

# GUIDE TO BIDDING AND CONTRACTING FOR SCHOOL DISTRICTS AND COMMUNITY COLLEGE DISTRICTS



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## INTRODUCTION

Absent a statutory requirement, a public entity is not bound to engage in competitive bidding. See, e.g., *San Diego Service Authority for Freeway Emergencies v. Superior Court*, 198 Cal. App. 3d 1466 (1988); *Smith v. City of Riverside*, 34 Cal. App. 3d 529, 535-536 (1973); *County of Riverside v. Whitlock*, 22 Cal. App. 3d 863, 877-878 (1972); 62 Op. Att'y Gen. 643, 647 (1979). There is no all-pervasive public policy that requires all public entities to engage in competitive bidding. Public Contract Code section 102 sets forth a general principle regarding competitive bidding. It states, "To encourage competition for public contracts and to aid public officials in efficient administration of public contracting, to the maximum extent possible, for similar work performed for similar agencies, California's Public Contract law should be uniform." This section was interpreted in *San Diego Service Authority for Freeway Emergencies v. Superior Court*, 198 Cal. App. 3d 1466 (1988). The court held that in the absence of a statute requiring a public agency to apply competitive bidding principles in awarding a contract for an emergency call box system, competitive bidding requirements would not be imposed by mere implication or by virtue of Public Contract Code section 102. Thus, where no statute requires a public entity to follow competitive bidding procedures, a contract can be awarded without bidding.

The competitive bidding requirement is founded upon a salutary public policy declared by the Legislature to protect taxpayers from fraud, corruption and carelessness on the part of public officials and the waste and dissipation of public funds. *Miller v. McKinnon*, 20 Cal. 2d 83 (1942); *Graydon v. Pasadena Redevelopment Agency*, 104 Cal. App. 3d 631, 636 (1980), cert. den. (1980) 449 U.S. 983; *Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County*, 7 Cal. 3d 861, 866-867 (1972). Competitive bidding statutes are for the benefit and protection of the public, not the bidders. *Rubino v. Lolli*, 10 Cal. App. 3d 1059 (1970); *Charles L. Harney, Inc. v. Durkee*, 107 Cal. App. 2d 570 (1951). The purpose of competitive bidding requirements has been summarized as follows:

[p]rovisions . . . requiring competitive bidding . . . are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable and they are enacted for the benefit of property holders and taxpayers and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest. 10 McQuillin, *Municipal Corporations* (3d ed.) § 29.29.

The competitive bidding process applies the same rules of contract law which apply to contracts generally. *Pacific Architects Collaborative v. State of California*, 100 Cal. App. 3d 110, 123 (1979). Bids are irrevocable offers or options given to the public agency involved. *M. F. Kemper Constr. Co. v. Los Angeles*, 37 Cal. 2d 696, 700, 704 (1951). A contract is complete and binding when a valid bid is accepted. *City of Susanville v. Lee C. Hess Company*, 45 Cal. 2d 684 (1955).

A contract made without compliance with competitive bidding, where such bidding is required by statute, is void and unenforceable as being in excess of the public agency's power. *Miller v. McKinnon, supra*, 20 Cal. 2d 83, 88. Because persons dealing with a public agency are presumed to know the law with respect to the requirement of competitive bidding and act at their peril, *Miller v. McKinnon, supra*, 20 Cal. 3d 83, 89, no payments may be made by a public entity under a contract let in violation of competitive bidding laws except as provided in Public Contract Code section 5110. Pursuant to Section 5110 where a contract for construction, alteration, repair or improvement has been determined to be invalid due to a competitive bidding process defect, the contractor is nevertheless entitled to be paid reasonable costs, excluding profit provided the specific good faith and other criteria in the statute can be met. However, in general, where a public agency has already made payments to a contractor

under a contract let in violation of competitive bidding laws, a cause of action exists to recover the monies paid to the contractor for work and materials furnished to the public agency. *Miller v. McKinnon, supra*, 20 Cal. 2d 83, 89. No estoppel is available against a public agency so as to preclude recovery from a contractor of money paid under a contract without compliance with a statute requiring competitive bidding. *Miller v. McKinnon, supra*, 20 Cal. 2d 83, 90; *Advance Medical Diagnostic Laboratories v. County of Los Angeles*, 58 Cal. App. 3d 263, 272 (1976). This rule is not, however, absolute and is modified by the provisions of Section 5110. In addition, a distinction is recognized between those cases where the public entity to be estopped has the legal power to accomplish directly what the estoppel will accomplish indirectly, and, on the other hand, those cases where the public entity does not have such power. *Long Beach v. Mansell*, 3 Cal. 3d 462, 497 (1970); *Advance Medical Diagnostic Laboratories v. County of Los Angeles, supra*, at 273.

**Also as part of our introduction, we wish to caution you that nothing in this Guide to Bidding and Contracting is intended to provide you legal advice regarding any specific matter. You must always consult your own legal counsel and not rely on the general information set forth in this booklet.**

## **I. BIDDING REQUIREMENT AND EXCEPTIONS**

### **A. The Competitive Bidding Requirement.**

#### **1. Public Contract Code Sections 20111/20651.**

The law in California requires competitive bidding for most public contracts. School districts and community college districts are required to competitively bid any contracts for the lease or purchase of equipment, materials, supplies or services which do not constitute a "public project," which are not exempted from competitive bidding, and which involve an expenditure of more than \$50,000, as adjusted. Public projects are required to be competitively bid if they require an expenditure of more than \$15,000, again unless an exception applies.

Contract Code section 20111 which was amended by the Legislature during the 1995-96 Regular Session (Chapter 897) provides as follows:

- a) The governing board of any school district, in accordance with any requirement established by that governing board pursuant to subdivision (a) of Section 2000, shall let any contracts involving an expenditure of more than fifty thousand dollars (\$50,000) for any of the following:
- (1) The purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district.
  - (2) Services, except construction services.
  - (3) Repairs, including maintenance as defined in Section 20115, that are not a public project as defined in subdivision (c) of Section 22002.

The contract shall be let to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.

- b) The governing board shall let any contract for a public project, as defined in subdivision (c) of Section 22002, involving an expenditure of fifteen thousand dollars (\$15,000) or more, to the lowest responsible bidder who shall give security as the board requires, or else reject all bids. All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:
- (1) Cash.
  - (2) A cashier's check made payable to the school district.
  - (3) A certified check made payable to the school district.
  - (4) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made.

- c) This section applies to all equipment, materials, or supplies, whether patented or otherwise, and to contracts awarded pursuant to subdivision (a) of Section 2000. This section shall not apply to professional services or advice, insurance services, or any other purchase or service otherwise exempt from this section, or to any work done by day labor or by force account pursuant to Section 20114.

- d) Commencing January 1, 1997, the Superintendent of Public Instruction shall annually adjust the dollar amounts specified in subdivision (a) to reflect the percentage change in the annual average value of the Implicit Price Deflator for State and Local Government Purchases of Goods and Services for the United States, as published by the United States Department of Commerce for the 12-month period ending in the prior fiscal year. The annual adjustments shall be rounded to the nearest one hundred dollars (\$100).

Public Contract Code section 20651 is substantially similar for community college districts except that it does not contain the reference to acting in accordance with any requirement established by the governing board pursuant to Public Contract Code section 2000, subdivision (a).

The amendment of these sections raised many issues regarding how the provisions should be applied and interpreted. These sections now include references to other Public Contract Code sections including sections 20115, 22002 and 20114. Thus, to apply these two basic bid limit sections, the other sections must be examined and considered.

Public Contract Code sections 20111 and 20651 now essentially enumerate three categories of contracts as follows:

- (1) Contracts which are not required to be competitively bid.
- (2) Contracts for public projects which must be competitively bid if they involve an expenditure of \$15,000 or more.
- (3) Contracts for the lease or purchase of equipment, materials, supplies or services, not coming within either category 1 or 2 above, which must be competitively bid if they involve an expenditure of \$50,000 or more, as annually adjusted.

Categories 2 and 3 above are discussed generally here. Category 1 regarding contracts not required to be competitively bid is discussed in detail at Section A subsection ("2") of this Guide.

i. **Contracts for Public Projects of \$15,000 or More Must be Competitively Bid.**

A school district must let any contract for a "public project" involving an expenditure of \$15,000 or more to the lowest responsible bidder. The term "public project" is defined in Public Contract Code section 22002, subdivision (c) as any of the following:

- a) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work<sup>1</sup> involving any publicly owned, leased, or operated facility.<sup>2</sup>
- b) Painting or repainting of any publicly owned, leased, or operated facility.

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<sup>1</sup> "Public project," however, does not include maintenance work. Maintenance work includes all routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes; minor repainting; resurfacing of streets and highways at less than one inch; and landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems; and work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams, reservoirs, powerplants, and electrical transmission lines of 23,000 volts and higher. Pub. Cont. Code § 22002, subd. (d).

<sup>2</sup> "Facility" is defined as any plant, building, structure, ground facility, utility system, real property, streets and highways, or other public work improvement. Pub. Cont. Code § 22002, subd. (e).

- c) In the case of a publicly owned utility system, 'public project' shall include only the construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

Thus, it appears that the \$15,000 threshold limit will apply generally to contracts for public works, construction works,<sup>3</sup> and construction services.

- ii. Contracts for Purchase of Equipment, Materials, or Supplies of \$50,000, as Adjusted, or More Must be Competitively Bid.

Contracts involving an expenditure of \$50,000, as adjusted,<sup>4</sup> or more must be let to the lowest responsible bidder if they are for any of the following:

- a) "The purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district.
- b) "Services, except construction services.<sup>5</sup>
- c) "Repairs, including maintenance as defined in Section 20115, that are not a public project as defined in subdivision (c) of Section 22002."

The term "maintenance" is defined in Public Contract Code section 20115 as "routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility for its intended purposes in a safe and continually usable condition for which it was designed, improved, constructed, altered, or repaired." It expressly includes carpentry, electrical, plumbing, glazing, and other craftwork designed to preserve the facility in a safe, efficient, and continually usable condition, including repairs, cleaning, and other operations on machinery and other equipment permanently attached to the building or realty as fixtures. "Maintenance" as defined in Public Contract Code section 20115 does not include janitorial or custodial services, security services, or painting, repainting, or decorating, other than touchup.

The \$50,000 threshold, as adjusted, does not apply to repairs which would constitute a "public project." As noted above, "public project" includes construction, reconstruction, erection, alteration, renovation, improvement, demolition, repair work (excluding maintenance work), and painting or repainting of any publicly owned, leased, or operated facility. Thus, for example, repairs to a public facility would be subject to the \$15,000 threshold, while repairs of equipment, such as a school bus, would be subject to the \$50,000 threshold, as adjusted. To the extent

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<sup>3</sup> All bids for construction work must be presented under sealed cover and must be accompanied by bidder's security in the form of (1) cash, (2) a cashier's check made payable to the school district, (3) a certified check made payable to the school district, or (4) a bidder's bond executed by an admitted surety insurer, made payable to the school district. Pub. Cont. Code § 20111(b). However, according to Public Contract Code section 20112 a board may accept a bid submitted electronically.

<sup>4</sup> Commencing January 1, 1997, the Superintendent of Public Instruction and the Board of Governors of the California Community College will annually adjust this amount to reflect the percentage change in the annual average value of the Implicit Price Deflator for State and Local Government Purchases of Goods and Services for the United States, as published by the United States Department of Commerce for the 12-month period. The adjustment effective January 1, 2015, is \$86,000.

<sup>5</sup> The requirement that service contracts exceeding \$50,000 must be competitively bid is also subject to the exception mentioned above that the competitive bidding requirements of Public Contract Code section 20111 do not apply to contracts for professional services or advice, insurance services, or any other service otherwise exempt from its provisions. (See A, 2.)

equipment is permanently attached to a building or realty as a fixture, it would probably constitute a repair to a public facility and fall under the \$15,000 threshold.

Public Contract Code sections 20111 and 20651 before their amendment and together with other public bidding statutes had been broadly interpreted by the courts to apply to contracts for the purchase of textbooks, *Chandler v. Los Angeles City High School Dist.*, 28 Cal. App. 2d 594 (1938), contracts for school construction, *Reams v. Cooley*, 171 Cal. 150 (1915), contracts for installation of electrical heaters, *Strauch v. San Mateo Junior College Dist.*, 104 Cal. App. 462 (1930) and the purchase of school buses. 48 Op. Att'y Gen. 11 (1966). These interpretations will continue to be generally pertinent.

Whether Public Contract Code sections 20111/20651 may be interpreted in such a fashion that a contract which combines purchases covered by the \$50,000 limit, as adjusted, together with public project matters covered by Public Contract Code section 22002 such as alteration or renovation work is required to be competitively bid only if the public project portion exceeds \$15,000 or the equipment, materials, supplies or services portion exceeds \$50,000, as adjusted, has not been specifically addressed in the Public Contract Code. For example, would competitive bidding be required if a job involved \$1,800 in labor for installation or alteration of electrical lines in an existing building together with the purchase of \$48,000 in computer equipment. Certainly the most conservative and prudent response to this question is that the labor on the alteration or renovation work associated with the equipment or materials to be installed should not be separated for the purposes of avoiding the requirement for competitive bidding. Although the language in these sections has been in place more than ten years, interpretation of these sections as presently written remains to be made by the courts. It has been argued that a common sense approach should be applied by a court to allow the entire project to be accomplished without competitive bidding since it is under \$50,000, and the primary purpose of the contract is the purchase of computer equipment. Although such an argument is appealing, no case law which exists today would clearly support such a "common sense" approach to splitting a project to avoid competitive bidding. Therefore, as noted above, the most prudent and conservative response to this question is that the labor and installation on the improvement of the existing electrical lines in the existing building associated with the purchase and installation of the computers should not be separated for the purposes of avoiding the requirement for competitive bidding. See, e.g., *Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County*, 7 Cal. 3d 861, 866 (1972).

- iii. Competitive Bidding may be Required Even if no Public Funds are Expended if the Value of Services or Equipment Acquired Exceeds the Bidding Limit.

As noted above, competitive bidding is required for services that will require an "expenditure" of over \$50,000, as adjusted. Pub. Cont. Code §§ 20111/20651. There are at least two cases dealing with the issue of what constitutes an "expenditure" requiring competitive bidding. These cases (discussed below) support the conclusion that competitive bidding requirements may apply to certain contracts even where no public funds are actually expended if the value of the service, equipment, etc., acquired exceeds the threshold amount for competitive bidding.

The case of *East Bay Garbage Co. v. Washington Township Sanitation Co.*, 52 Cal. 2d 708 (1959), involved the applicability of a competitive bidding requirement located in the Health and Safety Code (requiring competitive bidding where the cost of a public works contract exceeds \$2,500) to an exclusive contract awarded by a sanitation district for the removal of garbage. Under the contract, the cost for garbage collection was to be paid directly by the inhabitants of the district to the garbage company and not from public funds of the sanitation district.

Additionally, the garbage company was to pay the district a flat sum of \$1,200 a year for the first five years and \$1,800 a year for the second five years of the contract.

In the *East Bay Garbage Co.* case the argument was made that competitive bidding was not required because the contract between the sanitation district and the garbage company did not involve the expenditure of public moneys. The California Supreme Court cited with approval the reasoning in *McKim v. South Orange*, 133 N.J.L. 470, 44 A.2d 784, as follows:

Certainly the aggregate of such moneys to be paid to and received by the scavenger will greatly exceed the sum of \$1,000, which is the cost limit for contracting without public bidding. . . Obviously, the village could not contract directly for the doing of the work without calling for bids. The proposed method is, we think, in violation of a public policy, implicit in these and other statutes, that public work exceeding a limited sum shall not be awarded except upon advertisement and to the lowest responsible bidder. The evils attendant upon an award without open bidding are not less under license than under direct contract. *Splitting the total cost among the property-users by a system that leaves to them no choice but to incur and pay the expense does not alter the fact that in essence an award of public work at a price of many thousands of dollars is being made to a private contractor without competition in bidding. East Bay Garbage Co. v. Washington Township Sanitation Co.*, 52 Cal. 2d 708, 712-713 (1959).

The California Supreme Court concluded as follows:

Plaintiff concedes the applicability of the statute where the district itself undertakes to do the work, in the sense that it will pay the scavenger firm directly for the services performed, and the costs to plaintiff exceeds \$2,500. It is no less applicable where, as here, the district contracts with one of competitive bidding scavenger firms to do the work required, and has the cost of removal of the garbage paid directly to the firm by the inhabitants of the district. The same reasoning prevails in protection of the public interest to insure the greatest possible value for the least expenditure. To hold otherwise would permit circumvention of the statute contrary to its purport and reasonable construction. *East Bay Garbage Co. v. Washington Township Sanitation Co.*, 52 Cal. 2d 708, 712-713 (1959).

Thus, in *East Bay Garbage Co.*, the court held that the contracted service in question must be competitively bid despite the fact that no public funds were spent.

In *Boydston v. Napa Sanitation District*, 222 Cal. App. 3d 1362 (1990), the Napa Sanitation District advertised for a tenant for 353 acres of pasture to be irrigated with reclaimed municipal wastewater and 157 acres of nonirrigated pasture. Mr. Boydston argued that as the highest bidder, the Napa Sanitation District was required to award the lease to him pursuant to Public Contract Code section 20783, which requires competitive bidding and award to the lowest responsible bidder for a public work contract that exceeds twenty-five thousand dollars (\$25,000). Napa Sanitation argued that the lease did not involve a public work contract or an expenditure of public funds, but was merely an agricultural lease in exchange for the tenant skill and experience in utilizing wastewater. The court held:

It is undisputed that appellant is engaging a private party to perform a task that, but for the agreement, it would perform itself. The difference between this

agreement and the more customary public work contract is that payment for the work comes not in the form of cash from appellant's treasury, but in the form of use of appellant's land and reclaimed water from the private party's own agricultural purposes. The fact that the lessee pays rent does not alter the fact that the agreement requires the lessee to perform public work. The reasonable conclusion to be drawn from the agreement is that the rental value of the property and the fertilization/irrigation value of the reclaimed water together exceed the cost of the sewage by-product disposal, and the rent paid by the lessee represents the net difference. Under such circumstances appellant's duty to the taxpayers, pursuant to the policy of competitive bidding, is to obtain the highest rent, thereby reducing its expenditure for the public work. *Id.* § 1368.

Thus, the court in *Boydston* held that the contract was a contract for public works and that the contract constituted an expenditure of funds requiring compliance with the competitive bidding requirements notwithstanding the fact that no public funds were actually expended.

## **2. Splitting Bids (Pub. Cont. Code § 20116/20657.)**

Public Contract Code section 20116/20657 prohibits splitting a contract into smaller contracts to avoid competitive bidding. Section 20116/20657 provides in pertinent part as follows:

"It shall be unlawful to split or separate into smaller work orders or projects any work, project, service or purchase for the purpose of evading the provisions of this article requiring contracting after competitive bidding."

Chapter 897 of the Statutes of 1995 clarified the prohibition against bid splitting to avoid competitive bidding by amending Public Contract Code section 20116 to include a prohibition against splitting into smaller work orders or projects not only any project, but also any work, service or purchase.

This change in the statute further supports the conclusion stated above that neither work nor labor associated with a purchase of equipment or materials to be installed to improve an existing building should be separated out from the equipment purchase for the purpose of avoiding the requirement for competitive bidding.

In *Advance Medical Diagnostic Laboratories v. County of Los Angeles*, 58 Cal. App. 3d 263 (1976), a county purchasing agent issued various suborders below the \$10,000 limit and thereby avoided Government Code section 25502.5 which permits county purchasing agents to engage in contracts for the county as long as the estimated aggregate cost of the contract does not exceed \$10,000. The Court of Appeal held that section 25502.5 had been violated in that the test of the agreements' validity as far as the \$10,000 limit was concerned, was not the estimated cost of the individual suborders but the estimated cost of the total project.

A project may however be split into several trade oriented contracts in order to keep project costs low provided the competitive bidding requirement has been met. 57 Op. Att'y Gen. 417 (1974). Also, contracts for related school improvements have been held to be individual contracts in instances where each contract was decided on separately and independent of others. *Brown v. Bozeman*, 138 Cal. App. 133 (1934).

### 3. Prequalification of Bidders (Pub. Cont. Code §§ 20111.5/20651.5, and 20111.6.)

As of January 1, 2014, prequalification of bidders became mandatory for specified projects. For other projects, prequalification remains permissive. The mandatory and permissive prequalification sections are discussed separately below.

#### Mandatory Prequalification

Commencing on January 1, 2014, prequalification became mandatory for school districts with an average daily attendance of at least 2,500 when they are awarding a construction project of \$1,000,000 or more that will be funded in whole or in part with state bond funds. Contractors who must prequalify for such projects include general contractors, as well as mechanical, electrical, and plumbing (“MEP”) subcontractors. School districts subject to this mandatory prequalification requirement may elect to prequalify contractors or subcontractors on a project-by-project basis, or establish a process for prequalifying prospective bidders on a quarterly or annual basis, in which case contractors that satisfactorily prequalify will remain prequalified for one year. Some districts also adopt ‘rolling’ prequalification, where contractors and subcontractors may prequalify throughout the year and remain prequalified for one year from the date of their prequalification. Pub. Contract Code § 20111.6.

Mandatory contractor prequalification must include the submission of a standardized prequalification questionnaire and financial statement verified under oath, and a uniform system for rating the bidders on the basis of the questionnaire and financial statement. The questionnaire, financial statement, and bidder rating system must at a minimum include the issues covered by the standardized questionnaire and model guidelines for rating bidders developed by the Department of Industrial Relations (DIR). Also, the questionnaire should include a statement that prequalification of a prospective bidder does not preclude a district’s subsequent consideration of a prequalified bidder’s responsibility on factors other than financial qualifications. The questionnaires and financial statements are not public records open to public inspection. Pub. Contract Code, § 20111.6(b), (c), (d).

A district must also provide prospective bidders with a standardized proposal form, which must be submitted as the bid. A school district cannot accept a proposal form from a contractor if the contractor or any of the contractor’s listed subcontractors who are required to prequalify has failed to submit a completed standardized questionnaire and financial statement within ten business days prior to the bid opening date, or has not been prequalified for at least five business days prior to the bid opening date. School districts are also expressly authorized to require submissions at an earlier date, and to set a longer time before the bid for prequalification to be completed. A school district must also make available to all bidders a list of district prequalified general contractors and MEP subcontractors at least five business days prior to the bid opening date. Pub. Contract Code, § 20111.6(e), (f), (j).

For projects awarded on or after January 1, 2015, general contractors and MEP subcontractors on lease-leaseback contracts must meet the prequalification requirements of section 20111.6. Although school districts are authorized to prequalify contractors on competitively bid projects on a per-project, quarterly, or annual basis, school districts are required to prequalify lease-leaseback contractors on a quarterly or annual basis only. For a discussion of lease-leaseback contracts, see section IV.T.3 of the Guide.

Mandatory prequalification has resulted in a host of questions for which there is not yet any guidance. For example, as discussed in section D.1 and 2 of the Guide, a bid may only be accepted if it is the lowest responsive and responsible bid. If a bid is rejected as nonresponsive, the bidder must be given notice and an opportunity to submit materials in a manner defined by the district concerning the issue of responsiveness. On the other hand, where a bidder is deemed non-responsible, the district is required to conduct a hearing and allow the bidder to present evidence that it is qualified to perform the contract. It is not clear how issues of responsiveness and responsibility are impacted by the prequalification requirements.

Also, the prequalification requirements state that a school district cannot accept a proposal form from a contractor if the contractor's listed subcontractors who are required to prequalify have failed to do so by the applicable deadlines. This presents an issue for school districts since they will not know which subcontractors are listed in the bid until they receive, open, and review the bid. These and other questions will remain a challenge for school districts to navigate until there is further guidance from the courts or the Legislature. School districts are encouraged to consult with legal counsel throughout the prequalification process, particularly in the event that a prospective bidder challenges their disqualification.

The mandatory prequalification requirements expire on January 1, 2019, unless that date is modified by the Legislature.

#### Permissive Prequalification

School districts and community college districts are also authorized to use prequalification on projects where prequalification is not mandatory. Public Contract Code section 20111.5 states:

- a) The governing board of the district may require that each prospective bidder for a contract, as described under Section 20111, complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works. The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaire and financial statements shall not be public records and shall not be open to public inspection.
- b) Any school district requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine the size of the contracts upon which each bidder shall be deemed qualified to bid.
- c) Each prospective bidder on any contract described under Section 20111 shall be furnished by the school district letting the contract with a standardized proposal form that, when completed and executed, shall be submitted as his or her bid. Bids not presented on the forms so furnished shall be disregarded.
- d) A proposal form required pursuant to subdivision (c) shall not be accepted from any person or other entity who is required to submit a completed questionnaire and financial statement for prequalification pursuant to subdivision (a), but has not done so at least five days prior to the date fixed for the public opening of sealed bids or has not been prequalified, pursuant to subdivision (b), for at least one day prior to that date.

