide
Project Management – Mickey Horn

PJones:lss OptionsPJ3.doc H:Appraisals and Local Programs/Jones

State of California

Business, Transportation and Housing Agency

Memorandum

To : STATEWIDE CONTRACT OFFICERS

Date : June 28, 1993

File No: P&I 93-19

From : **DEPARTMENT OF TRANSPORTATION**
DIVISION OF ADMINISTRATIVE SERVICES-OFFICE OF SERVICE CONTRACTS

Subject: Contracting Out Justification - G.C. 19130

Government, by its very nature, is only authorized to engage in activities that are expressly permitted by law. The State Constitution establishes a civil service merit system that requires that the work of the state be performed by civil service employees. Therefore, the Department must have the "authority" to enter into a service or consultant service contract before it can be executed. Government Code Section 19130 specifies under what conditions contracting is permitted. Subpart (a) outlines the requirements to contract on a cost savings basis. Subpart (b) outlines other circumstances under which contracting may be permissible.

It is the express responsibility of each person who processes a contract for services to know the statutory authority under which contracting is permitted. This requirement pertains to both contracts prepared by a contract staff person or one prepared by a contract requester or manager and forwarded to the contracts office for processing.

Effective immediately, all service contracts, processed under Government Code 19130 (a) or (b) (1-10), will have a complete justification, in writing. Merely stating, for example, "G.C. 19130 (b) (3) The services contracted are not available within civil service" on the reverse side of the Std. 15 will not be acceptable. Any contract that is currently advertised, has been awarded but not executed, or requires a contract amendment **must** include a full justification, in writing.

The attached standards and guidelines are provided to aid you in processing contracts under Government Code 19130. By no means are these guidelines all encompassing. It should be understood that questions will arise that may not be covered here. Every effort should be made to resolve them locally; however, some situations may arise requiring resolution on a case-by-case basis. Please feel free to contact your HQ Contracts Analyst for help.

Any ideas or suggestions you may have to help clarify contracting out justifications should be forwarded to me. The information will then be prepared and sent out statewide to aid Caltrans staff in justifying contracting out.

Any questions resulting from following the attached guidelines and standards should be referred to me at (916) 653-0043 or CALNET 453-0043.

Robert R. Dennis

ROBERT R. DENNIS
Departmental Contracts Officer

STANDARDS AND GUIDELINES

FOR THE PROCESSING OF SERVICE CONTRACTS

UNDER GOVERNMENT CODE 19130

(1) **Government Code 19130 (a) - Cost Savings**

All contracts justified under GC 19130 (a) must clearly demonstrate that the work to be performed will result in actual overall cost savings to the state and must meet all the requirements of GC Section 19130 (a) to include approval by the State Personnel Board (SPB). The SPB requires four to six months to respond to a request for approval. It has been the practice of the SPB to route such requests to the affected employee organization for comment. It has not been the practice of the SPB to approve requests which have been opposed by the employee organizations. Contracts office staff should advise Contract Managers requesting contracts justified under G.C. 19130 (a) that the approval process is lengthy and rarely successful.

(2) **Government Code Section 19130 (b) (1-10)**

(b) (1)The functions contracted are exempted from civil service by Section 4 of Article VII of the California Constitution, which describes exempt appointments.

If the services to be contracted are exempted from civil service by the Constitution, the question of their being contracted is outside the State Personnel Board's jurisdiction. The department could contract with firms or individuals without seeking prior merit-related approval from DGS. However, approval in other areas may still be required by the DGS. Section 4, Article VII of the State Constitution gives a complete listing of exempt position. Note: Agreements entered into by civil service agencies in which an exempt agency is the contractor are not exempt from DGS review.

The issue here pertains to the need to provide a contractor to fill a position that is currently exempt from the state civil service system. Such need for services should be fully researched before the contracting out procedure is followed and must be verified and approved by the Personnel Officer.

Example

The Military Department contracts for armed security guards at military bases. The security services in question were performed by active duty military personnel prior to the time they were contracted out. Section 4k of the Constitution exempts from civil service "members of the military while engaged in military service."

(b) (2) The contract is for a new state function and the Legislature has specifically mandated or authorized the performance of work by independent contractors.