- e) Notwithstanding subdivision (d), any school district may establish a process for prequalifying prospective bidders pursuant to this section on a quarterly basis and may authorize that prequalification to be considered valid for up to one calendar year following the date of initial prequalification.

Public Contract Code section 20651.5 contains a similar authorization for community college districts. Public entities are also authorized to prequalify under Public Contract Code section 20101. Although that section is written broadly so as to apply to a public entity subject to the Public Contract Code dealing with contracting by local agencies, it is not clear whether it applies to school and community college districts since they already have specific statutory authority for permissive prequalification of bidders. In fact, section 20101 specifically separates itself from section 20111.5, which controls for school districts. Public entities prequalifying bidders under section 20101 are required to establish a process to allow prospective bidders to dispute their proposed prequalification rating prior to the closing time for receipt of bids. If a rating is disputed, the public entity must provide notification to the prospective bidder of the basis for its disqualification and any supporting evidence received from others or adduced as a result of the public entity's investigation. The public entity must also give the prospective bidder the opportunity to rebut any evidence used as a basis for disqualification and to present evidence as to why the prospective bidder shall be found qualified. Again, it is unclear whether these procedures could apply to school or community college districts; some districts may follow these procedures out of an abundance of caution, and because section 20111.5 does not provide any guidance regarding challenging a disqualification.

#### **4. Uniform Public Construction Cost Accounting Act.**

A public entity may elect to affirmatively adopt the Uniform Public Construction Cost Accounting Act and use "Informal Bidding Procedures" to award contracts between \$45,000 and \$175,000.

- a) Summary of the Act.

The Uniform Public Construction Cost Accounting Act ("Act") was created to promote the uniformity of cost accounting standards and bidding procedures on construction work performed or contracted by public entities in California. (Pub. Contract Code, § 22000 *et seq.*) The Act raises the formal bid thresholds for public entities to \$175,000 and sets forth specific informal and formal bidding procedures. This means that a public entity that has affirmatively adopted the Act can use "informal bidding procedures," as defined by the Act, to award public projects between \$45,000 and \$175,000. The Act's "informal bidding procedures" require a public entity to notify specific trade journals each year in November and generate a list of interested contractors from contractor responses received by the public entity to the trade journal notifications. After this "Master List" is created, the public entity must provide all contractors on the Master List with notice for each contract exceeding \$45,000 to be bid at least ten (10) calendar days before bids are due. Additionally, the Act requires public agencies to notify these construction trade journals when formally bidding contracts in excess of \$175,000, as a part of the Act's formal bid procedures.

The Act is a good tool for local public entities who want to raise their bidding limits and have sufficient resources and staff time to generate a Master List each year and provide notice to all contractors on the Master List and the construction trade journals each time the public entity bids a construction contract between \$45,000 and \$175,000. Additionally, the Act imposes certain accounting procedures on the public entity which are triggered in limited

circumstances, which are discussed in more detail below in Section (c). In summary, a public entity should balance the benefit of obtaining a higher formal bid threshold against the burden of generating contractor lists on an annual basis, providing notice to all interested contractors on the list and the specified trade journals each time the public entity bids a contract between \$45,000 and \$175,000, and notifying the trade journals each time the public entity formally bids a construction contract over \$175,000.

b) Informal Bidding Procedures.

Pursuant to the Act, there are three different types of contracts which, for simplicity of discussion, are labeled as the following:

Small: Contracts for Public Projects under \$45,000  
Medium: Contracts for Public Projects between \$45,000 and \$175,000  
Large: Contracts for Public Projects Over \$175,000

The Act focuses on the procedures for awarding Medium Contracts. We discuss the Act's requirements for the above Small and Large Contracts below in Section (c). The discussion of the award procedures for Medium Contracts will be discussed in detail immediately following at Section 2.

c) Small/Large Contracts.

Small Contracts may be performed by the public entity's employees by force account, by negotiated contract, or by purchase order. Pub. Contract Code, § 22032 subd. (a). Large Contracts must be awarded utilizing formal bidding procedures, as modified by the Act in Public Contract Code section 22037. Pub. Contract Code, § 22032 subd. (c). The formal bid requirements for bidding Large Contracts are generally unchanged by the Act; however, there are two differences. First, the Act requires public agencies awarding Large Contracts to publish or post the "Notice Inviting Bids" at least 14 calendar days before the date for opening the bids. Pub. Contract Code, § 22037. Second, the Act requires that a public entity provide the construction trade journals, selected by the Uniform Public Construction Cost Accounting Commission ("Commission"), with the Notice Inviting Formal Bids for the Large Contract. Pub. Contract Code, § 22037. The notice inviting formal bids must also be sent electronically, if available, by either facsimile or electronic mail and mailed to all construction trade journals. The notice must be sent at least fifteen (15) calendar days before the date of opening the bids. In addition to the notice required by Public Contract Code section 22037, a public entity may give such other notice as it deems proper.

d) Medium Contracts.

Medium Contracts may be awarded pursuant to the "informal bidding procedures" to be adopted by the public entity in an informal bidding ordinance or resolution as set forth in the Act. Pub. Contract Code, §§ 22032, subd. (b), 22034. Pursuant to Section 22034 subdivision (a), the public entity must maintain a list of qualified contractors, identified according to categories of work, to which notices of informal bids on Medium Contracts will be mailed. The minimum criteria for development and maintenance of the contractors list shall be determined by the Commission.

According to the Cost Accounting Policies and Procedures Manual of the Commission ("Manual"), the public entity must also send such notices to the construction trade journals

determined by the Commission to be mandatory. The Commission determines, on a county-by-county basis, the appropriate construction trade journals which must receive mailed notice of all informal and formal construction contracts being bid for work within the specified county. (Please see [http://www.sco.ca.gov/Files-ARD-Local/cuccac\\_cuccac\\_man.pdf](http://www.sco.ca.gov/Files-ARD-Local/cuccac_cuccac_man.pdf) for your county.) The Commission also suggests that a public entity add any additional journals in its area to its distribution list. An entire list of possible journals is maintained by the Commission. Therefore, a public entity subject to the Act must notify the appropriate construction trade journals each time the public entity bids a Medium Contract or a Large Contract, as discussed above.

The list of contractors is established by mailing a notice to each of the above construction trade journals inviting all licensed contractors to submit certain information to the public entity for inclusion on the agencies' list. This information includes the following:

- 1) The name and address to which a notice or proposal should be mailed;
- 2) A telephone number at which they can be reached;
- 3) The type of work in which the contractor is interested and for which they are currently licensed; and
- 4) The class of license(s) they currently possess.

In addition, the public entity may include any contractor it desires and must include any contractor who requests to be added to the list during the year, so long as the contractor provides the public entity with the required information. The notice must be sent each November in order to establish the public entity's contractor list for the next calendar year. (Manual, p. 6.)

The following is a suggested list of information that should be included in the notice mailed to the construction trade journals and listed contractors:

- 1) Project title and contract # (if any)
- 2) Cost range
- 3) Location of site
- 4) Who is taking bids/date and time due
- 5) Owner's address and phone number
- 6) Architect's address and phone number
- 7) Brief description of work to be done
- 8) Where plans may be obtained
- 9) Deposit Required/Whether or not refundable
- 10) Percentage of bid bond
- 11) Percentage of performance bond
- 12) Percentage of payment bond

If all of the bids the public entity receives exceed \$175,000, the governing board may, by an adoption of a resolution by a four-fifths vote, award the contract, at \$187,500 or less, to the lowest responsible bidder, if the Board determines the cost estimate of the public entity was reasonable. Pub. Contract Code, § 22034 subd. (f). Otherwise, if the contract would exceed \$175,000, the public entity must formally bid the contract as described above in the discussion regarding Large Contracts. Pub. Contract Code, § 22032.

e) Accounting Procedures.

The Act provides that the Commission shall review the accounting procedures of any participating public entity where a contractor presents evidence that the work undertaken by the public entity falls within any of the following categories:

- 1) Is to be performed by a public entity after rejection of all bids, claiming work can be done less expensively by the public entity.
- 2) Exceeded the force account limits.
- 3) Has been improperly classified as maintenance.

So long as a contract is less than \$45,000 (including all change orders), the public entity does not perform the work itself after rejecting all bids, claiming that it can perform the work for less money, or improperly classify work as "maintenance," a public entity will be not subject to the Commission's review of its accounting procedures.

f) Procedures for Adopting the Act.

Should a public entity elect to become subject to the Act, it must, by resolution, formally adopt the Act. Once the resolution is adopted the public entity must undertake the following measures:

- Notify the State Controller of the public entity's election to become subject to the Act. The public entity may do this by letter, with a copy of the executed resolution attached, addressed to: Office of the State Controller, Division of Accounting & Reporting, Local Government Policies Section, P.O. Box 942850, Sacramento, California 94250.
- Adopt an informal bidding ordinance pursuant to Public Contract Code section 22034. Section 22034 states:

Each public agency that elects to become subject to the uniform construction accounting procedures set forth in Article 2 (commencing with Section 22010) shall enact an informal bidding ordinance to govern the selection of contractors to perform public projects pursuant to subdivision (b) of Section 22032. The ordinance shall include the following requirements:

- (a) The public agency shall maintain a list of qualified contractors, identified according to categories of work. Minimum criteria for development and maintenance of the contractors list shall be determined by the commission.
- (b) All contractors on the list for the category of work being bid or all construction trade journals specified in Section 22036, or both all contractors on the list for the category work being bid and all construction trade journals specified in Section 22036, shall be mailed a notice inviting informal bids unless the product or service is proprietary.
- (c) All mailing of notices to contractors and construction trade journals pursuant to subdivision (b) shall be completed not less than ten (10) calendar days before bids are due.
- (d) The notice inviting informal bids shall describe the project in general terms, how to obtain more detailed information about the project, and state the time and place for the submission of bids.

- (e) The governing body of the public agency may delegate the authority to award informal contracts to the public works director, general manager, purchasing agent, or other appropriate person.
- (f) If all bids received are in excess of one hundred seventy-five thousand dollars (\$175,000), the governing body of the public agency may, by passage of a resolution by a four-fifths vote, award the contract, at one hundred ten eighty-seven thousand five hundred dollars (\$187,500), or less, to the lowest responsible bidder, if it determines the cost estimate of the public agency was reasonable.

If a public entity opts to adopt the Act, lists of trade journals and contractors may be maintained pursuant to any internal, administrative procedures the public entity may have in place. For further guidance regarding the Act, the latest edition of the "Cost Accounting Policies and Procedures Manual of the California Uniform Public Construction Cost Accounting Commission" may be found at [http://www.sco.ca.gov/Files-ARD-Local/cuccac\\_cuccac\\_man.pdf](http://www.sco.ca.gov/Files-ARD-Local/cuccac_cuccac_man.pdf).

## **B. Statutory Exceptions.**

The following are various statutory exceptions to the competitive bidding requirement.

### **1. Change Order for Material and Supplies (Pub. Cont. Code §§ 20118.4/20659.)**

Public Contract Code section 20118.4/20659 authorizes the change or alteration of a contract governed by Education Code Sections 17595, *et seq.*, to be made without competitive bidding if the cost agreed upon in writing between the governing board and the contractor does not exceed the greater of the following: (a) the amount specified in Public Contract Code sections 20111/20651 or 20114/20655, whichever is applicable to the original contract, or (b) ten percent of the original contract price.

The opinion of most lawyers is that Public Contract Code section 20118.4/20659 extends to contracts for materials or supplies. Public Contract Code section 20118.4/20659 by its terms refers to Public Contract Code section 20111/20651 which governs contracts for materials or supplies in addition to contracts for public projects and construction work. Additionally, the Public Contract Code makes the change order provision applicable to portions of the Education Code which continue to pertain to a variety of types of contracts including continuing contracts for materials or supplies.

Based on Public Contract Code section 20118.4/20659, it is possible to increase or decrease the cost of a bid after the contract is awarded because of changes which arise during the course of the contract. These changes are limited to the bid limits or, in the larger contracts, to ten percent of the original contract price, whichever is greater. These limits, according to the California Attorney General, "appear to be inserted to ensure that substantial changes are not made which would, in effect, constitute the making of a new contract." 73 Op. Att'y Gen. 423 (1990). Thus, the change order provision allows districts to negotiate changes to a contract provided that the contract is not materially altered by the change so as to create a new project which should be separately bid.

**2. Computers, Software, Telecommunications Equipment, Microwave Equipment and Related Electronic Equipment and Apparatus (Pub. Cont. Code 20118.2)**

School districts may procure by a detailed request for proposal and competitive negotiation process computers, software, telecommunications equipment, microwave equipment, and other related electronic equipment and apparatus provided that the contracts are not for construction or for the procurement of any product that is available in substantial quantities to the general public. Published notice is required and discussed further in section II.C. below. In the context of technology bids, there is a tendency to overlook the newspaper publication requirement, especially given that FCC Forms are posted on the USAC website and school districts often publish RFP's on their own website. However, failure to follow California public bidding requirements, including newspaper publication, can serve as grounds for a bid protest and/or forfeiture of any eRate funding received for the contract. The RFP must identify all significant evaluation factors and their relative importance. In addition to price, evaluation factors may include vendor financing, performance reliability, standardization, life-cycle costs, delivery timetables, support logistics, the broadest possible range of competing products and materials available, fitness of purchase, manufacturer's warranties, and similar factors. Procedures for technical evaluation of proposals must be in place. If award is not to the lowest priced bidder, the district "shall make a finding setting forth the basis for the award." (See also Section C. 2. a. below pertaining to Public Contract Code section 20118.1 and "Award to Any of Three Lowest Responsible Bidders for Data Processing Systems and Supporting Software").

**3. Educational Material (Pub. Cont. Code §§ 20118.3; Educ. Code § 81651.)**

The governing board of a school district may purchase supplementary textbooks, library books, educational films, audiovisual materials, test materials, workbooks, instructional computer software packages, or periodicals in any amount needed for the operation of its schools without taking estimates or advertising for bids. Pub. Cont. Code § 20118.3; Educ. Code § 81651.

**4. Perishable Foodstuffs and Seasonal Commodities (Educ. Code § 38083; Pub. Cont. Code § 20660.)**

There are specific federal and state requirements related to acquisition of perishable foodstuffs and seasonal commodities. This includes a requirement of bidding for perishable food and other items, if funded from revenues generated by school food services. Although State law exempts purchases of perishable foods under Education Code section 38083, federal law governs pursuant to the Supremacy Clause of the United States Constitution. Under the federal regulations, school districts should use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procedures conform to applicable Federal law and regulations. (7 C.F.R. §3016.36(b).) Under the federal rules, examples of situations considered to be inappropriately restrictive of competition include but are not limited to: (1) placing unreasonable requirements on firms in order for them to qualify to do business; (2) requiring unnecessary experience and excessive bonding; (3) noncompetitive pricing practices between firms or between affiliated companies; (4) noncompetitive awards to consultants that are on retainer contracts; (5) organizational conflicts of interest; (6) specifying on a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement; and (7) any arbitrary action in the procurement process. (7 C.F.R., § 3016.36(c).)

If the total annual value of the contract is less than the applicable bid threshold (\$86,000 as of January 1, 2015), an informal bid process can be used. For contracts that are equal to or exceed the applicable bid threshold, a formal bid process must be used. (Cal. Department of Education, *Food Service Management Procurement*

<http://www.cde.ca.gov/ls/nu/sn/fsmcproc.asp> (as of January 26, 2015).)

For informal bidding, the district must write a description of the services being sought and provide the same information to a minimum of three agencies which the district contacts to obtain price quotes for the services. (Cal. Department of Education, *Food Service Management Procurement, supra.*)

For formal bidding, districts must issue and publicly advertise a Request for Proposal (RFP) or Invitation for Bid (IFB) for any procurement equal to or over the applicable small purchase threshold. Preparing and issuing an RFP or IFB includes the following steps:

1. Evaluating which types of services are needed and preparing a Scope of Work (SOW) that describes the services and tasks or products requested.
2. Drafting the RFP/IFB, which must include the SOW and a sample contract.
3. Submitting the RFP/IFB to the CDE for review and approval prior to publishing (SFAs should allow 90 days for the CDE to review and approve).
4. Providing the RFP/IFB to contractors known to offer the desired services or products.
5. Publicly advertising the RFP/IFB.
6. Establishing a date and time for opening proposals/bids.
7. Evaluating the proposals/bids.
8. Submitting the negotiated contract and all bidding documents to the CDE for review and approval (allow 30 days); this is not required for an IFB procurement.
9. Awarding the contract and publicly posting the outcome of the RFP/IFB.

(See, Cal. Department of Education, *Food Service Management Procurement, supra.*) Both the informal and formal bid processes require districts to maintain records sufficient to detail the significant history of the procurement process. These records include, but are not limited to: public notice, RFP/IFB, contract, rationale for the method of procurement, selection of contract type, justification for lack of competition, basis for contractor selection or rejection, and basis for award cost or price. (Cal. Department of Education, *Food Service Management Procurement, supra.*)

Federal law also requires districts to have protest procedures in place to handle and resolve disputes relating to their procurements and must in all instances disclose information regarding a protest to the California Department of Education. Also, contracts with food service management companies must include federally required clauses contained in the Code of Federal Regulations, title 7, sections 3019.48, 3016.36(i), 210.16(a), and 250.12(d). Finally, districts are prohibited from awarding a contract to any vendor that prepared or had a significant role in developing the contract and related bid documents.

## **5. Surplus Federal Property (Educ. Code §§ 17602/81653.)**

Governing boards of school districts may also purchase surplus property from the federal government or any agency thereof in any amount needed for the operation of the schools of the district without competitive bidding. Educ. Code §§ 17602/81653.

**6. Energy Service and Conservation Contracts (Gov't Code §§ 4217.12/15814.10; Educ. Code § 81660.)**

Education Code sections 81660 through 81662 authorize a community college district to enter into an energy management agreement for energy management systems (i.e., solar energy or solar and energy management systems) with the lowest responsible bidder, considering the net cost or savings to the district (i.e., the cost of the system to the district, if any, less the projected energy savings to be realized from the system), for a term not to exceed fifteen years.

Prior to January 1, 1988, Education Code sections 39660 through 39662 authorized school districts to enter into energy management agreements. These sections were repealed effective January 1988 by Statutes of 1987, chapter 1452. The purpose of chapter 1452 was to more fully implement the "permissive code section," Education Code section 35160. In order to do this, the Legislature found it necessary to repeal many provisions of the Education Code. In section 1 of chapter 1452 the Legislature stated that whenever a power, authorization or duty of a school district was repealed by that chapter, it was not the intent of the Legislature to prohibit the district from acting as prescribed by the deleted provisions. Instead, the Legislature stated that it intended that school districts should have the power, in the absence of other legislation, to act under the general authority of Education Code section 35160.

Thus, school districts may also enter into energy management agreements for energy management systems with the lowest responsible bidder, considering the net cost or savings to the district. A school district would not, however, be limited to a fifteen-year term.

Although the Education Code requires competitive bidding for energy management agreements, public agencies are authorized to develop energy conservation, co-generation and alternate energy supply sources pursuant to sections 4217.10 to 4217.18 of the Government Code, without competitive bidding. School districts and community college districts are included in the definition of "public agency." Gov't Code § 4217.11, subd. (j).

A school district or community college district may enter into an energy service contract and any necessarily related facility ground lease on terms the governing board determines are in the best interests of the district. The determination must be made at a regularly scheduled public hearing, with two weeks advance notice and the governing board must find: (a) that the anticipated cost to the district for thermal or electrical energy or for the conservation facility under the contract will be less than the anticipated marginal cost to the district of thermal, electrical, or other energy that would have been consumed by the district in the absence of those purchases; and (b) that the difference, if any, between the fair rental value for the real property subject to the facility ground lease and the agreed rent, is anticipated to be offset by below-market energy purchase or other benefits provided under the energy service contract. Gov't Code § 4217.12.

Government Code section 4217.13 authorizes a district to enter into a facility financing contract and a facility ground lease on terms determined by the board to be in the best interest of the district if the determination is made after two weeks' public notice at a regularly scheduled public hearing and if the governing body finds that funds for the repayment of the financing or the cost of design, construction and operation of the energy conservation facility, or both, are projected to be available from revenues resulting from sales of electricity or thermal energy from the facility or from funding which otherwise would have been used for purchase of electrical, thermal, or other energy required by the district in the absence of the energy conservation facility or both. Districts may also enter into contracts for the sale of electricity, electrical

generating capacity or thermal energy produced by the energy conservation facility. Gov't Code § 4217.14.

Section 4217.16 of the Government Code specifically states:

Prior to awarding or entering into an agreement or lease, the public agency may request proposals from qualified persons. After evaluating the proposals, the public agency may award the contract on the basis of the experience of the contractor, the type of technology employed by the contractor, the cost to the local agency, and any other relevant considerations. The public agency may utilize the pool of qualified energy services companies established pursuant to Section 388 of the Public Utilities Code and the procedures contained in that section in awarding the contract.

It is clear from this language that districts can enter into any of the above contracts or leases without competitive bidding.

In addition, in 1993 Government Code sections 15814.10 and following pertaining to energy conservation in public buildings were expanded. Section 15814.10 provides in part, "The intent of the Legislature in enacting this chapter is to provide a mix of financing options for the development of cost saving state energy and water conservation projects." In 1993 Section 15814.11 was amended to include within the definition of public building "any publicly funded school that includes kindergarten and grades 1 to 12" for any device or modification that reduces water use from established water sources or for equipment, maintenance, meters, load management techniques and equipment, or other measures to reduce energy or water use or make for a more efficient use of energy or water. According to Section 15814.12 the State Public Works Board also may "enter into energy service contracts, at any structure, building, facility, site or work used, owned or hereafter acquired by . . . the community colleges . . . ." Thus, lawyers typically approve Energy and Water Service Contracts between districts and the State Public Works Board.

The above rules may be altered where a school district or community college district is using Proposition 39 ("Prop. 39") funding. Prop. 39 was approved by voters in 2012 and requires that a portion of increased corporate tax revenue to the State be allocated to the Clean Energy Job Creation Fund to fund projects that create California clean energy jobs. The Legislature subsequently enacted Senate Bill (SB) 73 in order to implement the requirements of Prop. 39. SB 73 provides in part that while an educational agency "may use the best value criteria" as defined in Public Contract Code section 20113, it "shall not use a sole source process to award [Prop. 39] funds." Pub. Resources Code, § 26235(c). The Legislature, however, did not define "sole source process." On December 19, 2013, the California Energy Commission approved the "Proposition 39: California Clean Energy Jobs Act – 2013 Program Implementation Guidelines." Unfortunately, those Guidelines do not provide clarity regarding how contracts with design professionals, energy consultants, contractors and others should be awarded in order to qualify for Prop. 39 funding. Therefore, educational agencies are left with uncertainty as to what type of competitive process is sufficient and to what extent such a process is required for consultants not involved in the actual construction and implementation of Prop. 39 funded projects, such as energy consultants and similar professionals.

While the scope of the sole source prohibition remains unclear, an educational agency may potentially decrease its risk of an inadvertent violation by increasing the competitive process it utilizes for awarding a Prop. 39 funded contract, to the extent such contracting processes are

otherwise legally permissible. An educational agency may avoid the risk of violating this prohibition by utilizing Prop. 39 funds on contracts awarded to contractors through a competitive bid process, while funding design professional contracts with non-Prop. 39 funds. An educational agency planning to award Prop. 39 funded contracts should carefully review its contract awarding process with legal counsel in order to assess the risks created by the “sole source” prohibition, and the application of that prohibition to a particular set of facts.

**7. “Piggybacking” on other Public Agency Contracts (Educ. Code § 17595; Pub. Cont. Code §§ 20118, 20652, 20653; Gov’t Code § 14931.)**

The governing board of a school district may, without advertising for bids, if the board has determined it to be in the best interests of the district, authorize by contract, lease, requisition or purchase order, any public corporation or agency to lease data-processing equipment, purchase materials, supplies, equipment, automotive vehicles, tractors and other personal property for the district. It is important to note that the Public Contract Code does not authorize districts to “piggyback” on other public agency’s service contracts.

Effective January 1, 2007, Public Contract Code section 20118 has been amended to clarify that a district is not required to make payment to the other public agency but may make payment directly to the vendor. Unfortunately, the parallel section for community college districts, Public Contract Code section 20652, was not amended. There may, nevertheless, be reasonable arguments to be made for community college districts that they may pay vendors directly. The issue, however, is uncertain. Pub. Contract Code §§ 20111, 20118/20652. In 2006 the California Attorney General issued an opinion (89 Op. Att’y Gen. 1) that concluded Public Contract Code section 20118 may not be used to contract with another public agency to acquire factory-built modular building components for installation on a permanent foundation. This conclusion appears to be being accepted by school attorneys throughout the State. Footnote 4 of the opinion, however, stated in part, “The statute provides no authority for a school district contract directly with a lessor or vendor.” As noted above, this conclusion is made moot for school districts by the amendment of Public Contract Code section 20118 discussed above.

The governing board of a school district is also authorized to purchase materials, equipment or supplies through the State Department of General Services without advertising for bids. Educ. Code § 17595; Pub. Cont. Code § 20653.

To take advantage of the exception in Public Contract Code, section 20118/20652, the governing board of a district is required to make a determination that a purchase through a public corporation or agency is in the best interests of the district. The board may then authorize the public corporation or agency, by contract, lease, requisition, or purchase order, to make a purchase on its behalf. Such authorization enables the public corporation or agency to include in its advertisement for bids, the quantity or nature of the personal property desired by the district.

For many years the application of Public Contract code sections 20118/20652 has been stretched to cover a wide variety of acquisitions. The 2006 opinion of the California Attorney General appears to have reined in some of the broadest interpretations of the statute which arguably allowed true construction projects to be undertaken without bidding for modular buildings. This practice is clearly not authorized by the statute which expressly pertains to personal property, not property which will be installed on a permanent foundation.

Section 20118/20652 states that the governing board of a school district ". . . may authorize by contract, lease, requisition, or purchase order, any public corporation or agency to lease data-processing equipment, purchase materials, supplies, equipment, automotive vehicles, tractors, and other personal property for the district in the manner in which the public corporation or agency is authorized by law to make the leases or purchases . . . ." if the public corporation or agency through which a district purports to make a purchase is required to competitively bid for its purchases, then the purchases it makes on behalf of a district must also be competitively bid. In the last example used above, the purchase of six (6) relocatables directly from the vendor by District B does not satisfy the requirement that the purchase be made for the district in the manner in which District A is authorized by law to make purchases, because the six (6) relocatables were not advertised by District A.

In summary, districts should check with their lawyers prior to "piggybacking" a purchase as some take a less conservative approach, that section 20118/20652 does not authorize a school district ("purchasing district") to make purchases of personal property (as described in section 20118/20652) directly from a vendor who has been awarded a contract by another district, unless the awarding district included in its advertisement for bids, at a minimum, the name of the district on whose behalf it is making the purchase. A school district is authorized to make purchases on contracts awarded by other districts provided said districts are acting on behalf of the authorizing district.

Piggybacking is also a mechanism by which cooperative purchasing may be achieved, as discussed further in section III.D. School districts should ensure that any out-of-state piggyback contracts, associated with a cooperative purchasing agreement or otherwise, complied with all California public contracting laws in procuring the subject of the underlying contract and that the contract terms are consistent with California law.

It is generally accepted that a contract for personal property may be piggybacked under section 20118 if it includes an incidental amount for labor or installation. The general rule is that these labor/installation services should not exceed more than 10% of the contract work or else the contract should be competitively bid or otherwise exempt from traditional public bidding requirements. Where installation is less than 10% of the contract, it is considered "incidental" and is not subject to the bidding procedures outlined in the Public Contract Code. (See *Steelgard v. Jansen* (1985), 171 Cal. App. 3d 79.) The *Steelgard* case holds that if the labor/installation component is more 50% or more of the total contract value then it is not incidental and must be treated as a public works project. However, where the labor/installation is beyond the 10% threshold but less than 50% of the contract, the labor/installation is presumptively not incidental, and the burden is placed on a school district to determine otherwise. Where the labor/installation component is between 10%-49%, the District is advised to record and formalize any findings and their rationales in the approving resolution and any Board minutes, in order to protect itself in the event of a legal challenge. The *Steelgard* case was decided under a body of law that is not applicable to school districts, however, it is generally believed that it can be applied to school district purchases by analogy.

#### **8. Acquisitions from California Multiple Award Schedules (CMAS) Including Acquisitions of Information Technology Goods and Services (Pub. Contract Code, §§ 10290 - 10299 and 12100.)**

The Procurement Division of the California Department of General Services can provide purchasing assistance to local agencies such as school districts and community college districts

without the necessity for the districts to go to bid. Public Contract Code section 10298, subdivision (a), allows the Director of General Services to:

“consolidate the needs of multiple state agencies for goods, information technology, and services, and, pursuant to the procedures established in Chapter 3 (commencing with Section 12100) [regarding the acquisition of technology goods and services], establish contracts, master agreements, multiple award schedules, cooperative agreements, including agreements with entities outside the state, and other types of agreements that leverage the state’s buying power, for acquisitions authorized under Chapter 2 (commencing with Section 10290) [the so-called “CMAS” provisions].”

Section 10298 also allows for participation in an “Alternative Protest Process” pursuant to Chapter 3.6 (commencing with Section 12125) for bid protests.<sup>6</sup> Participation in this process is permissive. Section 10298, subdivision (a) specifically states “State and local agencies may contract with suppliers awarded those contracts without further competitive bidding.” Section 10298, subdivision (b), goes on to authorize the Director of the Department of General Services to make the services of the Department available “upon the terms and conditions agreed to, to any . . . district, or other local governmental body or corporation empowered to expend public funds . . . .” Thus, the authority for community college districts to use these acquisition procedures appears clear. On its face the section also appears to be applicable to school districts.

Public Contract Code section 10299, subdivision (a), however, specially provides:

“Notwithstanding any other provision of law, the director may consolidate the needs of multiple state agencies for information technology goods and services, and, pursuant to the procedures established in Chapter 3 (commencing with Section 12100) [regarding the acquisition of technology goods and services], establish contracts, master agreements, multiple award schedules, cooperative agreements, including agreements with entities outside the state, and other types of agreements that leverage the state’s buying power, for acquisitions authorized under Chapter 2 (commencing with Section 10290) [the so-called “CMAS” provisions], Chapter 3 (commencing with Section 12100) [regarding the acquisition of technology goods and services] . . . .”

These provisions also allow for participation in the “Alternative Protest Process” pursuant to Chapter 3.6 (commencing with Section 12125) for bid protests. Participation in this process is permissive. Section 10299, subdivision (a) specifically states, “State agencies and local agencies may contract with suppliers awarded the contracts without further competitive bidding.” Thus, although it is not identical to subdivision (a) of Section 10298 in the above respects, it is very similar.

Section 10299, subdivision (b), is more specific than is Section 10298, subdivision (b), however, in that it specifically allows the Director of General Services to make the services of the Department of General Services available “to any school district empowered to expend public funds.” (Emphasis added.) In addition, it again states that school districts need not

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<sup>6</sup> Note: section 12125 is operative until December 31, 2011, then repealed by law (Pub. Contract Code § 12128) unless extended before December 31, 2012.

competitively bid to utilize the “contracts, master agreements, multiple award schedules, cooperative agreements, or other types of agreements established by the department for use by school districts for the acquisition of information technology, goods, and services.” It is certainly clear that school districts can use the CMAS acquisition process for technology goods and services and for goods when the Director of General Services makes these contracts, agreements and schedules available to them as it now does.

Prior to 2001, Public Contract Code sections 10324 and 12110 required the Department of General Services to make acquisitions on behalf of local public agencies, which included school districts and community college districts. At that time, school districts and community college districts were advised that the Public Contract Code provisions establishing CMAS and providing for acquisitions of information technology goods and services were only available if the Department of General Services made the acquisitions on behalf of the districts. However, the Department of General Services was unwilling to so acquire those goods and services.

Statutes 2000, chapters 918 and 71 added Public Contract Code sections 10298 and 10299 and repealed Public Contract Code sections 10324 and 12110. The repeal of Public Contract Code sections 10324 and 12110 and the adoption of Sections 10298 and 10299 clarified that the CMAS statutes and the statutes pertaining to the acquisition of information technology goods and services (which are available to schools and community college districts through the CMAS statutes) are fully available to schools and community college districts to use for the direct acquisition of the specified goods and services.

Public Contract Code section 10290.3 also allows the CMAS's bidding provisions to include reverse auction procedures for the acquisition of goods and services. This section also defines reverse auction as “a competitive online solicitation process for fungible goods or services in which vendors compete against each other online in real time in an open and interactive environment.” Vendors must register before the auction.

With the many revisions to the laws pertaining to CMAS acquisitions and acquisitions of information technology goods and services by Statutes 2000, chapters 918 and 71, also came revisions to Public Contract Code section 12100. That section was revised to reference a very broad definition of “information technology” from former Government Code section 11702. Former Government Code section 11702, subdivision (e) (as amended by Stats. 1995, ch. 508, § 21) provides:

“‘Information technology’ includes, but is not limited to, all electronic technology systems and services, automated information handling, system design and analysis, conversion of data, computer programming, information storage and retrieval, telecommunications which include voice, video, and data communications, requisite system controls, simulation, electronic commerce, and all related interactions between people and machines.”

Former Government Code section 11702 was repealed on January 1, 2003. However, courts will likely continue relying on the definition from the section because Public Contract Code section 12100 still refers to it.

It is generally accepted that a CMAS contract may include labor/installation services if those services are “incidental” to the project. According to official CMAS program information, an agency purchase order may allow for a public works component only when it is incidental to the overall project

requirements, describing “incidental” as meaning that the total dollar value of all services included in a purchase order must not exceed the dollar value of the products. (General CMAS Program Information <<http://www.documents.dgs.ca.gov/pd/cmas/GeneralCMASProgramInformation.pdf>. (as of January 2015).) This appears to mean that as long as the construction/labor/installation portion of the contract is less than fifty percent of the total project cost, CMAS may be used. This is in contracts to a much lower 10% rule of thumb that applies to piggyback contracts. (See section I.B.7.)

## **9. Emergency Repair Contracts (Pub. Cont. Code §§ 20113/20654.)**

In an emergency, when any repairs, alterations, work or improvement is necessary to any facility of public schools to permit the continuance of existing school classes or to avoid danger to life or property, the governing board of a school district or a community college district by unanimous vote and with the approval of the county superintendent of schools may make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing of materials or supplies for the purpose without advertising for or inviting bids.

In 2004 in the case of *Marshall v. Pasadena Unified School District*, 119 Cal.App.4th 1241, the Court of Appeal determined the definition of emergency in Public Contract Code section 1102 must be read into the terms of Section 20113. Section 1102 defines an emergency as a “sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services.” Instead of making a contract as stated above, the governing board of a school district or a community college district may authorize the use of day labor or force account for such work. Pub. Cont. Code §§ 20113(a)(2)/20654.

For districts that have elected to become subject to CUPCCAA (see Section I.A.4 of the Guide), different rules apply for emergency contracts. Under CUPCCAA, emergency situations are governed by Public Contract Code sections 22035 and 22050, *et seq.* In the case of an emergency, the CUPCCAA district may, by four-fifths vote of its governing body, repair or replace a public facility, take any directly related and immediate action required by that emergency, and procure the necessary equipment, services, and supplies for those purposes, without giving notice for bids to let contracts. Pub. Contract Code, § 22050(a)(1). The Board must make a finding, based on substantial evidence set forth in the minutes of the meeting, that the emergency will not permit a delay to allow for a competitive solicitation for bids, and that the action is necessary to respond to the emergency. Pub. Contract Code, § 22050(a)(2). The Board may also delegate the authority to order any action authorized in the case of an emergency pursuant to Public Contract Code section 22050(a)(1), by resolution and a four-fifths vote. Pub. Contract Code, § 22050(b).

## **10. Day Labor (Pub. Cont. Code §§ 20114/20655.)**

A governing board may make repairs, alterations, additions or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on school grounds, erect new buildings and perform maintenance by day labor or by force account, whenever the total number of hours on the job does not exceed 350 hours. If the school district has an average daily attendance of 35,000 or more, or for community college districts if the number of full-time equivalent students is 15,000 or more, the board may also make repairs to school buildings, grounds, apparatus or equipment, including painting or repainting and perform maintenance as defined in Public Contract Code section 20115/20656 by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours or when the cost of materials does not exceed \$21,000. Day labor includes the use of maintenance

personnel employed on a permanent or temporary basis. Pub. Cont. Code §§ 20114/20655. Based on the express language of the statute, the \$21,000 limit for the cost of materials does not apply to school districts with less than 35,000 average daily attendance, or community college districts with less than 15,000 full-time equivalent students.

### **11. Contracts for Special Services (Gov't Code § 53060.)**

The courts have noted that the Legislature has recognized the right to hire certain special services without competitive bidding by enacting Government Code section 53060, which is discussed at Section VII, subdivision A, 2, of this Guide.

### **12. Joint Powers Agency Purchasing Agreements (Govt. Code § 6500, et seq.)**

School districts and community colleges may enter into joint powers agreements to establish a Joint Powers Agency ("JPA") to purchase equipment, materials, and supplies. (Govt. Code § 6500, et seq., 15 Op. Att'y Gen. 108 (1950)) The governing board of each public agency to be a member of the JPA must approve the formation of the JPA.

The administration of a JPA is typically governed by a joint powers agreement. The agreement should include the relationship between the public agencies, the manner in which it will purchase equipment, materials and supplies, and how costs will be shared among the member districts. Please note that the California Attorney General has issued an opinion clarifying that a JPA cannot delegate purchasing to a private company on behalf of the JPA. (71 Op. Atty Gen. 266, 275 (1988).

More and more JPAs are being formed for purchasing purposes, and some believe that the JPA need not comply with the Public Contract Code. It is important to remember that public agencies that are party to a JPA may only exercise powers that are common to them. Gov. Code, § 6502. Thus, a JPA made up of school districts would generally be subject to the same legal requirements as each individual member, including the Public Contract Code.

## **C. Other Exceptions.**

### **1. "Public Policy" Exception.**

The purposes of competitive bidding statutes are to secure economy in the construction of public works and the expenditures of public funds for materials and supplies needed by public bodies; to protect the public from collusive contracts; to exclude favoritism and corruption and to promote competition among bidders so as to ensure that all public contracts are secured at the lowest cost to taxpayers. 64 Am.Jur. 2d, Public Works and Contracts, 37.

However, where competitive bidding proposals do not produce an advantage, a statute requiring competitive bidding does not apply. The law in California on this point holds that where competitive bidding works an incongruity and is unavailing as affecting the final result, or where it does not produce any advantage or it is practically impossible to obtain what is required and observe such forms, then competitive bidding may be dispensed with; for example, competitive bidding is not required in a case of a sole supplier of a needed commodity. See *Los Angeles Gas & Electric Corp. v. Los Angeles* (1922) 188 Cal. 307 ; *Los Angeles Dredging Co. v. Long Beach* (1930) 210 Cal. 348; *Hodgeman v. San Diego* (1942) 53 Cal. App. 2d 610; *County of Riverside v. Whitlock* (1972) 22 Cal. App. 3d 863. Competitive bidding statutes should not be construed so as to defeat their purpose or impede public business.

In *Graydon v. Pasadena Redevelopment Agency (1980)* 104 Cal. App. 3d 631, the court Discussed the situations in which exceptions to competitive bidding have been upheld as follows:

This principle has been held applicable in California decisions in a variety of situations involving both the purchase of services and products and the construction of public improvements and buildings where it has appeared that competitive bidding would be incongruous or would not result in any advantage to the public entity in efforts to contract for the greatest public benefit. It has also been applied in fact situations in which the government entity has entered into contracts for personal services depending upon a peculiar skill or ability (*Kennedy v. Ross*, supra, 28 Cal.2d 569;<sup>7</sup> *San Francisco v. Boyd*, supra, 17 Cal.2d 606;<sup>8</sup> *Miller v. Boyle*, supra, 43 Cal.App. 39);<sup>9</sup> contracts for the purchase of patented products (*Hodgeman v. City of San Diego (1942)* 53 Cal. App. 2d 610);<sup>10</sup> contracts for the provision of services or the construction of public improvements by a government regulated monopoly (*Los Angeles G. & E. Corp. v. Los Angeles*, supra, 188 Cal. 307;<sup>11</sup> *County of Riverside v. Whitlock*, supra, 22 Cal.App.3d 683);<sup>12</sup> contracts for experimental or unique products and/or services (*Hiller v. City of Los Angeles*, supra, 197 Cal.App.2d 685);<sup>13</sup> and actions or contracts for the acquisition or disposition of property for a particular use and with a special value to one person (*Orange County Water Dist. v. Bennett*, supra, 156 Cal.App.2d 745;<sup>14</sup> *Meaking v. Steveland, Inc.*, supra, 68 Cal.App.3d 490<sup>15</sup>).

In *Los Angeles Dredging Company v. Long Beach*, supra, 210 Cal. 348, contracts were entered into with a dredging company for the rerouting of dredging pipes, without competitive bidding.

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<sup>7</sup> In the *Kennedy* case, the court held that a contract with a consulting engineer to prepare engineering and architectural plans and specifications for a sewage disposal plant was a contract for expert and professional services, not subject to competitive bidding.

<sup>8</sup> In the *Boyd* case, the court held that a contract for a civil engineer to make surveys and reports relative to traffic and transit conditions was a contract for the employment of a person who is highly and technically skilled in his science or profession, which may properly be made without competitive bidding.

<sup>9</sup> In the *Miller* case, the court held that because an architect's work required taste, skill, and technical learning and ability of a rare kind, a contract for an architect need not be competitively bid.

<sup>10</sup> In the *Hodgeman* case, the court held that a sole source contract for the purchase of parking meters was authorized where only one type of parking meter was available, and could be purchased from only one vendor, which would meet the special requirements of the city. The court stated that "there being no chance of real competitive bidding, to require it would work an incongruity."

<sup>11</sup> In the *Los Angeles Gas & Electric Corporation* case, the court upheld a sole source contract for the purchase of distributing plants for electrical power, stating that "the power to be supplied by the companies could not be obtained elsewhere and is furnished by public service corporations for distribution to customers already entitled to that service."

<sup>12</sup> In the *Whitlock* case, the court held that a contract for the furnishing of public utility services to a municipality or political subdivision is not subject to competitive bidding because the rates for the services were fixed or controlled by a regulatory body or commission, thereby affording adequate protection against fraud or favoritism.

<sup>13</sup> In the *Hiller* case, the court held that a contract with a nonprofit corporation for it to operate and maintain, at no expense to the city, a zoo to be constructed by the city, was not required to be competitively bid.

<sup>14</sup> In the *Bennett* case, the court held that a condemnation of a particular property was not subject to a general competitive bidding requirement for expenditures in excess of a certain amount, because requiring competitive bidding for the purchase, acquisition or condemnation of the property in question would work an incongruity, there being no chance of real competitive bidding.

<sup>15</sup> In the *Meaking* case, the court held that the sale of a 25-foot by 155-foot strip of public land (formerly a street) to the abutting property owners was not required to be competitively bid, where the abutting property owners were the only potential purchasers and were willing to pay the full appraised value of the property. The court stated that "under the circumstances, advertising for bids would not only be unnecessary, but also an idle act."

The court held that where the contractor was the only party that could enter into an agreement with the city due to the nature of the work required, the competitive bidding statute did not apply. The court stated at page 354:

The first exception is founded on the fact that sometimes it is undesirable or impossible to advertise for bids for particular work. In such cases the statutory requirement is deemed not to apply. In *2 Dillon on Municipal Corporations*, 1199, section 802, the law is thus stated: "It has been held that where competitive proposals work an incongruity and are unavailing as affecting the final result, or where they do not produce any advantage . . . or it is practically impossible to obtain what is required and observe such forms, a statute requiring competitive bidding does not apply." *Los Angeles Gas & E. Corp. v. Los Angeles*, 188 Cal. 307 [205 Pac. 125]; *Miller v. Boyle*, 43 Cal. App. 39 [184 Pac 421].

The above discussed principle of law and the broad language used by the court in *Los Angeles Dredging Company v. Long Beach*, supra, should not be interpreted as authorization for school districts to bypass the competitive bidding requirements in instances where it is merely felt that advertising for bids is inconvenient, or where the school district, based on negotiations with a particular supplier, believes it can obtain the best possible price from such a supplier even though there are other suppliers. In the event of a legal challenge in court to a sole source acquisition, a knowledgeable district employee, a knowledgeable employee of the vendor with whom the contract was entered as well as an independent expert likely should be called upon to provide evidence. Therefore, it is recommended that districts accumulate written information from their most knowledgeable employees and from a knowledgeable employee and principal of the vendor confirming in writing for their files that the item being obtained is unique, that there is only one source from which the item can be obtained, and describing how the item is unique. With this information, the school district's attorney will generally be able to provide an opinion letter confirming that the attorney has reviewed the information and advising that in the event of a legal challenge, a court will likely find that the acquisition is a legal sole source acquisition. In any event, before contracting on the basis of sole source needs, school districts should consult with legal counsel and with an individual or individuals with expertise regarding the product and the sources for purchase of the product at issue to assure that a sound argument can be made for a sole source purchase.

## **2. Completion of Construction Contracts Upon Default of Contractor.**

Where the governing board of a school district has reserved the right to complete a construction contract and deduct the amount expended from the agreed price of the contract should the contractor fail to carry out the work, a statute requiring competitive bidding does not apply. Unless there is a statutory provision which specifically requires readvertising for bids in such a situation, the district may itself take care of the completion of the contract in accordance with the terms of the contract. *Garvey School Dist. v. Paul* (1920) 50 Cal. App. 75; *Shore v. Central Contra Costa Sanitary Dist.* (1962) 208 Cal. App. 2d 465.

## **II. GENERAL BIDDING PRINCIPLES**

### **A. Conflict of Interest in Bids Where Bidder Assists in Preparation of Specifications.**

Although it may be inadvisable to allow consultants who assist districts in the preparation of bid documents to bid on the contract they helped prepare, this does not appear to be expressly prohibited. This is in contrast to Public Contract Code sections 10515-10517, which expressly prohibits the practice for State agencies. A consultant involved in preparation of the plans and specifications to be used in the bid process would be involved in the making of any resulting contract. Some have previously taken the position that this could constitute a conflict of interest under Government Code section 1090, which provides that governing board members and employees of a district shall not be financially interested in any contract made by them in their official capacity or by any body or board of which they are members. As used in Section 1090, a contract "made" by an officer or employee encompasses preliminary discussions, negotiations, compromises, reasoning, planning, drawing up plans and specifications and solicitation for bids. *Stigall v. City of Taft* (1962) 58 Cal. 2d 565, 569-571; *Millbrae Assoc. for Residential Survival v. Millbrae* (1968) 262 Cal. App. 2d 222, 237. Any contract entered into in violation of section 1090 is invalid. Gov. Code, § 1092. A willful violation of section 1090 is punishable as a felony. Gov. Code, § 1097.

The principle behind Government Code section 1090 is that no person can faithfully serve two masters. *Stockton Plumbing & Supply v. Wheeler* (1924) 68 Cal. App. 592; see also *Thomson v. Call* (1985) 38 Cal. 3d 633, 637. Government Code section 1090's purpose is to ensure a public officer's or employee's absolute loyalty and undivided allegiance to the best interests of the public entity, and to remove all direct and indirect influence of an interested officer or employee and to discourage deliberate dishonesty. *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal. App. 3d 201, 215.

Significant doubt exists as to the applicability of Government Code section 1090 to "consultants" or "independent contractors." In *People v. Christiansen* (2013) 216 Cal.App.4th 1181, a court concluded that a consultant who had previously been employed by a school district could not be criminally prosecuted for violating section 1090 because the consultant was not then an "employee" of the district. We note however that the *Christiansen* case did not address whether civil penalties under section 1090 might apply.

## **B. Request for Bids Versus Request for Proposals (Pub. Contract Code, §§ 20111/20651, 20112; Ed. Code, § 81641.)**

This section will discuss the conceptual and legal difference between a request for bids and a request for proposals. Also discussed are two situations in which the Legislature, by statute, has authorized modified forms of competitive bidding.

School districts are required to let any contracts for a public project involving an expenditure of more than \$15,000 or any contracts involving an expenditure of more than \$50,000, as adjusted, for (i) the purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district, (ii) services, except construction services, and (iii) repairs that are not a public project, to the lowest responsible bidder who shall give such security as the board requires or else reject all bids. Pub. Contract Code, §§ 20111, 20651. In order to secure bids, the board must publish a notice calling for bids stating the work to be done or materials or supplies to be furnished and the time when and the place where bids will be opened. The notice must be published at least once a week for two weeks in a newspaper of general circulation published in the district, or if there is none, then in a newspaper of general circulation circulated in the county. A bid may not be received after the time fixed in the public notice for the opening of bids. Pub. Contract Code, § 20112; Ed. Code, § 81641.

The competitive bid process is one in which a district publishes bid specifications and contractual provisions which all of the bidders must meet. Pursuant to the competitive bidding statutes, there is no general authority to let a contract upon specifications submitted by the bidders, because there would be no standard by which to measure the bids, and thus there would be no competition in the bidding. *Ertle v. Leary* (1896) 114 Cal. 238. The courts have recognized a long and well-established rule that where municipal contracts are required to be let upon public bidding, the proposals and specifications inviting the bids must be sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard and must be free from any restrictions tending to stifle competition. *Baldwin-Lima-Hamilton Corp. v. Superior Court of San Francisco* (1962) 208 Cal. App. 2d 803. Consequently,

[e]very element which enters into the competitive scheme should be required equally for all and should not be left to the volition of the individual aspirant to follow or disregard and thus to estimate his bid on a basis different from that afforded the other contenders, a common standard by which all bidders are to be measured being implied by the bidding law. 10 McQuillin, *Municipal Corporations* (3d ed.) § 29.44.