Such contracting is permissible if (1) the activity to be contracted is a new state function, and (2) there is specific legislative authorization to contract for it. Contracting is allowed because it involves work being performed outside the State Government structure and does not duplicate or displace functions being performed within civil service. These provisions are not to be applied to expansions of existing programs since they are already within the existing structure of State Government and are therefore subject to civil service. The issue here is "displacement of civil service employees". Mandates by the Legislature are found in specified laws. A copy of the statute authorizing contracting out must be provided as part of the justification.

Example

The State Court of Appeals recently (June 1992) ruled in the Caltrans v. Chavez case that 19130 (b) (2) "permits contracts with private firms only where there is legislative authorization and the work involves a new state function at the time the contracts are executed.

The Court found that when personal service contracts are executed 20 years after an authorizing statute is enacted and a designated state agency utilizes state employees for most of the work on the program authorized by that statute during those intervening years, the State Personnel Board may properly decide the work eventually contracted out does not relate to or stem from a new state function within the meaning of the statute.

(b) (3) The services contracted are not available within civil service, cannot be performed satisfactorily by civil service employees, or are of such a highly specialized or technical nature that the necessary expert knowledge, experience and ability are not available through the civil service system.

Contracts that are let under this criteria must be one time or occasional in nature and it should be clear that they will not develop into an ongoing function of the agency.

The issue here pertains to the skills, knowledge, experience or expertise of the services contracted. In a situation where there is a California state civil service job classification which could logically perform the services contracted, but there is simply insufficient numbers of incumbent employees or available equipment to utilize such employees, the requirements of Government Code 19130 (b) (3) would not be met. The Personnel Officer must verify in writing that the specialized skill, knowledge, and/or experience of the firm or individual sought after in the contract or amendment are not available within civil service classifications. NOTE: Be prepared to look beyond Caltrans staff.

Example

DMV contracted for the development of a validated videotape test for the department's open Motor Vehicles Field Representative examination. State staff with the required skills were not available in the time needed.

(b) (4) The Services are incidental to a contract for the purchase or lease of real or personal property. Contracts under this criterion, known as "service agreements," shall include, but not be limited to, agreements to service or maintain office equipment or computers that are leased or rented.

Such agreements normally come with the original purchase or lease of the property or equipment. It is expected that these agreements be researched to determine if needed repair and/or maintenance services are covered under warranty in the original procurement, lease or rental documents. Any such research or evaluation will be documented by the contract manager or requester before requesting contract services.

Example

Caltrans contracts for maintenance services of rented personal computers in a newly established district office until such time as newly purchased personal computers are received.

(b) (5) The legislative, administrative, or legal goals and purposes cannot be accomplished through the utilization of persons selected pursuant to the regular civil service system. Contracts are permissible under this criterion to protect against a conflict of interest or to insure independent unbiased findings in cases where there is a clear need for a different outside perspective. These contracts shall include, but not be limited to, obtaining expert witnesses in litigation.

When preparing a request for approval under Government Code 19130 (b) (5), the request must identify in a narrative fashion the issues which make a service contract necessary. This criteria is intended to protect against a conflict of interest and to ensure independent and unbiased findings in cases where there is a clear need for a different, outside perspective. Contract requests for services will be evaluated on the merit of the issues identified in the narrative. While contracts with consulting firms are generally appropriate to conduct independent studies, such contracts shall not be approved for ongoing workload.

Example

Expert witnesses in litigation may be hired under contract to clearly free them from the conflict of interest issues that might arise if they were an employee of the agency involved in the case.

(b) (6) The nature of the work is such that the Government Code standards for emergency appointments apply. These contracts shall conform with Article 8 (commencing with Section 19888) of Chapter 2.5 of Part 2.6 of the Government Code.

Emergency appointments are defined as appointments made for a period not to exceed 60 working days either during an actual emergency to prevent the stoppage of public business or because of the limited duration of the work. References to G.C. 19888 should be made and the Personnel Officer should verify and approve that the services requested are legitimately allowed under law. When recurring work of this nature can be anticipated, however, provisions should be made to accommodate it within civil service.

Example

The Department of Fish & Game contracted for clerical support services. The Department was required to confirm with applicable civil service restrictions on emergency appointments. The department faced an extreme hardship in coping with an ongoing legislative program while the only trained clerical support person was on maternity leave.

(b) (7) State Agencies need private counsel because a conflict of interest on the part of the Attorney General's Office prevents it from representing the agency without compromising its position. Such contracts shall require the written consent of the Attorney General, pursuant to Section 11040 of the Government Code.

State agencies occasionally need private counsel under contract when a conflict of interest on the part of the Attorney General's Office prevents it from representing the agency without compromising its position. The Contract Manager/Requester should communicate with the Attorney General's office, providing the circumstances necessitating a services contract. A consent, in writing, must be obtained from the Attorney General's office prior to writing any contract for needed services. Both the request for consent and the A.G.'s written consent shall be provided to the Contracts Office prior to the contract being written.

Example

The Department of Mental Health has been sued by a client's family for abuse by an employee of the Department. The Attorney General's office is representing the Department in the lawsuit, and the Department's attorneys are working with the A.G.'s office on the case. The employee involved in the case has a right to be represented by the State in the law-

suit. Howeve However, due to a conflict of interest by both the A.G.'s Office and the Department, outside counsel is hired by contract to represent the employee.

(b) (8) The Contractor will provide equipment, materials, facilities, or support services that could not feasibly be provided by the state in the location where the services are to be performed.

Contracting with firms and, in limited instances, with individuals, is permissible when the services required cannot be appropriately obtained through a civil service appointment. Contract requests for services and/or amendments must identify the specific issue which makes the provision of the services not feasible in the location where services are needed.

It should be noted that the mere presence of capital or equipment requirements does not in and of itself make contracting appropriate. Functions with such requirements that will be ongoing should remain within civil service, provided that it would be reasonable for the state to acquire the necessary facilities or equipment.

Example

A state agency might contract for envelope stuffing and mailing for a large one-time mailing that exceeded the capacity of the agency's facilities. The contract might include the use of the contractor's building and equipment for this one-time, unanticipated workload problem.

(b) (9) The contractor will conduct training courses for which appropriately qualified civil service instructors are not available, provided that permanent instructor positions in academies or similar settings shall be filled through civil service appointment.

Individual trainers may be retained under this standard when they act as independent contractors; that is, they are paid based on the product, e.g., instruction provided rather than for time worked and are not supervised as an employee by the State. Training must be the primary service provided. A contract that includes training as an incidental item or as the conclusion of a project or study, may not in and of itself be approved under this standard.

Example

DMV contracted for 30 Drug Awareness Training sessions throughout California to license Registration Examiners and Investigators.

(b) (10) The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose.

Contracts which are justified under Government Code Section 19130 (b) (10) must demonstrate and identify the specific issue which makes the provision of the contract services urgent, temporary or occasional.

An example which may address the urgency issue could be that failure to provide the needed services will result in a construction contract being stopped so that a safety issue will remain unresolved, or that the state's tort liability will be increased. The fact that project delivery might be delayed, as a stand-alone justification, would not be considered sufficient to justify urgency.

Temporary services are defined in two ways: (1) Departments will only be contracting for a period of less than six (6) months, or (2) the service or function requires less than a half-time employee. In the first case the department should justify why they are unable to obtain staff through the regular civil service system, i.e., limited term or permanent intermittent.

Note that the intention must be to assign the work to civil service employees as soon as the required staff can be recruited and assigned so these contracts will not extend longer than six (6) months. Amendments to such contracts which extend the time beyond six (6) months will not be routinely processed.

Such services must be one time or occasional in nature and it should be clear that they will not develop into an ongoing function of the agency. It should be noted that this standard should not be used merely to increase the amount of money that the State is able to pay for the services of an individual. It is appropriate to contract with firms under this standard. Contracting with individuals is appropriate only when the individual's

services cannot be retained through a civil service hiring procedure.

The use of G.C. 19130 (b) (10) as justification for contracting out of services should include a plan for meeting the required services through civil service appointments.

Example

Departments have been allowed to contract for janitorial services under this criteria for a short period of time while awaiting approval of their cost-savings based contract. Departments have also been given limited approval to contract for services that they are currently contracting for and SPB determines that the contract is not approvable. This has been justified by SPB based on the fact that if the department was not able to continue to contract, there would be a significant disruption to state programs. The department is usually given six months to find an alternative to contracting.

REMINDER

In those instances where contracting for a limited time is allowed, a plan for the provision of services in the future through the civil service system must be developed as part of the justification for contracting out.

Each and every contract entered into must be justified under Government Code 19130 (a) or (b) and must provide, in writing, documentation identifying all efforts made to use civil servants to provide services. Only after all efforts have been exhausted can the above provisions be used to justify contracting out for services. Contract requesters and managers must provide written justifications documenting the efforts made to use state staff and the justification for contracting out when state staff cannot provide or are unable to provide the necessary services.