If any bidder does not meet all of the material bid specifications or agree to all of the material contractual provisions, that bidder must be deemed a non-responsive bidder and its bid rejected. *Menefee v. County of Fresno* (1985) 163 Cal.App. 3d 1175. Unless otherwise authorized by statute, in the competitive bid process a contract must be awarded to the lowest responsive responsible bidder.

A request for proposals is not a competitive bid process. In this situation, a public entity merely asks vendors to submit their own proposals containing whatever specifications they desire, so long as they meet certain general requirements. The bidders are required to explain how their equipment or systems meet the general requirements as well as how they may provide other services or advantages to the district for the stated price. In the request for proposal situation, the public entity need not choose the low monetary bidder, but may evaluate the proposals based upon the needs and desires of the district and award a contract based upon its determination of the best quality, services, functions, quantity, etc., for the price. After proposals have been received, it is not unusual for the public entity to negotiate with one or more of the proposers in terms of the equipment or services to be furnished and the price to be paid. In the request for proposal situation, it is usually impossible to determine who the low bidder is since the bidders will have usually offered dissimilar services and equipment of different value.

A request for proposals may be used by a public entity in those situations where the Legislature has specifically authorized its use, or where competitive bidding is not required by statute. In some instances, the Legislature has authorized public entities to request proposals from qualified persons. In Government Code section 4217.16, the Legislature has provided that in entering into energy services contracts, a public entity may "request proposals from qualified persons. After evaluating the proposals, the public entity may award the contract on the basis of the experience of the contractor, the type of technology employed by the contractor, the cost to the local agency, and any other relevant considerations." (See section I.B.6 of the Guide for a further discussion of Government Code section 4217.16, and the application of Prop 39 funding to such contracts.) Another example of a statutorily authorized request for proposal process is found in provisions for the state acquisition of electronic data processing and

telecommunications goods and services. Contract awards for these goods and services must be based on the proposal which provides the most value-effective solution to the state's requirements as determined by evaluation criteria which may provide for the selection of a vendor on an objective basis other than cost alone. Pub. Contract Code, § 12102. Additionally, acquisition of such goods and services may provide for price negotiation with respect to the contracts to be entered into. Pub. Contract Code, § 12103.

**1. Award to Any of Three Lowest Responsible Bidders for Data Processing Systems and Supporting Software (Pub. Contract Code, § 20118.1; Ed. Code, § 81645.)**

The authority for a school district to acquire computer hardware and software is contained in Public Contract Code section 20118.1 which provides as follows:

"The governing board of any school district may contract with an acceptable party who is one of the three lowest responsible bidders for the procurement or maintenance, or both, of electronic data-processing systems and supporting software in any manner the board deems appropriate."

See Ed. Code, §1276 for similar section applicable to the County Superintendent of Schools.

Section 20118.1 does not appear to authorize a school district to award to more than one bidder for the same item, or to all three bidders on each line item. This appears directly to conflict with the express statutory language, which states that the governing board may contract with "one of the three lowest responsible bidders." However, there is no express case law fully resolving this issue.

The language of this section has occasionally caused confusion as to whether it authorizes a request for proposals as opposed to a request for bids.

Your attorney may conclude that Public Contract Code section 20118.1 only authorizes a competitive bid process with the anomaly that instead of awarding the contract to the lowest responsible bidder, the school district may choose any one of the three lowest responsible bidders, based upon the language of the statute which requires the school district to contract with any one of the three lowest bidders. The only manner in which it may be determined which of the bidders are the three lowest is if the bidders have responded to and agreed to meet the same bid specifications. A district desiring the flexibility to award to one of the three lowest responsible bidders must advise bidders of that fact in the bid documents and should refer to Public Contract Code section 20118.1. As shown by Education Code section 81645, discussed below, when the Legislature has desired to authorize a public entity to request proposals not requiring competitive bidding it has used clear and unambiguous language to provide that authorization. The language in Public Contract Code section 20118.1 requiring the award to one of the three lowest responsible bidders cannot be so read as to authorize a request for proposals.

In 1990, Education Code section 81645, which previously contained the same language as Public Contract Code section 20118.1, was amended to read as follows:

The governing board of any community college district may contract with a party who has submitted one of the three lowest responsible competitive proposals or

competitive bids, for the acquisition, procurement, or maintenance of electronic data-processing systems and equipment, electronic telecommunication equipment, supporting software, and related materials, goods, and services, in accordance with procedures and criteria established by the governing board. (Emphasis added.)

This section authorizes community college districts to follow a request for proposal procedure rather than a formal bidding procedure for the procurement or maintenance of certain equipment, software, and related materials, goods and services. Because the proposals must be competitive, they must be the subject of advertising and not be structured to exclude vendors who are capable of meeting a district's needs. In fact, at the same time Education Code section 81645 was amended, Education Code section 81641 was also amended to require the publication of a notice calling for proposals in the same manner as publication of a notice calling for bids.

Education Code section 81645 provides that a community college district may contract "in accordance with procedures and criteria established by the governing board." The procedures and criteria which a community college district will use to evaluate proposals and determine which of the three lowest proposers will be awarded a contract can be either general procedures applicable to all requests for proposals under Education Code section 81645, or can be specific procedures established for each request for proposal prior to publication of a notice calling for proposals. The established procedures and criteria should be included in the request for proposals along with a statement that pursuant to Education Code section 81645 the district may award to any one of the three lowest proposals meeting the district's requirements.

A request for proposals should clearly and precisely describe the equipment or system which is being sought or the service to be performed. It should contain a description of the format which proposals must follow and the elements they must contain. It should also set forth the standards the district will use in evaluating proposals.

A difficulty with Education Code section 81645 is that instead of merely authorizing districts to use a request for proposal process, it requires the contract to be awarded to one of the three lowest proposers. As discussed, many times proposals may be so dissimilar that it is impossible to determine which proposal is the lowest in light of all the equipment and services to be provided. Requiring that the award be made to one of the three lowest will force the proposers to offer merely the basic elements required by the district, rather than proposing what may be a more cost effective, although more expensive, alternative.

## **2. Transportation Contracts (Ed. Code, § 39802.)**

In authorizing school districts to enter into transportation contracts the Legislature has authorized a modified form of competitive bidding as follows:

In order to procure the service at the lowest possible figure consistent with proper and satisfactory service, the governing board shall whenever an expenditure of more than ten thousand dollars (\$10,000) is involved, secure bids pursuant to sections 20111 and 20112 of the Public Contract Code whenever it is contemplated that a contract may be made with a person or corporation other than a common carrier or a municipally owned transit system or a parent or guardian of the pupils to be transported. The governing board may let the contract for the service to other than the lowest bidder. Ed. Code, § 39802.

A “municipally owned transit system” is defined as a transit system owned by a city, or by a district created by Public Utilities Code sections 24501, *et seq.* Ed. Code, § 39800. Although the statute provides that the governing board may let the contract to other than the lowest bidder, the courts have held that it does not authorize a district to accept a higher bid for the same services and comparable acceptability. *Educational & Recreational Services, Inc. v. Pasadena Unified Sch. Dist.* (1977) 65 Cal. App. 3d 775. By using these words, the Legislature gave the district the right to use judgment and discretion in awarding the contract and did not bind it to accepting the lowest bidder provided it first determined that the prevailing bidder could supply the better service under the enunciated standard. *Id.* at p. 782. A district cannot act arbitrarily and, if the award of a contract is challenged, must be able to demonstrate the factors that establish that the prevailing bidder could supply the better service. *Id.* at p.783.

**C. Advertising for Bids (Pub. Contract Code, § 20112; Ed. Code, § 81641; Gov. Code, § 6066.)**

A notice calling for bids must be published at least once a week for two weeks in a newspaper of general circulation in the district, or if there is no such newspaper, a newspaper of general circulation in the county. Government Code section 6066 provides that once a week for two successive weeks with at least five days intervening between the publication dates and not counting the publication dates is sufficient. It also states, “[t]he period of notice commences upon the first day of publication and terminates at the end of the fourteenth day, including therein the first day.” According to Public Contract Code section 20112 and, for community college districts, Education Code section 81641, the notice must specify the work to be done or materials or supplies to be provided as well as the time, place and location of the bid opening. In addition, Public Contract Code section 20112 and, as to community college districts, Education Code section 81641, also set forth the general rule that, “[w]hether or not bids are opened exactly at the time fixed in the public notice for opening bids, a bid shall not be received after that time.”

Effective January 1, 2000, and as amended effective January 1, 2003, however, Public Contract Code section 4104.5 provides that the officer or board taking bids for construction of any public work or improvement shall specify in the bid invitation to any prime contractor and in the public notice the place and time bids are to be received. “The date and time shall be extended by no less than 72 hours if the officer, department, board, or commission issues any material changes, additions, or deletions to the invitation later than 72 hours prior to the bid closing. Any bids received after the time specified in the notice or any extension due to material changes shall be returned unopened.” *Ibid.* A material change is one with a substantial cost impact on the total bid as determined by the awarding agency. *Ibid.* Bid invitation in this statute includes “documents issued to prime contractors that contain descriptions of the work to be bid or the content, form, or manner of submission of bids by bidders.” *Ibid.* Your attorney may conclude that this statute results in the ability to extend a bid opening date without re-advertising for bids.

**D. Awarding Bid to Lowest Responsible Responsive Bidder.**  
**1. Responsive Bidder (Waiver of Minor Variations).**

A basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted. 47 Ops.Cal.Atty.Gen. 129 (1966). A bid in response to a request for competitive bids must substantially conform to the specifications in the proposal. *Southern Check Exchange v. County of San Diego* (1970) 5 Cal. App. 3d 81 [65

A.L.R. 836]; 10 McQuillin, *Municipal Corporations* (3d ed.) §§ 29.73 and 29.78. Thus, it is said that the bidder must be a responsive bidder by having responded to the bid proposal in all material respects. If a bid does not respond to the bid proposal in all material respects, it is not a bid at all, but a new proposal. The failure of the bidder to comply with substantial requirements in the bid proposal places bidders on unequal footing and destroys free and fair competition. Consequently, if the omission or irregularity in a bid is substantial, affecting the amount of the bid, or the like, the bid must be rejected even if it is the lowest bid. 10 McQuillin, *Municipal Corporations* (3d ed.) § 29.78.

Award of a bid where the bidder failed to conform to specifications as called for in a request for bids can result in setting aside the contract as awarded. In *Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal. App. 3d 449, the court overturned a University of California award of a bid for copy machines to the low bidder because its bid deviated from the specifications. In *Konica*, even though the specifications required a copier which could produce at least forty copies per minute and had zoom magnification and reduction, the low bidder bid two machines, one which had the zoom features, but made only thirty-five copies per minute, and another which made fifty copies per minute, but did not have the zoom features. *Id.* at 452-453. The University argued that the equipment bid by the low bidder was acceptable. *Id.* at 455. The court analyzed whether the deviations gave the low bidder an unfair competitive advantage by allowing it to make a lower bid than it would have been able to make without the deviations. Citing an out-of-state case, the *Konica* court noted that factors to consider in determining whether a deviation is a minor irregularity or a substantial departure include whether the deviation could be a vehicle for favoritism, affect the amount of the bid, influence potential bidders to refrain from bidding, or affect the ability to make bid comparisons. *Id.* at 454-455.

In *Valley Crest Landscape v. City Council* (1996) 41 Cal. App. 4th 1432, 1436, the low bidder to whom the city had awarded a park project had listed the percentage of subcontractor work in its bid as 83 percent, even though the bid specifications required that the listed percentage of subcontractor work total less than 50 percent. The low bidder stated that the percentage of subcontractor work listed in its bid was erroneous and requested that it be allowed to set forth the correct percentage of 44.65 percent. *Ibid.* The city allowed the change, waiving it as an immaterial irregularity. *Id.* at 1437. The second low bidder sued, alleging that the low bidder was improperly permitted to change its bid. *Ibid.*

The court in the *Valley Crest Landscape* case indicated that the issue in determining the validity of the bid was whether the bidder would be liable on its bond if it attempted to back out after the bid was accepted based upon the Public Contract Code provisions for relief of bidder from mistake (see Section D, subsection 4, of this Guide). *Id.* at 1442. The court noted that misstating the correct percentage of work to be done by a subcontractor is in the nature of a typographical or arithmetical error, which makes the bid materially different and is a mistake in filling out the bid. *Id.* at 1442. As such, under Public Contract Code section 5103, the low bidder could have sought relief by giving the city notice of the mistake within five days of the bid opening. *Ibid.* Thus, the low bidder had a benefit not available to other bidders, since it could have withdrawn its bid. As a result, its mistake could not be corrected by waiving it as an irregularity. *Ibid.*

A low responsive responsible bidder that is wrongfully denied a public contract may bring a writ of mandate or injunction to set aside the contract award to the higher bidder, thus enforcing the public agency's representation that the contract will be awarded to the lowest responsible bidder. *Inglewood-Los Angeles County Civic Center Authority v. Superior Court* (1972) 7 Cal.

3d 861. If, however, by the time the basis for relief can be demonstrated the underlying contract already has been substantially or fully performed, the low responsive responsible bidder may maintain an action for monetary damages (based upon the theory of promissory estoppel) against the public entity. In *Kajima/Ray Wilson v. Los Angeles County Metropolitan* (2000) 23 Cal. 4th 305, the California Supreme Court permitted a low responsive responsible bidder who was not awarded the public contract to recover bid preparation costs, but not lost profits against the public entity. The court allowed the recovery of bid preparation costs on the theory that it deterred public entity misconduct and encouraged proper challenges to misawarded public contracts. The court refused to permit the recovery of lost profits since that would unduly punish the tax-paying public while providing an unfair windfall to the bidder.

As of January 1, 2004, Public Contract Code section 5110 has been added. Cases such as the *Konica* case and the case of *Miller v. McKinnon* (1942) 20 Cal. 2d 83, had previously indicated that contractors who were improperly awarded a contract and who performed valuable services were entitled to no remuneration. Public Contract Code section 5110, however, now provides for some relief.

When a project for the construction, alteration, repair, or improvement of any structure, building, or road, or other improvement of any kind is competitively bid and any intended or actual award of the contract is challenged, the contract may be entered into pending final decision of the challenge, subject to the requirements of this section. If the contract is later determined to be invalid due to a defect or defects in the competitive bidding process caused solely by the public entity, the contractor who entered into the contract with the public entity shall be entitled to be paid the reasonable cost, specifically excluding profit, of the labor, equipment, materials, and services furnished by the contractor prior to the date of the determination that the contract is invalid if all of the following conditions are met. Pub. Contract Code, § 5110.

The conditions include (1) that the contractor proceeded in the good faith belief that the contract was valid, (2) the public entity determines the work performed is satisfactory, (3) there was no contractor fraud, and (4) the contractor does not otherwise violate statutory or constitutional limitations. Section 5110 goes on to provide that the contractor shall not be paid more than either (1) its costs as included in its bid plus costs of approved change orders, or (2) the amount of the contract less profit at the point the contract is determined invalid.

A determination that a bid is generally nonresponsive is less complex than the determination that a bidder is not responsible. (See discussion on p. 34) A school district, before soliciting bids, will undoubtedly exercise its business and governmental judgment in defining a set of requirements for the work to be done. Responsiveness can be determined from the face of the bid and the bidder has an indication at the time of submitting his or her bid that there might be problems. In most cases, a determination of nonresponsiveness does not depend on outside investigation or information and will not affect the reputation of the bidder. *Great West Contractors Inc. v. Irvine Unified School District* (2010) 187 Cal.App.4th 1425; *Valley Crest Landscape v. City Council*, supra, 41 Cal. App. 4th 1432; *Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987)195 Cal.App.3d 1331. For these reasons, the courts have held that a bidder determined to be nonresponsive is entitled to notice of that fact and to submit materials in a manner defined by the district concerning the issue of responsiveness. A district is not, however, required to conduct a hearing or produce findings, so long as the issue of responsiveness is determined on the face of the bid.

If, however, a finding of nonresponsiveness is to be based upon information or investigation outside of the bid as submitted, recent case law in *Great West Contractors Inc. v. Irvine Unified School District*, supra, 187 Cal.App.4th 1425, indicates that the public entity must follow the hearing procedures applicable to a finding of nonresponsibility, since rejection of a bid despite literal compliance with the requirements of the call for bid is in legal effect a rejection for nonresponsibility, not nonresponsiveness.

It is also well established that a bid which substantially conforms to a call for bids may, though not strictly responsive, be accepted if the variance cannot affect the amount of the bid or give a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential. 47 Ops.Cal.Atty.Gen. 129 (1966); see also, *Ghilotti Const. Co. v. City of Richmond* (1996) 45 Cal.App.4th 897. If, however, a variance from the bid requirements gives the bidder a substantial advantage over other bidders, and thereby restricts or stifles competition, it will be considered material.

In determining whether a specific noncompliance constitutes a substantial and hence nonwaivable irregularity, the courts have applied two criteria first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition. 10 McQuillin, Municipal Corporations (3d ed.) § 29.65.

The following defects cannot be waived: (a) failure to issue a notice inviting bids; (b) failure to comply exactly with the publication requirements; and (c) failure of the bidder to submit a bid which substantially conforms to the call for bids. Lack of the bidder's signature on the bid form itself is waivable when the bid is complete in all other respects and contains the bidder's signature on other pages of the bid documents so that it is clear that the bidder is bound to enter into and perform the contract. *Menefee v. County of Fresno* (1985) 163 Cal. App. 3d 1175. Your attorney may conclude that the failure to submit a bid bond may be waived and will not prevent the board from awarding the contract so long as (1) prior to the opening of the bids, the bidder had in good faith incurred the expense of providing the bid security and all related obligations so as not to have obtained a competitive advantage over other bidders and (2) remedied the defect prior to award of the contract. *Cameron v. City of Escondido* (1956) 138 Cal. App. 2d 311. Also the lack of the contractor's signature on the performance bond or payment bond may be waived if signed before the award. *C. Gandahl Lumber Co. v. Thompson* (1928) 205 Cal. 354; *Pacific M. & T. Company v. Bonding and Insurance Co.* (1923) 192 Cal. 278.

## **2. Responsible Bidder.**

A contract let under mandatory competitive bidding statutes must be awarded to the lowest responsible bidder. See, e.g., Pub. Cont. Code, §§ 20111, 20651. Thus, a contract must be awarded to the lowest responsive bidder unless it is found that that bidder is not responsible, i.e., not qualified to do the particular work under consideration. The word "responsible" in the context of competitive bidding statutes is not necessarily employed in the sense of a bidder who is trustworthy so that a finding of non-responsibility connotes untrustworthiness. Rather, while that term includes the attribute of trustworthiness, it also has reference to the quality, fitness, capacity, and experience of the low bidder to satisfactorily perform the proposed work.

*Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County* (1972) 7 Cal. 3d 861; see also Pub. Contract Code, § 1103.

A determination of whether a bidder is "responsible" is a question of fact within the exercise of reasonable discretion by the governing board. However, prior to awarding a contract pursuant to competitive bidding to other than the lowest monetary bidder, a public body must notify the low monetary bidder of any evidence reflecting upon its responsibility received from others or adduced by independent investigation and afford that bidder an opportunity to rebut such adverse evidence and to present evidence that it is qualified to perform the contract. *Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County*, *supra*, 7 Cal. 3d 861 at 871. Where the staff recommendation or board intention is to reject the low bidder as a non-responsible bidder, the low bidder should be notified of the evidence reflecting upon its responsibility and be afforded an opportunity to present information to the public body and have the public body consider that information before the final decision is made to award the contract to another bidder. Due process does not, however, compel a quasi-judicial proceeding prior to rejection of the low monetary bidder as a non-responsible bidder. *Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County*, *supra*, 7 Cal. 3d 861, 871.

Recent case law has blurred the line between responsiveness and responsibility. In *Great West Contractors, Inc. v. Irvine Unified School District* (2010) 187 Cal.App.4th 1425, the bid instructions asked if the contractor had ever been licensed under any name or license number other than the ones given, to which the contractor answered "no". The District determined this response to be false and rejected the bid on the grounds that it was nonresponsive. According to the Court, the issue was one of responsibility of the bidder, who was therefore entitled to a hearing. The case generally holds that if a bid answers all questions and nothing is inaccurate or in violation of the bid specifications on its face, then any challenge to the accuracy or truthfulness of the information in the bid is not really a matter of responsiveness, but rather a matter of responsibility. Although the *Great West* Court noted the possibility that a determination of nonresponsiveness could be based on something outside the bid documents, but also observed that no published case had ever reached that conclusion. Therefore, if any outside information is necessary to establish the accuracy or inaccuracy of a bid response, there is risk to deeming the bid nonresponsive rather than non-responsible.

#### **E. Rejection of All Bids.**

Where contracts for public projects, construction work, services, the purchase of equipment, materials, or supplies to be furnished, sold or leased to a school district exceed the statutory amounts over which competitive bidding is required and are not otherwise exempt, the district must award a contract to the lowest responsible bidder or else reject all bids. Pub. Contract Code, §§ 20111, 20651. The power of a public agency to reject all bids received through competitive bidding is well recognized. 53 Cal. Jur. 3d, Public Works and Contracts, 26; 64 Am. Jur. 2d Public Works Contracts, § 75.

Even where the statutory provisions setting forth the mode of contracting are silent as to the right to reject all bids, the courts will recognize that right where the invitation for bids contains an express reservation of the right to reject all bids. *Laurent v. City and County of San Francisco* (1950) 99 Cal. App. 2d 707. Where a public body has expressly reserved the right to reject all bids, it may do so for any reason and at any time before it accepts a bid, and the courts will not interfere with the exercise of that right however arbitrary or capricious. *Universal By-Products, Inc. v. City of Modesto* (1974) 43 Cal. App. 3d 145; see also *Stanley-Taylor Co. v. Board of*

*Supervisors* (1902) 135 Cal. 486; *Charles L. Harney, Inc. v. Durkee* (1951) 107 Cal. App. 2d 570; *Laurent v. San Francisco*, supra, 99 Cal. App. 2d 707; *Baldwin-Lima-Hamilton Corp. v. Superior Court of San Francisco*, supra, 208 Cal. App. 3d 803. Where the power to reject all bids is reserved, no right exists in the lowest bidder to compel the acceptance of its bid by a writ of mandate. *Rubino v. Lolli*, supra, 10 Cal. App. 3d 1059; *Charles L. Harney, Inc. v. Durkee*, supra, 107 Cal. App. 2d at 580.

#### **F. Bid Security (Pub. Contract Code, §§ 20111, 20651.)**

All bids for construction work must be presented under sealed cover and must be accompanied by an authorized form of bidder's security. The authorized forms of bidder's security are: (1) cash, (2) a cashier's check made payable to the school district, (3) a certified check made payable to the school district, or (4) a bidder's bond executed by an admitted surety insurer, made payable to the school district. Pub. Cont. Code, §§ 20111, 20651. Upon an award to the lowest bidder, the security of an unsuccessful bidder must be returned in a reasonable period of time, but in no event may that security be held by the school district beyond 60 days from the time the award is made. *Ibid.*

Bids for materials and supplies may, but need not, require a form of bid security at the discretion of the district.

#### **G. Certification of Eligibility to Bid for Contracts of \$1 Million or More.**

Pursuant to Public Contract Code section 2204(a), a public entity must require a person that submits a bid or proposal to, or otherwise proposes to enter into or renew a contract with, a public entity with respect to a contract for goods or services of one million dollars (\$1,000,000) or more to certify, at the time the bid is submitted or the contract is renewed, that the person is not identified on a list created pursuant to Section 2203(b) as a person engaging in investment activities in Iran, as described in Section 2202.5(a), or as a person described in Section 2202.5(b), as applicable.

#### **H. Award of Multiple Contracts from One Bid.**

Where a project is required to be competitively bid, bids for different portions of that project may be called for in the discretion of the public entity. 10 *McQuillin, Municipal Corporations* (3d ed.) § 29.76. However, the public entity cannot reserve the right to divide the work (e.g., according to the ability of the contractors, or as they may think for the best interests of the property affected, and that of the public) after the bids are received; any division must be made previously so that bids may be made with reference to it. *Kneeland v. Furlong* (1866) 20 Wis. 437. Thus, a school district may not state that the bid or bids will be awarded in the best interests of the district and determine, after the receipt of bids, whether a multiple-item bid will be awarded as a lot to one bidder, on an item-by-item basis to the lowest bidder for each item, or to the lowest bidders for some items and to the lowest bidder for other groupings of items determined in the discretion of the school district.

The prohibition against a public entity reserving the right to divide the work after the bids are received does not, however, prohibit the calling for and submission of alternative bids. 10 *McQuillin, Municipal Corporations* (3d ed.) § 29.65. For example, where the construction of a sewer system was to be performed in two sections, the advertisement for bids could call for bidders to submit either a single proposal for both sections or separate proposals for such

section or sections as the bidder might select, and a bid which included three schedules (for section 1, for section 2, and for the two sections combined), was not invalid. *Cestone v. Evans* (1953) 281 A.D. 359, 121 N.Y.S. 2d 80. See, however, Section II, 1, below, with respect to alternate bids.

If the advertisement calls for bids for the whole work, a bid for less than the whole must be disregarded. *Stimson v. Hanley* (1907) 151 Cal. 379. Similarly, if applicable requirements call for bids upon separate parts, sections, components, or the like, a bid upon the whole of the matter advertised must be rejected. 10 McQuillin, Municipal Corporations (3d ed.) § 29.65. For example, where a building project was required to be let to the lowest responsible bidder and a county invited the submission of bids for the heating and plumbing under explicit instructions requiring the submission of separate bids for each, the county could not accept a combination bid covering both heating and plumbing. *State ex rel. Grosvold v. Board of Sup'rs* (1953) 263 Wis. 518, 58 N.W.2d 70.

## **I. Unit Price Bids and Job Order Contracts.**

Where competitive bidding is required, but where there is no way by which it can accurately be determined, at the time the request for bids is issued, what the exact amount of materials will be, bids may be called for at unit prices for furnishing the materials required, instead of calling for bids for a lump sum. *Bent Bros., Inc. v. Campbell* (1929) 101 Cal. App. 456, 466; *Kingsville v. Meredith* (1939) 103 F.2d 279; 10 McQuillin, Municipal Corporations (3d ed.) § 29.54. For example, even though competitive bidding is required, it is permissible to specify in the advertisement for bids a designated character of street lights of a certain candle power, burning for a designated time, at so much a week or month for each light required by the city, without fixing absolutely the number of lights required. *Cady v. City of San Bernardino* (1908) 153 Cal. 24.

When inviting bids for unit prices, the advertisement for bids should contain sufficient information concerning the materials to enable bidders intelligently to calculate their bids, and freely and openly to compete upon a basis of equality. 10 McQuillin, Municipal Corporations (3d ed.) § 29.54. If the kind and quantity of materials is left to the discretion of a public officer or employee so that it is impossible for bidders to determine the cost or profit of the work in advance, the information is insufficient and the contract will be invalid. *California Improv. Co. v. Reynolds* (1898) 123 Cal. 88. Thus, the time period during which the contractor will be required to supply the needs of the school district at the unit price bid should be specified in the call for bids. Additionally, an estimate of the number of units which may be required should be given, although it should be made clear that the figure is only an estimate and that the needs of the district may be more or less than the figure given. If it is known that a certain number of units will be needed immediately, that information should also be included in the call for bids. The bid form or notice to bidders should specify the basis for determining the low bidder, e.g., total of unit prices multiplied by the estimate of quantities.

While unit price bids for materials or supplies are acceptable, in a 2001 opinion of the California Attorney General, 84 Ops.Cal.Atty.Gen. 5 (2001), the Attorney General found that school districts lack the legal authority to enter into job order contracts for minor construction, renovation, alteration, painting and repair of existing public facilities. The Attorney General defined a job order contract (JOC) as a fixed price agreement based on specific charges set forth in a unit price book detailing repair and construction tasks with unit prices for each task. The contractor's bid is stated in terms of a percentage of the specific book charges. The

absence of legal authority for such contracts by school districts was then essentially confirmed by the adoption of Public Contract Code section 20919 and following, specifically allowing job order contracting only for the Los Angeles Unified School District. Section 20919.1 at subsection (e) defines a job order contract as a competitively bid contract with a licensed, bonded, liability insured contractor "in which the contractor agrees to a fixed unit price, and indefinite quantity contract that provides for the use of job orders for public works or maintenance projects."

#### **J. Alternate Bids.**

Public Contract Code section 20103.8 governs the use of additive and deductive bid alternates. Section 20103.8 identifies four methods for a local agency to determine who is the low bidder when bid alternates are set forth in the bid. The section requires that if additive or deductive items are included in a bid, the bid solicitation must identify which one of the methods will be used to identify the low bidder. If no method is identified, the low bidder must be chosen solely with reference to the base bid amount.

The four alternate methods for determining the low bidder where bid alternates are used are, (1) based on the base bid only, or (2) based on the "lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price," or (3) based on "the lowest total of the bid prices on the base contract and those additive or deductive items that when taken in order from a specifically identified list of those items, in the solicitation and added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the local agency before the first bid is opened," or (4) based on the lowest bid as "determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined." Pub. Contract Code, § 20103.8. Section 20103.8 goes on to provide that "[t]his section does not preclude the local agency from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined." Thus, the agency has a great deal of flexibility to consider its budgetary needs.

#### **K. Mandatory Pre-Bid Walks, Site Visits, Conferences or Meetings (Pub. Cont. Code, § 6610.)**

Visits to a site, walks through the site and meetings or conferences at the site prior to bid submittal are common where it is determined that bidders should be familiar with the site prior to submission of their bids. Effective January 1, 2001, Public Contract Code section 6610 was enacted to require that where such prebid site visits, conferences or meetings are mandatory, the notice to bidders must "include the time, date, and location of the mandatory prebid site visit, conference or meeting, and when and where project documents, including final plans and specifications are available." In addition, the section requires, "[a]ny mandatory prebid site visit, conference or meeting shall not occur within a minimum of five calendar days of the publication of the initial notice." *Id.*

#### **L. Limiting Bidding to Specified Product or Manufacturer.**

Generally speaking, where competitive bidding is required, specifications cannot be drawn so as to confine the bidding to one company, firm, or individual, where others are engaged in the

same business and can do the work or supply the materials. 10 McQuillin, Municipal Corporations (3d ed.) § 29.49. A request for bids should not unduly restrict competition. Public policy requires that all responsible bidders have the opportunity to compete, so that devices or unreasonable actions by public authorities which are designed to or tend to limit the list of qualified bidders are presumed to be injurious to the taxpayer and illegal. 10 McQuillin, Municipal Corporations, § 29.44; Edenwald Contracting Co. v New York (1974) 86 Misc.2d 711, 384 N.Y.S. 2d. 338.

Calling for a particular brand of product or trade name would restrict the competition among bidders in violation of public policy. This principle applies to both public works and the purchase of supplies, materials and equipment.

Public Works. Where public works contracts are required to be awarded after public competitive bidding, "it is a long and well-established rule that the proposals and specifications inviting such bids must be free of any restrictions tending to stifle competition." *Baldwin-Lima-Hamilton Corp. v. Superior Court of San Francisco* (1962) 208 Cal. App. 2d 803, 821; see also 47 Ops.Cal.Atty.Gen. 158, 160 (1966). In California, Public Contract Code section 3400 has controlled this subject area. It continues to specifically prohibit a school district from drafting specifications for bids in connection with the construction, alteration, or repair of public works (1) so as to limit the bidding, directly or indirectly, to any one specific concern, or (2) calling for a designated material, product, thing, or service by specific brand or trade name. As of 2004, however, only one, not two, brand name or trade name of comparable quality or utility must be specified and followed by the words "or equal." Additionally, if the public agency is aware of an equal product manufactured in California, it must name that product in the specification. Section 3400 was previously amended effective January 1, 2002, to provide for a period of time prior to or after, or prior to and after, the award of the contract for submission of data substantiating a request for substitution of "an equal" item. If no time period is specified, data may be submitted any time within 35 days after the award of the contract. Section 3400 allows a school district to call for a designated material, product, thing, or service by specific brand or trade name if the governing body, or its designee, makes a finding that is described in the invitation for bids or request for proposals that a particular material, product, thing, or service is designated by specific brand trade name for any of the following purposes: (1) in order that a field test or experiment may be made to determine the product's suitability for future use; (2) in order to match other products in use on a particular public improvement either completed or in the course of completion; (3) in order to obtain a necessary item that is only available from one source; (4) in order to respond to an emergency declared by a local agency, but only if the declaration is approved by a four-fifths vote of the governing board of the local agency issuing the invitation for bid or request for proposals; or (5) in order to respond to an emergency declared by the state, a state agency, or political subdivision of the state, but only if the facts setting forth the reasons for the finding of the emergency are contained in the public records of the authority issuing the invitation for bid or request for proposals. (Pub. Contracts Code, § 3400(c).)

Supplies, Materials and Equipment. For supplies, materials and equipment your attorney may conclude that, based upon statute and common law principles, specifications may not be drawn so as to confine bidding to one product. Government Code section 4333 provides as follows:

In any advertisement for supplies no bid shall be asked for any article of a specific brand or mark nor any patent apparatus or appliances, when such requirement would prevent proper competition on the part of dealers in other articles of equal value, utility, or merit.

The current effect of section 4333 on school districts is uncertain, for two reasons. First, the California Preference Law, Government Code sections 4330-4334, of which this section is part, is of questionable constitutionality. The purpose of these sections is to require the state, counties and cities to give a preference to California produced products. Gov. Code, § 4331. The California Attorney General has concluded that the California Preference Law is unconstitutional since it affects foreign commerce and constitutes an unconstitutional intrusion into an exclusive federal domain. 53 Ops.Cal.Atty.Gen. 72 (1970). This conclusion was based upon a case, *Bethlehem Steel Corp. v. Board of Commissioners* (1969) 276 Cal. App. 2d 221, holding the California Buy American Act sections of the Government Code, sections 4300-4305, unconstitutional. The Attorney General's opinion is not, however, clear with respect to whether Government Code section 4333 could be segregated from the unconstitutional provisions of the California Preference Law so that it may be validly applied.

Second, there is a question whether Government Code section 4333, notwithstanding its facial applicability to school districts, would be found not applicable to school districts. As the provision was originally enacted in 1897 as Political Code section 3247, it clearly was limited in its application to the state, cities and counties. The 1943 recodification of this provision into the Government Code was not intended by the Legislature as a substantive change in the law.

Despite these uncertainties, Government Code section 4333 points up the general policy of the law that all bidders having articles of equal value, utility and merit should be permitted to participate in the competition. 31 Ops.Cal.Atty.Gen. 161, 165 (1958).

Even if Government Code section 4333 does not statutorily prohibit the use of specific brand or trade names, your attorney may conclude that where the purchase of the equipment is subject to competitive bidding requirements, the specification of a particular brand of product would restrict competition among bidders and, thus, be invalid. With respect to specifications calling for a particular product by brand name, the California Attorney General has stated as follows:

Where competition is required, the specification of patented materials or equipment is upheld where all bidders may obtain and supply the article. [Citation omitted.] But, where the specifications are worded to restrict the bidding to one manufacturer's product, the bidding procedure is invalid [citation omitted], unless . . . no real comparison may be made between different articles or materials and, thus, competitive bidding is unnecessary. *Hodgeman v. City of San Diego* (1942) 53 Cal. App. 2d 610; 47 Ops.Cal.Atty.Gen. 158 (1960).

Because the principles involved are the same, your attorney may conclude that while Public Contract Code section 3400 does not apply to the letting of contracts for the purchase of equipment, a court would likely consider its standard reasonable for the purchase of equipment subject to competitive bidding requirements.

#### **M. Identical Bids (Pub. Contract Code, § 20117; Gov. Code, § 53064.)**

Where competitive bidding is required and two identical bids are received the bidder to whom the award is to be made should be determined by lot. This requirement applies broadly to competitive bidding situations for the purchase, sale, or lease of real property, supplies, materials, equipment, services, bonds, or the awarding of any contract. Pub. Contract Code, § 20117; Gov. Code, § 53064. Public Contract Code section 20117 states as follows:

Notwithstanding any other provision of law, in the event there are two or more identical lowest or highest bids, as the case may be, submitted to a school district for the purchase, sale, or lease of real property, supplies, materials, equipment, services, bonds, or the awarding of any contract, pursuant to a provision requiring competitive bidding, the governing board of any school district may determine by lot which bid shall be accepted.

Government Code section 53064 has essentially identical language and would apply to a community college district.

#### **N. Contract Entered Into After Competitive Bidding.**

Under competitive bidding laws, a school district may not let a contract different from that called for in the call for bids. The contract entered into must be substantially the same as the contract terms included in the bid documents. *Warren v. Chandos* (1896) 115 Cal. 382; *Bent Bros. Inc. v. Campbell* (1929) 101 Cal. App. 456.

As a general rule, public agencies are ordinarily limited by the plans and specifications adopted or otherwise defined in advance for the consideration of bids, and cannot award a contract which is substantially different from that so indicated. However, variances between the contract as advertised and the contract as actually entered into must be substantial before they are deemed to make the contract void and illegal. Slight variances or incidental changes in the proposed form of contract will not require readvertisement for bids. 64 Am.Jur.2d, Public Works and Contracts, § 66. However, public authorities cannot enter into a contract with the lowest bidder containing substantial provisions beneficial to the lowest bidder, which were not included in or contemplated in the terms and specifications upon which bids were invited; the contract which they execute must be the contract offered to the lowest responsible bidder by advertisement, and any contract entered into containing substantial provisions beneficial to the bidder which were not included in the specifications is void. *Diamond v. Mankato* (1903) 89 Minn. 48, 93 N.W. 911.

Although the courts have not established a definitive test for what constitutes a substantial or material provision of a contract, court decisions have identified several provisions which they will consider material. These include changes in the amount payable, the date, the time and place of performance, the medium of payment, and in the number or relation of parties. 3 Cal.Jur.3d, Alteration of Instruments, 24-38. Consistent with this test is the case of *Greer v. Hitchcock* (1969) 271 Cal. App. 2d 334, where the board of a county storm drainage district agreed to enter into a contract for more than the amount bid in order to offset the bidder's clerical error in preparing his bid. The Court of Appeal concluded that the board could not enter into a contract in excess of the bid and that its attempt to do so was void. *Id.* at 336. Thus, the court considered the amount of the bid to be a substantial provision which could not be modified. In *Brock v. Luning* (1891) 89 Cal. 316, the California Supreme Court voided a contract calling for completion of a street improvement within 30 days because the bid terms specified completion within 25 days. In *McBrien v. Grand Rapids* (1885) 56 Mich. 95, 22 N.W. 206, a Michigan court regarded the setting of a greater price for a portion of the work designated in the advertised plans and specifications as a material departure which was substantial and favorable to the bidder.

The general rules of contract law apply to the competitive bidding process. *Pacific Architects Collaborative v. State of California* (1979) 100 Cal. App. 3d 110, 123. Bids are irrevocable offers

or options given to the public agency involved. *M.F. Kemper Constr. Co. v. Los Angeles* (1951) 37 Cal. 2d 696, 700, 704. A contract is complete and binding when a valid bid is accepted. *Susanville v. Lee C. Hess Co.* (1955) 45 Cal. 2d 684. Therefore, when a bid which is responsive to the bid terms and conditions, including contractual provisions, is accepted, the contractual terms are determined as of that time, and further or different contract terms cannot be negotiated or included in the contract.

In concluding that a school district could not, under competitive bidding laws, let a contract for a school building which was different from that called for in the "call for bids," the Attorney General noted as follows:

It would result in a contract for a lesser building than that bid upon by all of the parties. Furthermore, from the standpoint of other contractors, such a practice, if permissible, might mean that other prospective bidders are caused to refrain from submitting a bid. For example, if a building estimated to cost \$100,000 was advertised for, but the final agreement calls for a \$65,000 building [because after receipt of the bids the board deleted certain specifications in order to downsize the project and its cost], then it is quite conceivable that many contractors might have bid on the job who did not feel capable of handling a job 35 percent larger. 18 Ops.Cal.Atty.Gen. 1, 3 (1951).

The Attorney General then concluded that the effect of letting a contract for work to be done which is different from that called for in the published notice calling for bids is the same as letting a contract for which no bids have been called and violates the statutory competitive bidding requirement. See also 73 Ops.Cal.Atty.Gen. 417, 423 (1990).

## **O. Participation by Disabled Veteran Business Enterprises ("DVBEs")**

State funded or State reimbursed contracts must comply with Article 6 (commencing with section 999) of Chapter 6, Division 4 of the Military and Veterans Code regarding Disabled Veterans Participation Goals for State Contracts (the "DVBE Law"). Prior to March 13, 1996, such contracts also had to comply with Article 1.5 (commencing with section 10115) of Chapter 1 of Part 2 of Division 2 of the Public Contract Code regarding Minority and Women Enterprise Participation Goals and State Contracts ("M/WBE Law"). As of March 13, 1996, the State Allocation Board repealed this requirement for M/WBE.

The DVBE Law only applies to contracts for which a district has requested or will request State funding through Bond Acts approved by the electorate after August 26, 1992. Thus, in order to assure that a district will qualify for State funds for projects and all contracts for which it is seeking such funds, even if the district will seek State funding on a project at some future date, the procedures required by OLA relating to DVBEs must be properly followed and used by the district. Furthermore, a district must comply with DVBE requirements for an entire project even if only a small portion of the project is or will be funded by the State.

A district must comply with the DVBE Law if a project is a State funded lease-purchase, but if a district finances the project by a lease-purchase through a private leasing company it is not required to comply with the DVBE Law, unless the district intends at some later time to seek reimbursement from the State. It is noted that although the State Allocation Board in Sacramento ("SAB") administers funding to schools for deferred maintenance, asbestos abatement and year-round schools air conditioning, these programs are not required to comply

with the DVBE Law. Also, community college districts at this time are not required to comply with DVBE Law.

Some district policies require minority/women participation goals for all their contracts, not just those required to comply with DVBE law, which is often part of a larger district affirmative action program affecting other district functions. Such policies involve potential problems as discussed below. Laws and Constitutional issues regarding minority and women business enterprises and contracting have been the subject of recent decisions, Attorney General opinions, and by other attorneys representing school districts. There is a substantial question as to the constitutionality of Public Contract Code section 2000.<sup>16</sup> In 1989, the United States Supreme Court, in a plurality decision, invalidated the minority business utilization plan of the City of Richmond, Virginia. *Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469 [102 L.Ed.2d 854, 109 Supreme Ct. 706]. The minority business utilization plan of the City of Richmond had many features which would be common with a plan which would be adopted pursuant to Public Contract section 2000. Although there may be some differences between the Richmond plan and one adopted under Public Contract Code section 2000, those differences would not appear to be major.

In the Richmond decision, the United States Supreme Court stated race-based measures by state and local public entities must be subjected to searching judicial inquiry into their justification and accordingly be judged by the strict scrutiny test, which has been articulated as follows:

There are two prongs to this examination. First any racial classification "must be justified by a compelling governmental interest." [citations.] Second, the means chosen by the State must be "narrowly tailored to the achievement of that goal." [Citation.] *Wygant v. Jackson Board of Education* (1986) 476 U.S. 267, 274 (plurality opinion).

The United States Supreme Court held that the Richmond Plan failed both prongs of the constitutional test. In summarizing, the court stated that none of the evidence presented by the City of Richmond "points to identified discrimination in the Richmond construction industry." The court further held that past societal discrimination alone could not justify rigid racial preferences.

With respect to Public Contract Code section 2000, the Legislature has made no finding of discrimination against minorities or women in public works contracts. Thus, the declared justification of the State Legislature may lack the specificity and historical evidence of discrimination required by the court. While no court has ruled upon the constitutionality of Public Contract Code section 2000, districts desiring to employ its provisions in furtherance of

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<sup>16</sup> Public Contract Code § 2000 authorizes a local agency to require that a contract is to be awarded to the lowest responsible bidder meeting goals and requirements, or who has made a good faith effort to comply with the goals and requirements, established by the local agency relating to participation in the contract by minority business enterprises and women business enterprises. In *Monterey Mech. Co. v. Wilson*, 125 F.3d 702 (1997), the Ninth Circuit Court of Appeal overturned a good faith requirement imposed on bidders for state construction contracts. In *Connerly v. State Personnel Bd.*, 92 Cal. App. 4th 16 (2001), the Court of Appeal upheld a trial court finding to the same effect except that reporting requirements only may still be in effect. The Court addressed Proposition 209, Article I, Section 81, Subdivision (a) of the California Constitution which prohibits both discrimination and the granting of preferences based on race, sex, color, ethnicity or national origin in public employment, public education or public contracting. The requirements of Public Contract Code section 10115 were similar in many respects to those found in Public Contract Code section 2000.

their own affirmative action programs should be aware that it would very likely lead to a court action to determine its constitutionality.

It should be noted that the low bid law would not invalidate anti-discrimination practices which do not depend upon the ability to disqualify a bidder. For example, the California Attorney General has opined that a requirement that the contractor and his subcontractors not practice racial discrimination in employment on the project does not violate state law and is within the authority of a school board. 42 Ops.Cal.Atty.Gen. 169 (1963) (opinion predated Public Contract Code section 2000 and would be strengthened by its enactment).

## **P. Small Business Preferences (Pub. Contract Code, § 2002.)**

Public Contract Code section 2002 was enacted effective January 1, 2002, to allow local agencies to facilitate contract awards to small businesses by providing preferences in construction, acquisition of goods or delivery of services contracts if responsibility and quality are equal. Where a district determines to provide for such preferences, "[t]he preference to a small business shall be up to 5% of the lowest responsible bidder meeting specifications." Pub. Contract Code, § 2002 subd. (a)(1). An amendment of the Section effective January 1, 2002, allows districts to define the term "small business." Districts may also establish small business participation goals for subcontractors on contracts to the same 5% maximum. Pub. Contract Code, § 2002 subd. (a)(2). In addition, in this process, bidders may be required to "make good faith efforts to meet a subcontracting participation goal for small business contracts. Bidders that fail to meet the goal shall demonstrate that they made good faith efforts to utilize small business contractors." Pub. Contract Code, § 2002 subd. (a)(3).

## **Q. Bid Protests.**

A bid protest is a notification to the district that the contract should not be awarded to the apparent low bidder for the reasons stated in the notice (e.g., for failure to comply with the requirements of the bid documents). The effect of a bid protest is to encourage the district to analyze the protested bid in accordance with the owner's own bid requirements. The purposes of a bidder protesting a low bid are:

- To be awarded the contract, by protesting that, *e.g.*:
- The lower bid(s) are defective in some manner and thus "nonresponsive" (e.g., the lower bid does not comply with the requirements of the bid documents); or
- The lowest bidder is not "responsible" or qualified; and
- As a secondary goal, to cause the owner to reject *all* bids and allow the protesting bidder to participate in a rebid.

### **1. Legal Standards for Protests.**

There is no statutory basis for bid protests on public projects; therefore, there are no statutory or uniform procedures for bid protests. If there are any protest procedures, they are developed by each public entity, and these procedures usually involve a hearing. However, there is some guidance from case law regarding bid protests. Although discussed somewhat in subsection 4 above, outlined below is an overview of the relevant case law affecting bid protests.

a) Minor Deviations or Errors May be Waived by the District.

California courts have made it clear that a bid which substantially conforms to the call for bids may be accepted by a public entity even though the bid is not strictly responsive, so long as the bid irregularity is immaterial or inconsequential. (See *Konica Business Machines USA, Inc. v. Regents of the University of California*, (1988) 206 Cal.App.3d 449, 454.)

b) Deviations Cannot Give Bidders a Competitive Advantage.

A bid may be responsive even if there is a discrepancy in the bid, as long as the discrepancy is inconsequential, that is, the discrepancy must not: (1) affect the amount of the bid; (2) give a bidder an advantage over others (e.g., give a bidder an opportunity to avoid its obligation to perform by withdrawing its bid); (3) be a potential vehicle for favoritism; (4) influence potential bidders to refrain from bidding; or (5) affect the ability to make bid comparisons. *Ghilotti Constr. Co. v. City of Richmond* (1996) 45 Cal.App. 4th 897.

However, an irregularity in a bid makes the bid nonresponsive and is not waivable if it affords the bidder an advantage over other bidders and affects an element relating to the price. The ability to withdraw a bid without forfeiting the bid bond is the applicable standard for determining whether the irregularity gives the bidder an unfair competitive advantage. (See *Menefee v. County of Fresno*, (1985) 163 Cal.App.3d 1175.) California case law recognizes that in order to demonstrate the right to withdraw a bid for an irregularity, and thus gain an impermissible competitive advantage, statutorily permissible grounds must exist for relief from the bid. A competitive advantage only exists if the bidder could be entitled to relief and the ability to withdraw its bid pursuant to Public Contract Code sections 5100 et seq. (Id. at p. 1181.) Public Contract Code section 5100 requires that a substantive material mistake be made in the bid, making it materially different from what it should have been, in order for a bidder to be entitled to relief from its bid. (See also *Valley Crest Landscape, Inc. v. City of Davis* (1996) 41 Cal.App.4th 1432.) Under these statutes, a bidder, in order to obtain relief from its bid, must establish that: (i) a mistake was made; (ii) the proper notice was given to the public entity; (iii) the mistake made the bid materially different; and (iv) the mistake was made in filling out the bid and not due to an error in judgment or carelessness. (Pub. Contract Code, § 5103.)

c) The District Can Demand Strict Compliance with Bid Specifications.

California courts provide public entities broad discretion to determine whether a bid is responsive or non-responsive. A district may choose to require strict conformance with its bid requirements or it may exercise its discretion to waive immaterial deviations. *MCM Construction v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 374. As stated by the MCM court, ultimately in determining responsiveness, bids, “must be evaluated from a practical rather than a hypothetical standpoint, with reference to the factual circumstances of the case. They must also be viewed in light of the public interest, rather than the private interest of a disappointed bidder. ‘It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal or license application of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy.’” Id. at p. 370, citations omitted.

As a public entity, when faced with a bid protest, a public entity can: 1) reject the protest and accept the protested low bid, 2) accept the protest, reject the protested bid, and accept the next lowest responsible bid, or 3) reject all bids and rebid the project.<sup>17</sup>

d) Best Practices for Bid Protests

- (1) Include the Bid Protest Procedure, including a deadline for submission, in the Bid Documents.<sup>18</sup>
- (2) Try to Calendar the Bid Openings and Award with Sufficient Time to Address Any Protests and related Public Records Act requests and protective orders for bid documents. The Award date should also take into account sufficient time to resolve any bid protests prior to any funding deadlines, such as eRate.
- (3) Always Respond in Writing to Bid Protests (Preferably with the Assistance of Legal Counsel).
- (4) You May Request a Response from the Bidder Being Protested.
- (5) Educate the District Board As Appropriate.
- (6) Document the Rejection of Protests.<sup>19</sup>

e) Sample of a Bid Protest Procedure:

The following is a sample bid protest procedure for inclusion in bid documents:

### **Protests by Bidders**

A bidder may protest a bid award if he/she believes that the award was inconsistent with Board policy or the bid's specifications or was not in compliance with law.

A protest must be filed in writing with the Superintendent or designee within five business days after opening of bids. The bidder shall submit all documents supporting or justifying the protest. A bidder's failure to timely file a protest shall constitute a waiver of his/her right to protest the award of the contract.

Any bidder submitting a Bid Proposal may file a protest of the District's intent to award the Contract provided that each and all of the following conditions are met:

- (1) The protest must be submitted in writing to the District (e-mail is not acceptable), before 4 p.m. of the fifth business day following bid opening.
- (2) The initial protest document must contain a complete statement of any and all basis for the protest, including without limitation all facts, supporting documentation, legal authorities and argument in support of the grounds for the bid protest; any matters not set forth in the written bid protest shall be deemed waived. All factual contentions must be supported by competent, admissible and creditable evidence.

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<sup>17</sup> Note that when a public works project is competitively bid and any intended or actual award of the contract is challenged, the public entity, nevertheless, may award the contract pending a final decision on the challenge. However, if the contract is later determined to be invalid due to a defect in the bidding process caused solely by the public entity, subject to specified conditions, then the contractor is entitled to recover reasonable costs, excluding profit, cost of labor, equipment, materials, and services, before the date of the determination. (Pub. Contract Code, § 5110.)

<sup>18</sup> If the project involves federal funding, include the protest procedures mandated by the federal agency providing funding and/or incorporate by reference federal standard form documents that specify protest procedures as applicable. Note that federal procedures can supersede or change any state and/or local agency procedures in effect.

<sup>19</sup> Note that the protester may be requesting copies of documents under the California Public Records Act (Gov. Code, §§ 6250-6277) and/or the Brown Act (Gov. Code, §§ 54950-54963).

- (3) The protest must refer to the specific portions of all documents which form the basis for the protest.
- (4) The protest must include the name, address and telephone number of the person representing the protesting party.
- (5) Any bid protest not conforming to the foregoing shall be rejected by the District as invalid. Provided that a bid protest is filed in strict conformity with the foregoing, the District's Deputy Superintendent, Business Services, or such individual(s) as may be designated by him/her, shall review and evaluate the basis of the bid protest. Either the District's Deputy Superintendent, Business Services or other individual designated by him/her shall provide the bidder submitting the bid protest with a written statement concurring with or denying the bid protest. The District's Governing Board will render a final determination and disposition of a bid protest by taking action to adopt, modify or reject the disposition of a bid award as reflected in the written statement of the Deputy Superintendent, Business Services or his/her designee. Action by the District's Governing Board relative to a bid award shall be final and not subject to appeal or reconsideration by the District, any employee or officer of the District or the District's Governing Board. The rendition of a written statement by the Deputy Superintendent, Business Services (or his/her designee) and action by the District's Governing Board to adopt, modify or reject the disposition of the bid award reflected in such written statement shall be express conditions precedent to the institution of any legal or equitable proceedings relative to the bidding process, the District's intent to award the Contract, the District's disposition of any bid protest or the District's decision to reject all Bid Proposals.
- (6) The procedure and time limits set forth in this paragraph are mandatory and are the Bidder's sole and exclusive remedy in the event of bid protest. Failure to comply with these procedures shall constitute a waiver of any right to further pursue the bid protest, including filing a Government Code Claim or legal proceedings.

### **III. CONTRACTUAL CONSIDERATIONS**

Contracts must be approved and/or ratified by the governing board of a school district, even when contracting authority has been delegated to a designee, as discussed further in section VIII.A. (Educ. Code § 17604, et seq.)

#### **A. Fingerprinting of Contractor Employees (Educ. Code, § 45125 et seq.)**

Employees of an entity that has a contract with a school district to provide school and classroom janitorial services, schoolsite administrative services, schoolsite grounds and landscape maintenance, pupil transportation services, or schoolsite food-related services, and who may have contact, other than merely limited contact, with pupils must be fingerprinted prior to coming into contact with pupils to assure they have not been convicted of a violent or serious felony. Educ. Code, § 45125.1. A school district may require employees of contract entities providing other schoolsite services who will have more than limited contact with pupils to be fingerprinted. The fingerprint requirement does not apply in emergency or exceptional situations, such as when pupil health or safety is endangered or when repairs are needed to make school facilities safe and habitable. An entity having a contract which requires that its employees be fingerprinted pursuant to Education Code section 45125.1(g) must certify in writing to the school district that neither the employer nor its employees who must be fingerprinted have been convicted of a violent or serious felony.

For construction contractors and other contracts for the reconstruction, rehabilitation, or repair of school facilities, Education Code Section 45125.2 also provides requirements for fingerprinting of at least supervisory employees of such contractors, if the entity will potentially have more than limited contact with students. The fingerprinted supervisors must then provide continuous monitoring of any other employees of the contractor who might have contact with students. As an alternative to fingerprinting, a physical barrier can be installed at the worksite to limit contact with students, or certain supervision, monitoring, or surveillance of contractor's employees can be implemented. (See discussion in section IV(K).)

As a best practice recommendation to better contractually protect the school district and address student safety, inserting a broad form fingerprinting provision in all contracts, which provides the school district with the sole discretion to require fingerprinting certification from the Department of Justice, is a valuable contractual tool to ensure pupil safety. The following is a sample clause:

"Fingerprinting Requirements. Consultant hereby acknowledges that, if determined by the District in its sole discretion, Consultant may be required to comply with the requirements of Education Code Section 45125.1 with respect to fingerprinting of employees who may have contact with the District's pupils. The Consultant shall also ensure that its sub-consultants on the Project also comply with the requirements of Section 45125.1. If required by the District, the Consultant must provide for the completion of a Fingerprint Certification form, in the District's required format, prior to any of the Consultant's employees, or those of any other consultants, coming into contact with the District's pupils. Consultant further acknowledges that other fingerprinting requirements may apply, as set forth in Education Code Section 45125 et seq., and will comply with any such requirements as determined by the District."

## **B. Indemnity Clauses.**

Contracts where Class I indemnification is generally preferred: All contracts should preferably contain a Class I indemnification of the public agency with the following exceptions: construction contracts, consultant contracts which are "collateral to" construction contracts, such as architecture and engineering contracts, "acquisition" leases (i.e., public agency as tenant), contracts for the purchase of goods, only, and contracts with other self-insured public entities. A form of Class I indemnification for use in such contracts is as follows:

"DEFENSE AND INDEMNITY. District shall not be liable for, and Contractor shall defend and indemnify District and its officers, agents, employees and volunteers (collectively "District Parties"), against any and all claims, deductibles, self-insured retentions, demands, liability, judgments, awards, fines, mechanics' liens or other liens, labor disputes, losses, damages, expenses, charges or costs of any kind or character, including attorneys' fees and court costs (hereinafter collectively referred to as "Claims"), which arise out of or are in any way connected to the work covered by this [Agreement/Contract] arising either directly or indirectly from any act, error, omission, negligence, or willful misconduct of Contractor or its officers, employees, agents, contractors, licensees or servants, including, without limitation, Claims caused by the concurrent negligent act, error or omission, whether active or passive, of District

Parties. Contractor shall have no obligation, however, to defend or indemnify District Parties from a Claim if it is determined by a court of competent jurisdiction that such Claim was caused by the sole negligence or willful misconduct of District Parties. This indemnification shall apply to all liability, as provided for above, regardless of whether any insurance policies are applicable, and insurance policy limits do not act as a limitation upon the amount of the indemnification to be provided by the Contractor."

Alternative Clauses Where Class I Indemnification is Refused: Generally, where a contractor refuses to accept a Class I indemnity for those contracts where a Class I is preferable, the public agency may wish to consider another contractor for the services. In circumstances where the public agency must contract with a particular contractor who refuses to accept a Class I indemnification that normally would be obtained, the drafter may first attempt to determine the nature of the objection to the clause. If the objection concerns only certain activities the contractor is to undertake, the drafter may attempt to remove those activities from the coverage of the indemnification clause, while retaining the Class I indemnity as to all other activities of the contractor. This can be accomplished by adding a final sentence to the standard Class I indemnity. An example of such an additional sentence is as follows:

" . . . . In addition, Contractor shall have no obligation to defend or indemnify District from a Claim if said Claim arises out of or is connected with the performance by the District of those responsibilities set forth in the [Agreement/Contract] as "District Responsibilities" (Exhibit \_\_, section \_\_)."

Another alternative where the Public Agency must contract with a contractor who refuses to accept a normally-obtained Class I indemnity would be for the drafter to propose a "contingent" Class I indemnity, in which the contractor only provides a Class I indemnity if it fails to procure the insurance required by the contract, and otherwise provides a Class II indemnity. Again, language to accomplish this purpose could be added to the end of the standard Class I indemnity, as follows:

"Notwithstanding any provision of this Section to the contrary, however, Contractor's indemnity obligation under this Section for District's concurrent active negligent act, error or omission shall be limited to the amount of its insurance coverage, so long as its coverage meets the requirements set forth in Exhibit '\_\_,' 'Insurance Requirements,' attached hereto, including, without limitation, the requirements to (i) obtain contractual liability coverage for the liability assumed by Contractor under this Contract, (ii) name District as an additional insured and (iii) procure the specified minimum coverage amounts."<sup>20</sup>

If neither alternative is feasible, the drafter may propose a Class II indemnification, as described below.

Contracts in which it is appropriate to initially propose Class II Indemnification: Civil Code section 2782 et seq. precludes the public agency from proposing Class I indemnity clauses for

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<sup>20</sup> Because this clause limits recovery under a Class I indemnity to the amount of the required insurance coverage, a disadvantage to this approach is that it gives insurance companies a motivation to deny the claim by finding exclusions from coverage under the applicable policy.

construction contracts and those contracts, such as agreements with architects and engineers and other design professionals, which are "collateral" to construction contracts. Accordingly, such contracts should contain Class II indemnification clauses that conform to the applicable statutes. Also, contracts for the sale of goods only generally can employ Class II indemnification. A form of Class II indemnification clause follows:

"DEFENSE AND INDEMNITY. To the maximum extent permitted by Civil Code Section 2782 et seq., District shall not be liable for, and [Consultant/Contractor] shall defend and indemnify District and its officers, agents, employees and volunteers (collectively 'District Parties'), against any and all claims, deductibles, self-insured retentions, demands, liability, judgments, awards, fines, mechanics' liens or other liens, labor disputes, losses, damages, expenses, charges or costs of any kind or character, including attorneys' fees and court costs (hereinafter collectively referred to as 'Claims'), which arise out of or are in any way connected to the work covered by this [Agreement/Contract] arising either directly or indirectly from any act, error, omission or negligence of [Consultant/Contractor] or its officers, employees, agents, contractors, licensees or servants, including, without limitation, Claims caused by the concurrent negligent act, error or omission, of District Parties. However, [Consultant/Contractor] shall have no obligation to defend or indemnify District Parties against Claims caused by the active negligence, sole negligence or willful misconduct of District Parties. This indemnification shall apply to all liability, as provided for above, regardless of whether any insurance policies are applicable, and insurance policy limits do not act as a limitation upon the amount of the indemnification to be provided by the Contractor"

For contracts involving "design professionals," Civil Code section 2782.8 is applicable, and limits the claims for which the public agency can require defense and indemnity to those arising out of, pertaining to, or relating to only the negligence, recklessness, or willful misconduct of the design professional. The statute defines "design professionals" as licensed, architects, landscape architects, professional engineers, and professional land surveyors. The following is a sample design-professional indemnification provision:

"DEFENSE AND INDEMNITY. To the maximum extent permitted by Civil Code Section 2782.8, District shall not be liable for, and [**Design Professional**] shall defend and indemnify District and its officers, agents, employees and volunteers (collectively 'District Parties'), against any and all claims, deductibles, self-insured retentions, demands, liability, judgments, awards, fines, mechanics' liens or other liens, labor disputes, losses, damages, expenses, charges or costs of any kind or character, including attorneys' fees and court costs (hereinafter collectively referred to as 'Claims'), which arise out of, pertain to, or relate to, the negligence, recklessness, or willful misconduct of [**Design Professional**] or its officers, employees, agents, contractors, licensees or servants, including, without limitation, Claims caused by the concurrent negligent act, error or omission, of District Parties. However, [**Design Professional**] shall have no obligation to defend or indemnify District Parties against Claims caused by the active negligence, sole negligence or willful misconduct of District Parties. This indemnification shall apply to all liability, as provided for above, regardless of whether any insurance policies are applicable, and insurance policy limits do not act as a limitation upon the amount of the indemnification to be provided by the [**Design Professional**].

Some design professionals request less strict language, claiming that insurance coverage is not available to cover the defense and indemnity obligation under Civil Code section 2782.8. However, others advise that the coverage does exist, it is just more expensive, and the number of design professionals making this claim is decreasing significantly.

Contracts with other self-insured or public agencies: When a public agency contracts with other self-insured or public agencies, it is usually not equitable to require a Class I or Class II indemnity. The following clauses are examples that might be used:

"DEFENSE AND INDEMNITY

1. Claims Arising From Sole Acts or Omissions of District

The District hereby agrees to defend and indemnify the \_\_\_\_\_ [OTHER PUBLIC AGENCY], its agents, officers and employees (hereinafter collectively referred to in this paragraph as 'OTHER PUBLIC AGENCY'), from any claim, action or proceeding against [OTHER PUBLIC AGENCY], arising solely out of the acts or omissions of District in the performance of this [NAME OF AGREEMENT]. At its sole discretion, [OTHER PUBLIC AGENCY] may participate at its own expense in the defense of any claim, action or proceeding, but such participation shall not relieve District of any obligation imposed by this Agreement. [OTHER PUBLIC AGENCY] shall notify District promptly of any claim, action or proceeding and cooperate fully in the defense.

2. Claims Arising From Sole Acts or Omissions of [OTHER PUBLIC AGENCY]

The \_\_\_\_\_ [OTHER PUBLIC AGENCY] hereby agrees to defend and indemnify the \_\_\_\_\_ District, its agents, officers and employees (hereafter collectively referred to in this paragraph as 'District') from any claim, action or proceeding against District, arising solely out of the acts or omissions of [OTHER PUBLIC AGENCY] in the performance of this Agreement. At its sole discretion, District may participate at its own expense in the defense of any such claim, action or proceeding, but such participation shall not relieve [OTHER PUBLIC AGENCY] of any obligation imposed by this Agreement. District shall notify [OTHER PUBLIC AGENCY] promptly of any claim, action or proceeding and cooperate fully in the defense.

3. Claims Arising From Concurrent Acts or Omissions

The \_\_\_\_\_ ("District") hereby agrees to defend itself, and the \_\_\_\_\_ [OTHER PUBLIC AGENCY] hereby agrees to defend itself, from any claim, action or proceeding arising out of the concurrent acts or omissions of District and [OTHER PUBLIC AGENCY]. In such cases, District and [OTHER PUBLIC AGENCY] agree to retain their own legal counsel, bear their own defense costs, and waive their right to seek reimbursement of such costs, except as provided in paragraph 5 below.

4. Joint Defense

Notwithstanding paragraph 3 above, in cases where District and [OTHER PUBLIC AGENCY] agree in writing to a joint defense, District and [OTHER PUBLIC AGENCY] may appoint joint defense counsel to defend the claim, action or proceeding arising out of the concurrent acts or omissions of [OTHER PUBLIC AGENCY] and District. Joint defense counsel shall be selected by mutual agreement of District and [OTHER PUBLIC AGENCY]. District and [OTHER PUBLIC AGENCY] agree to share the costs of such joint defense and any agreed settlement in equal amounts, except as provided in paragraph 5 below. District and [OTHER PUBLIC AGENCY] further agree that neither party may bind the other to a settlement agreement without the written consent of both District and [OTHER PUBLIC AGENCY]."

#### 5. Reimbursement and/or Reallocation

Where a trial verdict or arbitration award allocates or determines the comparative fault of the parties, District and [OTHER PUBLIC AGENCY] may seek reimbursement and/or reallocation of defense costs, settlement payments, judgments and awards, consistent with such comparative fault."

Things to consider when negotiating indemnity clauses:

- a) A "mutual" indemnity clause (i.e., where each party indemnifies the other "to the extent" of their negligence, etc.) does not obtain any protection for the public agency, as this "comparative negligence" adjudication would be made by a court in the event of a claim in any event. For third party contracts with contractors or other service providers, a mutual indemnity clause is not advised. The contractor/service provider should generally be required to provide one-way indemnification of the school district.
- b) Try not to limit a contractor's indemnity to any specific monetary amount, such as the value of the contract, or, with the exception of the alternative Class I indemnity discussed above, to the amount of an insurance recovery, etc.

### C. **Attorneys' Fees Clauses.**

Although it should be reviewed and determined by the school district on a case-by-case basis as a business decision, the general consensus among school district attorneys is that attorneys' fees clauses should not automatically be included in public agency contracts. The primary rationale for this has been that the potential benefit to the public agency from such clauses is usually less, and the detriment usually greater, than it is for the other party. Not only are public agency legal fees generally lower than opposing counsel's, but the public agency can't escape paying its bills by dissolving or transferring assets as is sometimes encountered with entities against whom public agencies win judgments. There is also the "encouragement to sue" factor where the other party might think it has more to gain than to lose by suing, especially if it can avoid payment to the public agency if it were to obtain an award of fees.

If a public agency is forced by circumstances to accept attorneys' fees provisions, the clause should be as "narrow" as possible, i.e., it should be limited to causes of action based upon interpretation of the contract itself, and should not apply to any and all actions "arising out of" or "connected to" the relationship of the parties.

The reason for this is that, under a narrow form of attorneys' fee clause, if either party sues under both tort and contract causes of action and then voluntarily dismisses the contract claim, neither party may recover attorneys' fees for either the contract or tort claim. If the action goes to judgment, the prevailing party can recover its attorneys' fees for contract claims only. Under a broad form of attorneys' fees clause, if either party sues for both contract and tort causes of action, and then voluntarily dismisses the contract claim, the prevailing party may still be able to recover for the remaining tort claim. If the case goes to judgment, the prevailing party can recover for both the tort and contract claims. For further discussion of these principles, see *Santisas v. Goodin*, (1998) 17 Cal. 4th 599.

Set forth below are examples of four attorneys' fee clauses, ranging from the most preferable from the public agency's viewpoint (i.e., the narrowest), to the least preferable (i.e., a broad form of clause, which should be avoided if at all possible).

**SAMPLE OF A PREFERRED "NARROW" FORM CLAUSE, WITH ADDITIONAL CONDITIONS.** (The key language making the clause either "narrow" or "broad" is in bold face in the following examples):

Attorneys' Fees. if either party commences any legal action or proceeding to **enforce, interpret or construe** this Agreement, the prevailing party shall be entitled to recover from the other party only those attorneys' fees and court costs reasonably incurred during litigation, as determined by the court upon satisfactory proof, and shall not be entitled to recover any pre-litigation fees and costs incurred in attempting to enforce the contract. Neither party shall be entitled to recover fees or costs incurred or arising out of any legal action or proceeding other than an action to enforce, interpret or construe this Agreement. The term "legal action or proceeding" includes a declaratory relief action and any bankruptcy or insolvency proceedings. The term "pre-litigation" includes, without limitation, administrative remedies, mediation and arbitration, and any other legal work undertaken prior to the actual filing of a complaint in court.

**SAMPLE OF A LESS CONDITIONAL "NARROW" FORM CLAUSE:**

Attorneys' Fees. if either party commences any legal action or proceeding to **enforce, interpret or construe** this Agreement, the prevailing party shall be entitled to recover from the other party reasonable attorneys' fees and court costs, as determined by the court. "Legal action or proceeding" includes a declaratory relief action and any bankruptcy or insolvency proceedings.

**ANOTHER SAMPLE OF A LESS DESIRABLE "NARROW" FORM CLAUSE:**

Attorneys' Fees. if either party commences any legal action or proceeding to resolve any dispute **based on** this Agreement, the prevailing party shall be entitled to recover from the other party reasonable attorneys' fees and court costs, as determined by the court. "Legal action or proceeding" includes a declaratory relief action and any bankruptcy or insolvency proceedings.

**SAMPLE OF A "BROAD" FORM CLAUSE (Avoid if at all possible):**

Attorneys' Fees. if either party commences legal proceedings **for any relief** against the other party **arising out of** this Agreement, the prevailing party shall be entitled to recover from the other party reasonable attorneys' fees and court costs, as determined by the court. "Legal action or proceeding" includes a declaratory relief action and any bankruptcy or insolvency proceedings.

## **D. Purchasing Consortiums/Cooperative Purchasing Agreements.**

The Joint Exercise of Powers Act, Government Code sections 6502 et seq., authorizes public agencies to jointly exercise any power common to them by agreement.

The California Attorney General has opined that these provisions are applicable to school districts. 15 Cal. Ops. Atty. Gen. 108 (1950). School districts can therefore enter into joint powers agreements whereby they combine their purchasing requirements for supplies which are common to their needs (e.g., office supplies and custodial supplies).

School districts desirous of establishing a cooperative purchasing agreement require approval to do so from their respective governing boards. Such approval is generally in the form of an authorizing resolution.

The following are some of the considerations when establishing a cooperative purchasing arrangement/agreement:

1. Determine the manner in which the agreement will be administered (e.g., by a governing board composed of one representative from each member district or by a designated member district).
2. The agreement should clearly state the scope of the relationship and the responsibilities of each member district.
3. Designate a member district responsible for issuing bids.
4. Determine the manner in which costs of advertising and other costs incidental to the bidding shall be borne.
5. Determine the manner of payment for orders.
6. Determine items to be purchased pursuant to the agreement.
7. Where a joint powers agency (JPA) is formed, specify that the constituent districts of the JPA are not separately or jointly liable for the obligations of the JPA. *Tucker Land Co. v. State of California* (2001) 94 Cal. App. 4th 1191. A joint powers agreement is required to specify the contracting party the restrictions applicable to the exercise of power by which will apply to the exercise of power by the JPA. Gov. Code, § 6509.

In an opinion pertaining to joint powers agencies created by school districts, the Attorney General concluded school districts could not form a joint powers agency (JPA) to contract for the procurement of materials and supplies by a private entity. The delegation to a private entity of an individual district's power to contract for the procurement of supplies is not authorized. Each member of a joint powers agency must have the independent authority to undertake the activity to be performed by the joint powers agency. Furthermore, the authority of school districts to delegate various responsibilities is limited by statute. Thus, the Attorney General concluded, "[T]wo or more school districts have no authority to establish a JPA to contract with a private entity to secure such agreements." 71 Cal.Ops.Atty.Gen. 266, 275 (1988). Thus, joint power agencies established for the purpose of cooperative purchasing should assure that the JPA authorizes or approves contracts the JPA enters into. Furthermore, the JPA should retain responsibility over the performance of powers delegated to it.

The most significant advantage of cooperative purchasing agreements is the cost savings to participants. As a result of combining requirements, districts are able to obtain quality items in large quantities for reasonable prices, as well as potentially reduce administrative costs. Cooperative purchasing is however not a suitable arrangement for every district and districts should be certain that the benefits of such an arrangement outweigh any detriment prior to entering into cooperative purchasing agreements. For example, some districts may have insufficient warehousing facilities to store large quantities and are forced to purchase small quantities on an "as needed" basis. Any cost savings may be negligible for such a district.

## IV. PUBLIC WORK CONSTRUCTION CONTRACTS

### A. Extending Date for Receipt of Bids.

In taking bids for the construction of any public work or improvement, the public agency must set forth in the bid invitation the place, a date and time for closing of submissions of bids by private contractors. Pub. Cont. Code § 4104.5. If the public agency issues any material change (one with a substantial cost impact on the total bid) to the invitation for bids within seventy-two hours prior to bid closing, it must extend the date and time for closing of submissions of bids by no less than seventy-two hours. Pub. Cont. Code § 4104.5.

The clear implication of the latter requirement in Public Code section 4104.5 is that changes to the invitation for bids made prior to seventy-two (72) hours before the bid closing do not require that the closing date be extended, whether or not the change is material. This section does not specify the manner in which the date and time for closing of submissions of bids must be made when it is being extended. Although Public Code section 20112/Education Code section 81641 requires publication of an invitation for bids for two weeks, and although it is not clear whether this requirement applies to changes covered by Public Contract Code section 4104.5, your attorney may conclude that such changes and extensions do not require re-advertising of the bid.

### B. Designation and Substitution of Subcontractors.

The Subletting and Subcontracting Fair Practices Act (ch. 4, div. 2 of the Pub. Cont. Code commencing at § 4100) has as its purpose the prevention of the practices of bid shopping and bid peddling in connection with public works projects. Pub. Cont. Code § 4101; *Bay Cities Paving & Grading, Inc. v. Hensel Phelps Constr. Co.* (1956) 56 Cal. App.3d 361. The Legislature has found that the practices of bid shopping and bid peddling in connection with public works often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies and loss of wages to employees. Pub. Cont. Code § 4101. **Bid shopping** occurs where the general contractor uses the lowest bid received to pressure other subcontractors to submit even lower bids. Bid shopping is the use of the low bid already received by the general contractor to pressure other subcontractors into submitting even lower bids. **Bid peddling**, conversely, is an attempt by a subcontractor to undercut known bids already submitted to the general contractor in order to procure the job. In *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, the court held that Public Contract Code section 4101 is designed to prevent only bid shopping and peddling that takes place after the award of the prime contract and held that bid peddling and shopping prior to the award of the prime contract "foster the same evils, but at least have the effect of passing the

reduced costs on to the public in the form of lower prime contract bids.” MCM Construction, *supra*.

On public works contracts, the prime contractor must submit with its bid a list of all subcontractors to whom it intends to subcontract work, including fabrication and installation, for more than one half of one percent of the total bid (for the construction of streets, highways and bridges the threshold amount is one half of one percent of the prime contractor's total bid or \$10,000, whichever is greater). Pub. Cont. Code § 4104. The bidder must give the name and the location of the place of business of each subcontractor at the time of bid opening. The awarding authority may determine that subcontractor information other than the name and location of the subcontractor may be submitted by the prime contractor up to 24 hours after the deadline established for receipt of bids. The name and location of the subcontractor performing more than one half of 1 percent of the work must always be provided at the time of bid opening. In *E.F. Brady Co. v. M.H. Golden Co.* (1997) 58 Cal App 4th 182, the court held that the listing does not create an express or implied contract between the contractor and subcontractor, but that once the general contractor's bid is accepted, the general contractor has a statutory duty to use the listed subcontractor, unless one of seven circumstances enumerated under Pub Con C § 4107(a), exist.

If a prime contractor fails to specify a subcontractor, or specifies more than one subcontractor for the same portion of work, the prime contractor agrees that it is fully qualified to perform that portion itself and that it shall perform that portion. Pub. Cont. Code § 4106. The prime contractor may not sublet or contract any portion of the work in excess of one-half of one percent of the initial bid if its original bid did not designate a subcontractor for that portion. This prohibition does not apply to the performance of change orders causing changes or deviations from the original contract. Pub. Cont. Code § 4107. Subletting or subcontracting any portion of the work in excess of one-half of one percent of the total bid where no subcontractor was designated in the original bid for that portion is permitted only in cases of public emergency or necessity after a written finding of the awarding authority setting forth the facts constituting the emergency or necessity. Pub. Cont. Code § 4109.

The general contractor may not circumvent the requirement for listing of subcontractors by listing another contractor who will in turn sublet portions constituting the majority of the work covered by the prime contract. Pub. Cont. Code § 4105.

Once a bid is accepted, the prime contractor may not substitute another subcontractor for the listed subcontractor unless it receives the consent of the awarding authority and proves one of the following circumstances: (a) the listed subcontractor, after having had a reasonable opportunity to do so, fails or refuses to execute a written contract for the scope of work specified in the subcontractor's bid and at the price specified in the subcontractor's bid, when that written contract, based upon the general terms, conditions, plans, and specifications for the project involved or the terms of that subcontractor's written bid, is presented to the subcontractor by the prime contractor; (b) the listed subcontractor becomes insolvent or the subject of an order for relief in bankruptcy; (c) the listed subcontractor fails or refuses to perform the subcontract; (d) the listed subcontractor fails or refuses to post payment and performance bonds in conformance with Public Contract Code section 4108; (e) the name of the subcontractor was listed as a result of an inadvertent clerical error; (f) the listed subcontractor is unlicensed; (g) the listed subcontractor is performing in an unsatisfactory manner, (h) the listed subcontractor is ineligible to work on a public works project; or (i) the awarding authority determines that a listed subcontractor is not a responsible contractor. Pub. Cont. Code § 4107.

Prior to approving a prime contractor's request to substitute a subcontractor, the awarding authority must give written notice by certified mail to the listed subcontractor of the request for substitution and the reasons for the request. The listed subcontractor then has five working days within which to submit written objections to the awarding authority. Upon the filing of written objections, the awarding authority must give at least five working days' notice to the listed subcontractor of a hearing by the awarding authority on the request for substitution. Should the listed subcontractor fail to file written objections upon being notified of the prime contractor's request for substitution, the failure to file is deemed a consent to the substitution. Pub. Cont. Code § 4107.

#### Inadvertent Clerical Error in Naming Subcontractor

If the reason for the prime contractor's requests to substitute a subcontractor is that the listed subcontractor was listed as the result of an inadvertent clerical error, the prime contractor must, in order to assert such a claim of inadvertent clerical error, give written notice to the Awarding authority, with a copy to both the subcontractor listed in error and the intended subcontractor, within two working days of the bid opening.<sup>21</sup> A listed subcontractor may submit to the awarding authority and to the prime contractor written objection to the prime contractor's claim of inadvertent clerical error within six working days from the time of the bid opening. A failure to file a written objection within the six working days is considered primary evidence of its agreement that an inadvertent clerical error was made. If the listed subcontractor has submitted a timely written objection to the claim of inadvertent clerical error, the awarding authority must investigate the claims of the parties and hold a public hearing as provided in Public Contract Code section 4107 to determine the validity of the claims. If the prime contractor, the listed subcontractor and the intended subcontractor each submit affidavits to the awarding authority within eight working days from the time of the bid opening showing that an inadvertent clerical error was made, the awarding authority, after a public hearing and in the absence of compelling reasons to the contrary, must consent to the substitution of the intended contractor. Moreover, if affidavits are filed within eight working days by the prime contractor and the intended subcontractor, and the listed subcontractor has not submitted a written objection within six working days, the awarding authority, after a public hearing and in the absence of compelling reasons to the contrary, must consent to the substitution of the intended contractor. Pub. Cont. Code § 4107.5.

#### Violations

A violation of the provisions of the Subletting and Subcontracting Fair Practices Act by the prime contractor authorizes the awarding authority, in its discretion, either (1) to cancel the contract or (2) to assess the prime contractor a penalty of not more than 10 percent of the amount of the subcontract involved. The penalty must be deposited in the fund out of which the prime contract is awarded. If the contract is to be cancelled or a penalty assessed against the prime contractor under this section, the prime contractor must be given a public hearing with five days' prior notice of the time and place. Pub. Cont. Code § 4110. Additionally, a violation of the Subletting and Subcontracting Fair Practices Act is ground for disciplinary action by the Contractors State License Board. Pub. Cont. Code § 4111.

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<sup>21</sup> In *Cal-Air Conditioning, Inc. v. Auburn Union School Dist.* (1993) 21 Cal.App.4<sup>th</sup> 655, the court applied the doctrine of substantial compliance to the two-day written notice provision in a case where the prime contractor gave the awarding authority the required written notice but orally notified by phone the allegedly erroneously listed contractor the day after the prime bids were opened and then sent written notice to the erroneously listed subcontractor on the fourth working day after the bid opening.

If a prime contractor makes an invalid substitution, the listed subcontractor may recover from the prime contractor the benefit of the bargain it would have realized had it not wrongfully been deprived of the subcontract. *Southern California Acoustics Co. v. C.V. Holder, Inc.* (1969) 71 Cal. 2d 719. The public agency, however, is not liable whether or not it consented to the substitution. Additionally, even if the prime contractor may have made an excusable clerical mistake, if it does not comply with the statutory procedure for substitution of a listed subcontractor (giving written notice of the clerical error within two working days) even though it receives permission to substitute another subcontractor, the listed subcontractor may recover as damages the benefit of the bargain it would have realized had it not been wrongfully deprived of the subcontract. *Coast Pump Associates v. Stephen Tyler Corp.* (1976) 62 Cal. App. 3d 421. See also *R. J. Land & Assocs. Constr. Co. v. Kiewit-Shea* (1999) 69 Cal. App. 4th 416.

Where a public agency approves the substitution of a subcontractor on the basis of one of the statutorily recognized reasons, the only remedy available to the subcontractor is a writ of mandamus under Code of Civil Procedure section 1094.5 to challenge the local agency's decision. *Interior Systems, Inc. v. Del E. Webb Corp.*, (1981) 121 Cal. App. 3d 312. Under such circumstances, a cause of action for damages for breach of statutory duty is not permitted unless the decision of the awarding authority is set aside by mandamus.

Effective July 1, 2014, all invitations to bid for construction of any public work or improvement must specify that any person making a bid or offer to perform the work shall, in his or her bid or offer, including the California contractor license number of each subcontractor. Pub. Contract Code, § 4104(a)(1). An inadvertent error in listing such license number is not grounds for filing a bid protest or grounds for considering the bid nonresponsive if the corrected contractor's license number is submitted to the public entity by the prime contractor within 24 hours after the bid opening and provided the corrected contractor's license number corresponds to the submitted name and location of that subcontractor. Pub. Contract Code, § 4104(1)(2).

### **C. Bonding of Subcontractors (Pub. Cont. Code § 4108.)**

If a prime contractor desires to require its subcontractors to furnish payment and performance bonds, the prime contractor's written or published request for subbids must specify the amount and requirements of the bond or bonds to be provided by the subcontractors. Additionally, if a prime contractor desires to have the subcontractors bear the expense of the bond or bonds, it must so indicate in its written or published request for subbids. If the prime contractor's written or published request for subbids does not specify bond requirements, the prime contractor may not impose bond requirements on subcontractors. Pub. Cont. Code § 4108.

If a prime contractor's written or published request for subbids does specify bond requirements for subcontractors and a subcontractor does not, upon request of the prime contractor, furnish a bond or bonds by an admitted surety, the prime contractor may substitute another subcontractor, subject to Public Contract Code section 4107. Public Contract Code section 4107 authorizes an awarding authority to consent to the substitution of a subcontractor when the listed subcontractor fails or refuses to meet the bond requirements of Public Contract Code section 4108.

A school district may, in its request for bids, require a prime contractor to require that its subcontractors furnish payment and performance bonds. In order to be able to determine whether the prime contractor is responsive in this regard, the request for bids should require the

prime contractor to submit with its bid copies of its written or published request for subbids specifying the amount and requirements of the bonds to be provided by its subcontractors.

Many attorneys believe that school districts should not become involved in any manner in the relationship between the prime contractor and its subcontractors, even to the extent of requiring that the prime contractor require its subcontractors to furnish bonds. They believe that the determination of whether subcontractors should provide bonds should be left to the discretion of the prime contractor since the prime contractor is ultimately responsible for completing the project and will have provided payment and performance bonds covering the whole project.

#### **D. Relief of Bidder from Mistake (Pub. Cont. Code §§ 5100-5107.)**

A bid containing a mistake may not be reformed or modified, such as increasing the price bid because of a clerical error, after the bid opening since to do so would violate the statutory requirement that contracts be let only to the lowest bidder answering a published call for bids. If the contractor is not able to or does not rescind the bid, he will be held to the bid made. *Lemoge Electric v. County of San Mateo*, (1956) 46 Cal. 2d 659; *Greer v. Hitchcock* (1969) 271 Cal. App. 2d 334; Pub. Cont. Code § 5101.

Prior to 1971, the courts allowed a bidder on a public project which was competitively bid to rescind the bid due to an error if the elements for a rescission were met. *M.F. Kemper Constr. Co. v. Los Angeles* (1951) 37 Cal. 2d 696. The elements of rescission are: (1) a mistake of fact which is material to the contract; (2) the mistake is not the result of a neglect of a legal duty; (3) enforcement of the contract as made would be unconscionable; (4) the other party may be placed in status quo; (5) the party seeking relief must give prompt notice of his election to rescind; and (6) the party seeking relief must restore or offer to restore to the other party everything of value which he has received under the contract. *White v. Berrenda Mesa Water Dist.* (1970) 7 Cal. App. 3d 894. It has also been held that a mixed mistake of fact and judgment may give rise to the right to rescind an erroneous low bid.

Since 1971, a bidder's remedy for a mistake in its bid on certain types of public projects became governed by the relief of bidders provisions now found in Public Contract Code sections 5100-5107. These provisions apply only to competitive bidding for the construction, alteration, repair, or improvement of any structure, building, road or other improvement of any kind. Pub. Cont. Code § 5100. For bids subject to these provisions, they provide the exclusive procedure for relief from a mistake in a bid to a public entity. *A & A Electric, Inc. v. City of King* (1976) 54 Cal. App. 3d 457. Thus, the cases cited above no longer govern the relief of bidders from mistake by way of rescission for bids covered by these statutory provisions. Nevertheless, for bids which do not fall within the provisions of the relief of bidders' statutes, the cases cited above arguably may still provide authority for a bidder to rescind the bid due to error.

Under the statutes for relief of bidders on public contracts, the only mistakes which could release a bidder from its bid are typographical or arithmetical errors, not mistaken submission of a bid. Relief is only allowed if the bidder can establish that the mistake was made in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans or specifications. (Pub. Cont. Code § 5103(d).) This statute clearly does not contemplate relief from the mistaken submission of a bid. *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal App 4th 359. Furthermore, relief is available under Pub. Cont. Code §§ 5101, 5103 only for errors in the general contractor's bid and these provisions do not apply to mistaken bids submitted by a subcontractor to the general contractor; the statute is

not intended to apply to mistakes in the bid of subcontractors. Pub. Cont. Code § 5103(c) provides that to obtain relief, the bidder must show that the mistake made the bid materially different than he or she intended it to be, and if the bid from the general contractor to the public entity is based on the bid received from a subcontractor, the contractor cannot truthfully represent to the public entity that the bid is different from what it intended. Moreover, the range of materiality would change drastically if it were to be measured against the bid of each subcontractor, rather than against the bid of the general contractor, and § 5103(d) requires that the mistake be made in filling out the bid, that is, in filling out the proposal submitted to the public entity, and subcontractors' bids are not submitted to the public entity. *Diede Construction, Inc. v. Monterey Mechanical Co.* (2004) 125 Cal App 4th 380.

A bidder who submits an erroneous bid for the construction, alteration, repair, or improvement of any structure, building, road or other improvement may not be relieved from the bid unless by consent of the awarding authority, nor shall any change be made in the bid because of mistake, but the bidder may bring a court action against the public entity for the recovery of the amount forfeited, without interest or costs. Pub. Cont. Code § 5101. A demand for forfeiture of a bid bond is sufficient to allow the bidder to invoke the remedy provided for in these sections even though no actual forfeiture has occurred. *Balliet Bros. Constr. Corp. v. Regents of University of California*, (1978) 80 Cal. App. 3d 321. If the bidder fails to recover judgment, the bidder must pay all costs incurred by the public entity in the suit, including reasonable attorney's fees. Pub. Cont. Code § 5101. A complaint must be filed and served within ninety days after the opening of the bid. Pub. Cont. Code § 5102.

In order to withdraw a bid, the bidder must establish to the satisfaction of the court that (a) a mistake was made; (b) the bidder gave the public entity written notice of the mistake within five days after the opening of the bids, specifying in the notice in detail how the mistake occurred; (c) the mistake made the bid materially different than the bidder intended it to be; and (d) the mistake was made in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of work, or in reading the plans or specifications. Pub. Cont. Code § 5103. Before the case of *Emma Corporation v. Inglewood Unified School District*, 114 Cal. App. 4th 1018 (2004), it was believed these grounds for relief must be strictly followed by the bidder in order to have a right to relief. As discussed below, the *Emma* case placed a potentially heavy burden on the District essentially to inform the bidder of the requirements of the law. It is recommended that questions regarding rescission be reviewed by legal counsel. In *A & A Electric, Inc. v. City of King* (1976) 54 Cal. App. 3d 457, the contractor, while notifying the city of a mistake in its bid, failed to provide any details of the mistake as required by Public Contract Code section 5103. The court held that rescission was not warranted because of failure to comply with the statutory provisions.

Districts should be cautious when dealing with requests for relief from bids. In the case of *Emma Corp. v. Inglewood Unified School Dist* (2004) 114 Cal.App.4th 1018, the Court found that the District was estopped from enforcing a contract with Emma Corporation, a low bidder who made a mistake in its bid. Emma Corporation had notified the District in a timely manner that it made a clerical error in its bid of almost \$800,000. It, however, failed to include all the information required by statute to be relieved from its bid. The Court essentially determined that the District's employees, out of concern for the cost of the new school construction project upon a re-bid, failed to request additional information from Emma Corporation after the company representative, in a timely manner, had offered to provide additional information. The Court then found that the District was estopped from enforcing the contract against Emma Corporation when Emma sued the District to rescind its contract, and the District was neither permitted to recover on the bid bond nor to recover from Emma Corporation the difference in the amount of

the bid from Emma Corporation and the next low bidder. The court stated at page 1031, "We decline to bar estoppel against a public entity where, as here, the public entity deliberately misled a mistaken bidder from timely complying with the bid withdrawal statutes." Consequently, districts should be cautious in handling bidders who request relief from their bids. An abundance of caution would lead a district to advise the bidder of what additional information it should provide to allow the district to properly relieve it of its bid.

A public entity may, on refusal or failure of the successful bidder to execute the contract, award the contract to the second lowest bidder. Pub. Cont. Code § 5106. A bidder who claims a mistake or who forfeits its bid security is prohibited from participating in further bidding on the project on which the mistake was claimed or security forfeited. Pub. Cont. Code § 5105. Whether a later project is considered the same as a preceding one when the specifications are altered for purposes of the second bid is a question of fact for the trial court. *Columbo Construction Co. v. Panama Union School Dist.* (1982) 136 Cal. App. 3d 868.

#### **E. Change Orders (Pub. Cont. Code §§ 20118.4/20659.)**

The governing board of a school district may authorize changes in plans and specifications and order extra work performed without competitive bidding provided the cost of the extra work to be performed does not exceed the limit of expenditures allowed without bids or does not exceed ten percent of the original contract price, whichever is greater.

Public Contract Code section 20118.4 provides as follows:

- a) If any change or alteration of a contract governed by the provisions of Article 3 (commencing with Section 39643) of Chapter 4 of Part 23 of the Education Code is ordered by the governing board of the district, the change or alteration shall be specified in writing and the cost agreed upon between the governing board and the contractor. The board may authorize the contractor to proceed with performance of the change or alteration without the formality of securing bids, if the cost so agreed upon does not exceed the greater of:
  - (1) The amount specified in Section 20111 or 20114 whichever is applicable to the original contract; or
  - (2) Ten percent of the original contract price.
- b) The governing board of any school district, or of two or more school districts governed by governing boards of identical personnel, having an average daily attendance of 400,000 or more as shown by the annual report of the county superintendent of schools for the preceding year, may also authorize any change or alteration of a contract for reconstruction or rehabilitation work other than for the construction of new buildings or other new structures, where the cost of the change or alteration is in excess of the limitations in subdivisions (a) and (b) but does not exceed 25 percent of the original contract price, without the formality of securing bids, when such change or alteration is a necessary or integral part of the work under the contract and the taking of bids would delay the completion of the contract. Changes exceeding 15 percent of the original contract price shall be approved by an affirmative vote of not less than 75 percent of the members of the governing board.

Public Contract Code section 20659, applicable to community college districts, simply states:

- a) If any change or alteration of a contract governed by the provisions of this article is ordered by the governing board of the community college district, such change or alteration shall be specified in writing and the cost agreed upon between the governing board and the contractor. The board may authorize the contractor to proceed with performance of the change or alteration without the formality of securing bids, if the cost so agreed upon does not exceed the greater of:
- (1) The amount specified in Section 20651 or 20655, whichever is applicable to the original contract; or
  - (2) Ten percent of the original contract price.
- b) Where work not included in the original plans is being added to a project and where the resulting change in the contract price is in excess of ten percent of the original contract price, such change is subject to competitive bidding requirements unless the change is being made to meet an emergency or competitive bidding would be useless or disadvantageous.

Sections 20118.4 and 20659 are consistent with case law decided prior to their enactment. For example, in *Clinton Constr. Co. v. Clay* (1917) 34 Cal. App. 625, a city charter expressly permitted changes in the plans and specifications for a school building to be made after the contract for its construction had been let in accordance with a provision requiring contracts involving more than \$500 to be let to the lowest bidder. It was held that the board of education could not, without again calling for bids, enter into a new or supplemental contract with the original contractor involving more than \$500 for district work not even mentioned in the plans and specifications of the original contract.

To permit changes or alterations to contracts in excess of the ten percent limitation without advertising and letting to the lowest bidder would be in direct conflict with the statute and would present opportunities for favoritism and abuse. For example, if such changes were allowed, a contract might be lawfully made by a school district for one project and then by virtue of the ability to make changes, the lowest bidder could be placed in the advantageous position of performing work wholly different from that which was submitted to bidders. Such a practice would clearly be inconsistent with the requirement for competitive bidding.

Nevertheless, in unusual circumstances, project changes necessitated by unforeseen problems may allow changes to be made without competitive bidding even though the amount of the change would be in excess of ten percent of the original contract price. Under prior case law, it was held that where unseen emergencies arise after the letting of a contract and the beginning of work, additional work to address the emergency may be authorized without a new call for bids. *Bent Bros., Inc. v. Campbell*, (1929) 101 Cal. App. 456. In *Los Angeles Dredging Co. v. Long Beach* (1930) 210 Cal. 348, it was held that an emergency might properly be said to exist so as to dispense with the competitive bidding requirement where a contractor, having entered into a dredging contract with a city, was required to place mains in the streets for the conveyance of dredging materials. The city paid an additional sum over the contract price for the transportation of dredged materials because of the relocation of the mains, where it was found that the deposit of the dredged materials was polluting the water at a public bathing place when the dredge was running and the normal leakage and overflow of the mains in the streets was rendering them unsafe.

It should be noted that in the cases where changes have been necessitated by unforeseen emergencies, the courts have made a distinction between amendments or alterations in the plans and specifications which do not affect the material character of the work and those changes or alterations which constitute substantial modifications or changes in the character and quality of the work to be performed. Where changes are only incidental, the contract is held unaffected and further publication and letting of bids has not been required. Where changes are substantial, however, a different conclusion has been reached. *Bent Bros., Inc. v. Campbell, supra*, 101 Cal. App. at 456; *Clinton Constr. Co. v. Clay, supra*, 34 Cal. App. at 625. Where the work is entirely distinct, independent and apart from any and all work contemplated and provided for under the original contract, competitive bidding is required.

Circumstances also sometimes arise which make competitive proposals are unavailing in part because they are the result of unforeseen conditions and only the contractor on the site with forces fully engaged can reasonably be expected to handle the site conditions. Courts have determined that contractors may recover in a contract action for extra work or expenses necessitated by the conditions on the project being other than as represented. *Souza & McCue Constr. Co. v. Superior Court of San Benito County* (1962) 57 Cal. 2d 508, 510. Many attorneys believe this is an exception to the requirement that a change order not exceed ten percent of the contract price. Additionally, there is a more general common law rule that if there is no public benefit to bidding, bidding is not required. (See discussion of *Graydon*, and related cases in section I(C)(1) of this Guide.)

It has been said that this principle is mainly based on the theory that misleading plans and specifications are the responsibility of the public agency, not the contractor. In fact, Public Contract Code section 1104 states in part, "No public entity . . . shall require a bidder to assume responsibility for the completeness and accuracy of architectural or engineering plans and specifications on public works projects, except on clearly designed design build projects. . . . Nothing in this section shall be construed to prohibit a local public entity, charter city, or charter county from requiring a bidder to review architectural or engineering plans and specifications prior to submission of a bid, and report any errors and omissions noted by the contractor to the architect or owner. The review by the contractor shall be confined to the contractor's capacity as a contractor, and not as a licensed design professional."

Government Code section 4215 also provides that the public entity take responsibility for problems which arise when specified utility facilities on the site of a construction project are not identified by the public agency in the plans and specifications. The public entity must compensate the contractor accordingly whether the changes are within or outside of the ten percent change order limitation. Furthermore, under section 4215, the contractor cannot be assessed liquidated damages when delays arise from such problems. (See also Pub. Cont. Code § 7104 regarding subsurface latent physical conditions involving excavations deeper than four feet and the requirement for a change order for such conditions; see Guide, Section I below.)

All of the circumstances and facts surrounding the consideration of a project change necessitated by unforeseen problems whether due to site conditions or problems with plans and specifications should be carefully considered and reviewed with legal counsel before determining that changes in excess of ten percent should be permitted. Part of the consideration process must take into account whether the contractor acted reasonably. The rule in the *Souza* case was not intended to burden public entities with liability for the cost of changes where the contractor underbids due to lack of diligence in examining specifications and

plans which are themselves accurate. *Jasper Construction, Inc. v. Foothill Junior College Dist.* (1979) 91 Cal. App. 3d 1, 10.

Further, when a contract requires a written change order, which is typical in public works construction contracts, verbal approval of a change order by a representative of the public entity is insufficient to bind the public entity. *P & D Consultants, Inc. v. City of Carlsbad* (2011) 190, Cal. App.4<sup>th</sup> 1332.

#### **F. Classification of Contractor's License (Pub. Cont. Code § 3300.)**

Public Contract Code section 3300 provides as follows:

- a) Any public entity, as defined in Section 1100, the University of California, and the California State University shall specify the classification of the contractor's license which a contractor shall possess at the time a contract is awarded. The specification shall be included in any plans prepared for a public project and in any notice inviting bids required pursuant to this code.

This requirement shall apply only with respect to contractors who contract directly with the public entity.

- b) A contractor who is not awarded a public contract because of the failure of an entity, as defined in subdivision (a), to comply with that subdivision shall not receive damages for the loss of the contract.

Bid documents prepared by school districts should therefore clearly specify the classification of contractor's license which contractors submitting bids must possess at the time the contracts are awarded.

A school district may not lawfully award a contract to an unlicensed contractor. The Contractors' License Law (ch. 9 [commencing at § 7000] div. 3 of the Business and Professions Code) makes it a misdemeanor for any person, including a co-partnership, to engage in business or act in the capacity of a contractor within this state without having a license. Cal. Bus. & Prof. Code §§ 7028, 7025 and 7026. It is therefore the responsibility of school districts to determine prior to the award of a contract, that the contractor to whom the contract is being awarded is licensed in accordance with the Business and Professions Code requirements.

#### **G. Contractor's License Number and License Expiration Date (Bus. & Prof. Code § 7028.15.)**

Business and Professions Code section 7028.15 makes it a misdemeanor for any person to submit a bid to a public agency in order to engage in the business or act in the capacity of a contractor within the state without having a license therefore. The only exceptions to this requirement for a license are where the contractor is specifically exempted by the Business and Professions Code or where the bid is submitted on a state project governed by Public Contract Code section 10164 or where the bid is submitted on a local agency project governed by Public Contract Code section 20103.5. Public Contract Code section 20103.5 deals with contracts involving federal funds and authorizes a bidder to be properly licensed at the time the contract is awarded even if the bidder is not properly licensed at the time the bid is submitted.



## **I. Provision Required if Excavations Deeper than Four Feet (Pub. Cont. Code § 7104.)**

Any public works contract of a local public entity (e.g., a school district) which involves digging trenches or other excavations deeper than four feet must contain a clause which provides the following:

- a) That the contractor shall promptly, and before the following conditions are disturbed, notify the public entity in writing of any:
  - (1) that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site; in accordance with provisions of existing law.
  - (2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids.
  - (3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.
- b) That the public entity shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.
- c) That in the event a dispute arises between the local public entity and the contractor whether the conditions materially differ, involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties. Pub. Cont. Code § 7104.

## **J. Liability to Contractor for Delay by Public Entity (Pub. Cont. Code § 7102.)**

There is an implied provision in every contract that neither party to the contract will do anything to prevent performance thereof by the other party or that will hinder or delay him in its performance. Not only must the government refrain from hindering the contractor's performance, it must do whatever is necessary to enable the contractor to perform. *Lewis-Nicholson, Inc. v. United States* (1977) 550 Fed. 2d 26, 32.

Under a construction contract, the owner owes the contractor a legal duty not to hinder, delay, interfere with or prevent his performance. *COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal. App. 3d 916. In every construction contract the law implies a covenant that the owner will

provide the contractor timely access to the project site to facilitate performance of work. When necessary permits relating to the project are not available or access to the site is limited by the owner, the implied covenant is breached. *Howard Contracting, Inc. v. G.A. McDonald Construction Co., Inc.* (1998) 71 Cal. App. 4th 38.

Generally, a building or construction contractor has the right to recover damages resulting from an unreasonable delay caused by the owner, although the right to recover damages may be precluded by the provisions of the contract, unless prohibited by law. *Hawley v. Orange County Flood Control Dist.* (1963) 211 Cal. App. 2d 708 (that case also holds that a general contractor may also present a subcontractor's claim of damages for delay on a pass through basis even though there is no privity of contract between the subcontractor and the public agency owner.) Such contract provisions generally limit the contractor to an extension of time for the delay, and prohibit any damages for the delay. However, for public agencies in California, the ability to preclude a contractor from recovering damages for a delay caused by the public agency through a contract provision has been prohibited by Public Contract Code section 7102.

Public Contract Code section 7102 provides that contract provisions in construction contracts of public agencies which limit the public agency's liability to an extension of time for delay for which the public entity is responsible and which delay is unreasonable under the circumstances involved, and not within the contemplation of the parties, will not be construed to preclude the recovery of damages by the contractor or subcontractor. See *Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal. App. 4th 38. Thus, a public agency may not limit its liability for delay to an extension of time if (i) it is responsible for the delay, (ii) the delay is unreasonable under the circumstances, and (iii) the delay was not within the contemplation of the parties at the time the contract was entered into. In the typical standard form construction contract documents used in California, there is often language designed to limit a district's liability for delay to an extension of time in all other circumstances. A public agency may not require a contractor to waive, alter, or limit the applicability of Public Contract Code section 7102, and any such waiver, alteration, or limitation is void. Public Contract Code section 7102 does not void any provision in a construction contract which requires notice of delays, provides for arbitration or other procedure for settlement, or provides for liquidated damages. However, the case of *Greg Opinski Construction, Inc. v. City of Oakdale* (2011) 199 Cal.App.4th 1107, favors local public agencies when they experience delays on construction projects. In that case, the court held that if a contractor fails to follow contract procedures to obtain a time extension, a local public agency is entitled to liquidated damages for delay in completing a project, even if the agency caused the delay.

## **K. Fingerprinting Requirements for Construction Contracts (Educ. Code § 45125.2.)**

Education Code section 45125.2 imposes specific requirements on school districts entering into contracts for construction, reconstruction or repair of school facilities where the contractor's employees will have more than limited contact with students. In these situations, fingerprinting of the contractor's employees is not required if one or more of the following is required: (a) a physical barrier is installed at the worksite to limit contact with students, (b) supervision and monitoring of the contractor's employees by a contractor employee fingerprinted by the Department of Justice and not convicted of a violent or serious felony is undertaken, or (c) surveillance of employees of the contractor by school employees is undertaken.

If the contractor will have only limited contact with students, your district's construction contract documents should contain provisions requiring that the contractor's employees check in with the school office upon arriving at the school; inform school office staff of their proposed activities and location and not change location without contacting the school office; not use student restroom facilities, and if they find themselves alone with a student, immediately contact the school office and request school staff be assigned to the work location.

Exceptions from fingerprinting requirements are also made when the contracting is required as a result of emergency or exceptional situations such as when public health or safety is endangered or when repairs are required to make facilities safe and habitable.

## **L. Monitoring and Enforcing Prevailing Wage Law**

The body of law which pertains to the requirements that public works contracts must be performed by workers paid prevailing wages is found in Labor Code sections 1720 through 1861. The details of prevailing wage laws are found in the typical standard form school district construction contract documents.

Labor Code sections 1770, *et seq.*, require the payment of prevailing wages to all workers employed on public works projects. The Director of the DIR is generally tasked with monitoring and enforcing compliance with the state's prevailing wage law for any public works project paid for in whole or in part out of public funds. In recent years, awarding bodies have been required directly to pay the DIR's Compliance Monitoring Unit (CMU) for the costs of monitoring and enforcing compliance with the prevailing wage law as a cost of construction. Implementation of this statutory and regulatory scheme was problematic, however. As a result, Senate Bill (SB) 854 was enacted as a trailer bill for the June, 2014, budget.

SB 854's new requirements apply to all public works projects, not just those supported by state funds. SB 854 will require all contractors and subcontractors intending to bid or perform work on public works projects annually to register and pay a fee to the DIR for purposes of monitoring and enforcing compliance with the state's prevailing wage law. Consequently, the Department will no longer directly charge awarding bodies for prevailing wage monitoring and enforcement by the CMU.

Through registration, the DIR will collect fees directly from contractors and subcontractors to fund the DIR's duties, including oversight of the state's prevailing wage law, compliance monitoring and enforcement, determinations of prevailing wage and public works coverage, and enforcement appeals hearings. The current fee is \$300, through the Director of the DIR has the authority annually to adjust the fee. Contractors and subcontractors are also required to meet minimum qualifications to register, allowing them to bid and work on public works projects. The DIR will post a list of registered contractors and subcontractors on its website.

School districts and other awarding bodies should be aware of the following compliance requirements under the prevailing wage law requirements of SB 854:

- Awarding bodies must submit a contract award notice to the DIR within five days of the award on form "PWC 100";
- Awarding bodies must post – or require the prime contractor to post – job site notices;
- Awarding bodies must specify in the call for bids and contract documents that the public works project is subject to compliance monitoring and enforcement by the DIR;

- As of March 1, 2015, awarding bodies must ensure that contractors and subcontractors submitting bids on public works contracts are registered with the DIR; and
- As of April 1, 2015, awarding bodies must ensure that public works contracts are awarded only to contractors and subcontractors registered with the DIR.

## **M. Stop Payment Notices.**

### a) Principles and Procedures

Effective January 1, 2011, the Legislature completely revamped the law regarding mechanics' liens and stop notices (stats. 2010, SB 189). Former Title 15 of the Civil Code (sections 3082-3267) have been replaced by new Part 6 (sections 8000-9566) of Division 4 of the Civil Code. The Assembly Judiciary Committee synopsis of SB 189 remarks:

“[T]his venerable area of the law . . . has become unduly complex and impenetrable as the result of piecemeal amendments over the years. This bill would among other notable achievements streamline, reorganize, clarify and re-codify these statutes; it would modernize terminology and eliminate inconsistencies in language; make provisions more readable and easier to use; place provisions that apply exclusively to private or public work in separate titles, and place jointly applicable provisions in a common third title.”

While the goal of simplification is laudable, it is doubtful that anyone will find the mechanic's lien laws any less “complex” and “impenetrable” than before. Although most of the provisions of the new went into effect July 1, 2012. Section 107 of SB 189, provides that, with the exception of thirty-six enumerated sections, the new law “is intended to be nonsubstantive in effect.” Court decisions interpreting the old law continue to apply to the new act to the extent that the new act substantially follows the former laws, but by substantially rewording and reordering prior provisions, and by changing terminology, the effect of prior court decisions may be uncertain and construction industry professionals will have to re-acquaint themselves with the law.

Civil Code sections 8000 through 8050 contain definitions used in the revised law and should be referred to as there are a fair amount of terminology changes. For example former Civil Code section 3100 referred to “public work” as “any work of improvement contracted for by a public entity” but the new law, Civil Code section 8038, refers to “public works contract” defined as “an agreement for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind.” Also stop notices will now be called “stop payment notices” and Preliminary 20-day notices are simply called “preliminary notices.”

Although the laws have recently changed, the general principles regarding stop notices and mechanics' liens are the same. Aside from the provisions of law which are not subject to repeal until July, 2012, the law pertaining to stop notices is now found in Chapter 4 (commencing with section 9350) of Title 3 of Part 6 of Division 4 of the Civil Code. Although revised, the law continues to provide persons performing labor or supplying materials or equipment for works of improvement on privately-owned property with a mechanics' lien (among other devices) to assure them of payment. However, mechanics' liens do not apply to any public work. Civ. Code § 9350 et seq.. See also *A.J. Setting Co. v. Trustees of California State University & Colleges* (1981) 119 Cal. App. 3d 374, 381.

There are two primary legal devices provided persons performing labor or supplying materials or equipment on public jobs; they are labor and material payment bonds (discussed later) and stop notices. While no mechanics' lien or materialmen's liens can be filed against the public property on a public works contract, such claimants are entitled to the use of stop notices. *Clark v. Beyrle* (1911) 160 Cal. 306, 311; *United States Fidelity & Guaranty Co. v. Oak Grove Union School District* (1962) 205 Cal. App. 2d 226, 230.; *Pacific Employers Ins. Co. v. State of California* (1970) 3 Cal. 3d 573, 576; and regarding sovereign immunity from mechanics liens see *Mayrhofer v. Board of Education* (1981) 89 Cal. 110.

The stop payment notice functions as a demand by the "claimant" that the owner withhold for the claimant's benefit sums which would otherwise be paid to the general contractor. The filing of a valid stop payment notice imposes a trust upon the public agency holding the funds, and if the agency fails to comply with the stop payment notice, even if unintentionally, it may be liable to the claimant (or the surety company who has made payment to the claimant). *United States Fidelity & Guaranty Co. v. Oak Grove Union School Dist.* (1962) 205 Cal. App. 2d 226 .

Civil Code section 9358(a) provides in part as follows:

The public entity shall, on receipt of a stop payment notice, withhold from the direct contractor sufficient funds due or to become due to the direct contractor to pay the claim stated in such stop payment notice and to provide for the public entity's reasonable cost of any litigation pursuant to the stop payment notice.

Section 9358(b) states that the public entity may satisfy its duty by refusing to release funds held in escrow under Section 10263 or 22300 of the Public Contract Code.

In *Stanislaus Pump, Machinery & Construction Corp. v. City of Modesto* (1988) 200 Cal. App. 3d 1442, 1447, the court interpreted Civil Code sections 3186 and 3193, which were predecessors of current sections 9358 and 9456. The court held that after the stop notices were filed, the contractor "lost the right to collect the amount of those claims from the city or his assignee. The city has an absolute statutory duty to pay the valid amounts of those claims to the stop notice claimants and no one else." *Stanislaus Pump, Machinery & Construction Corp. v. City of Modesto, supra*, 200 Cal. App. 3d 1442, 1447. The court also explained that "[s]hould the stop notice claimants sue contractor, contractor would be entitled to indemnification from the City for any sums the City withheld." Thus, the public agency must take steps to assure it handles stop notice claims properly.

Funds withheld by the District pursuant to a stop payment notice should be placed in an interest bearing account. It has been held that the Takings Clause of the Fifth Amendment of the United States Constitution (applied through the Fourteenth Amendment) and California common law prohibit a public entity from lawfully retaining for its own account interest earned on funds withheld from a prime contractor in response to a subcontractor's stop notice. *Breda Costruzioni Ferroviarie, v. Los Angeles County Metropolitan Transportation Authority* (1997) 56 Cal. App. 4th 1433.

A stop payment notice is effective, however, only as to funds still held by the owner. If insufficient funds are left at the time the stop payment notice is filed (e.g., due to progress payments to the original contractor), the owner has no duty to obtain funds sufficient to enable it to withhold the stop payment notice amount. Civil Code section 9360 states as follows:

(a) This chapter does not prohibit payment of funds to a direct contractor or a direct contractor's assignee if a stop payment notice is not received before the disbursing officer actually surrenders possession of the funds.

(b) This chapter does not prohibit payment of any amount due to a direct contractor or a direct contractor's assignee in excess of the amount necessary to pay the total amount of all claims stated in stop payment notices received by the public entity at the time of payment plus any interest and court costs that might reasonably be anticipated in connection with the claims.

A stop payment notice filing does not result in immediate payment of the claimed funds by the public entity to the claimant. Rather, (unless the public entity has permitted the filing of another bond by the contractor and released the funds in return), the public entity will retain possession of the funds until entitlement thereto (if contested) has been determined by a court.

If a school district has its own claims against retention such that there are insufficient funds to cover all stop payment notices, the district should withhold the funds from the contractor, but may also have a claim to priority over those funds, ahead of the subcontractors. You may wish to consult with legal counsel if faced with such a situation.

There are detailed statutory procedures, forms and timelines for the filing and enforcement of stop payment notices at Civil Code sections 9350, *et seq.* Although some defects in form may be overcome if a stop payment notice "substantially informs" the owner of required information, any significant defect should be reviewed by legal counsel. The general procedures are as follows:

- (1) A potential claimant who does not have a direct contractual relationship with the contractor, and is not a laborer, must file a Preliminary Notice within twenty days of start of any work which is the subject of the stop payment notice or claim on payment bond. Civ. Code §§ 9300-9306. This requirement is to protect the owner from claims by "secret" subcontractors or suppliers and does not require any response by the owner. The preliminary notice must comply with content and notice requirements set forth in Civil Code Sections 8100, *et seq.*, and must contain a general description of the work and an estimate of the total price of the work provided and to be provided. (Civ. Code §9303.)
- (2) A stop payment notice in the form required by Civil Code sections 9352(a) and 8102 must be verified, and must include basic project information, including a general description of the work to be provided, and an estimate of the total amount in value of the work to be provided. A stop payment notice is not effective unless given before the expiration of whichever of the following time periods is applicable: (a) if a notice of completion, acceptance, or cessation is recorded, 30 days after that recordation, or (b) if a notice of completion, acceptance, or cessation is not recorded, 90 days after completion or cessation. (Civ. Code, § 9356.)
- (3) The public agency must, on receipt of a stop payment notice, withhold from the direct contractor sufficient funds due or to become due to the direct contractor to pay the claim stated in the stop payment notice and to provide for the public entity's reasonable cost of litigation pursuant to the stop payment notice. (Civ. Code, § 9358(a).)

- (4) If the claimant has paid ten dollars (\$10) at the time of giving the stop payment notice, the public agency must notify the claimant not later than ten days after each of the following events, of the time within which an action to enforce payment of the claim in the stop payment notice must be commenced: (a) completion of a public works contract, whether by acceptance or cessation, and (b) recordation of a notice of cessation or completion. (Civ. Code, § 9362.)
- (5) The public entity may, in its discretion, permit the direct contractor to give the public entity a release bond, which must be executed by an admitted surety insurer, in an amount equal to 125 percent of the claims stated in the stop payment notice, conditioned for the payment of any amount the claimant recovers in an action on the claim, together with court costs if the claimant prevails. (Civ. Code, § 9364(a).) On receipt of a release bond, the public entity may not withhold funds from the direct contractor pursuant to the stop payment notice. (Civ. Code, § 9364(b).) The surety issuing this bond must be a different surety from the one issuing the payment bond on the job. See *Azusa Western, Inc. v. City of West Covina*, 45 Cal. App. 3d 259 (1975). The surety on the release bond is jointly and severally liable to the claimant with the sureties on any payment bond. (Civ. Code, § 9364(c).) The statute does not require the public agency to notify the claimant of the filing of the bond.
- (6) A contested stop payment notice may be determined under a summary procedure involving an affidavit and demand for release from the contractor, a counter-affidavit from the claimant and the filing of an action in superior court. (Civ. Code, §§ 9400, *et seq.*)
- (7) An action to enforce the stop payment notice in court must be filed after ten days from the date the claimant gives the stop payment notice, and not later than ninety days after the expiration of the time within which a stop payment notice must be given, or else the stop payment notice ceases to be effective and the public entity must release funds withheld pursuant to the notice. (Civ. Code § 9502.)

A guideline to provide for the reasonable cost of litigation concerning a stop payment notice (as of the date of this publication), would be for districts to add the following amounts:

<u>Amount of Claim</u>	<u>Additional Withhold</u>
\$1,500 or less	\$500
\$1,500 through 5,000	\$500 plus 50% of excess over \$1,500
\$5,001 through 15,000	\$1,000 plus 20% of excess over \$5,000
\$15,001 and over	\$3,000 plus 15% of excess over \$15,000

We caution that the right to properly contest stop payment notice funds must not be determined by the public agency, but rather by the appropriate court. (Civil Code section 9358).

b) Release of Retention Funds and Statute of Limitations Issues

The courts appear increasingly inclined to broadly interpret stop payment notice provisions to allow recovery by stop payment notice claimants even after the statute of limitations has run. As a result release of stop payment notice retention funds must be handled cautiously after careful review of the circumstances surrounding the filing of the stop payment notice.

In the case of *Structural Steel Fabricators, Inc. v. City of Orange* (1991) 234 Cal. App. 3d 1206, a question arose as to whether the statute of limitations for litigating a stop notice claim had been tolled. The subcontractor alleged that the statute of limitations should not be a defense by the City because of the *City's conduct in influencing the subcontractor not to pursue enforcement of the stop notice*. The court concluded that estoppel can be asserted to extend the time limits within which to file an action to enforce a stop notice. *Structural Steel Fabricators, Inc. v. City of Orange, supra*, 234 Cal. App. 3d 1206, 1212. Essentially, the court determined that the city lulled the subcontractor into sitting on its rights.

In a subsequent appeal arising out of the same case, the court analyzed whether the trial court correctly applied the doctrine of equitable tolling in light of the facts of the case. The court cited previous case law which articulated the three elements of equitable tolling: timely notice, lack of prejudice to the defendant (the public entity), and reasonable and good faith conduct on the part of the plaintiff (the subcontractor). *Supra*, at p. 464, 465. In holding that the trial court correctly applied equitable tolling, the court reiterated that the doctrine of equitable tolling is generally appropriate in suits to enforce stop notices. *Structural Steel Fabricators v. City of Orange* (1995) 40 Cal. App. 4th 459.

In the case of *J. H. Thompson Corp. v. DC Contractors* (1992) 4 Cal. App. 4th 1355, another appellate court considered a question of whether the statute of limitations had run on an action for recovery on a stop notice claim. The court concluded that the stop notice claimant, the supplier, should not be precluded from pursuing its claim even though the time for filing an action had passed. In addition to filing a timely stop notice, the supplier served the public agency with a request for notice of expiration of the stop notice period (so it would know when it had to file a lawsuit), and paid the \$2 fee in accordance with Civil Code section 3185. The public agency withheld the stop notice amount of \$72,239.48, but failed to notify the supplier when the stop notice period ended. As a result, the supplier failed to file a timely suit to recover on the stop notice claim. Because a timely lawsuit was not filed, the public agency released the funds it had withheld to the general contractor. The public agency's failure to notify the supplier of the time when the stop notice period ended, however, essentially estopped or prevented the public agency from relying on the statute of limitations as a defense to the lawsuit.

Although these cases allowed plaintiffs to recover even after the statute of limitations had expired, if the elements of equitable tolling are not present in the case, a stop payment notice claimant may not be able to maintain a lawsuit on a stop payment notice after the expiration of the statute of limitations.

The date of contract completion or cessation of work or filing of the notice of completion is another important factor in determining when the statute of limitations period for filing stop payment notices runs and thus for determining whether retention funds should be released. In *W.F. Hayward Co. v. Transamerica Ins. Co.* (1993) 16 Cal. App. 4th 1101, a California appeals court held that a subcontractor's failure to file its complaint within six months of the expiration of the period in which to file stop notices bars an action against the contractor's payment bond surety. The court did not allow the subcontractor to file his stop notice action, holding that "actual work stoppage gives a subcontractor both notice of the problem between the contractor and the owner (or public entity) and the right to file a stop notice to obtain protection of its

rights." The court held that a complete work stoppage on a public work of improvement for thirty days constitutes a "cessation" of labor and a "completion" of the project. Since the subcontractor filed no stop notice and then failed to file suit against the surety within the statutory time limits, the court found any work which the subcontractor had subsequently performed on the project was not pursuant to the contract between the original contractor and the owner, since that contract was terminated thirty days after cessation of labor.

Based on these cases, districts should take great care in handling stop payment notice claims as well as the requests of stop payment notice claimants for notification of the expiration of stop payment notice periods pursuant to Civil Code section 9362. If a district receives a stop payment notice claim and later must determine whether to release the stop payment notice funds to the general contractor, all of the circumstances surrounding the stop payment notice claim should be considered carefully before the funds are released. In addition, the date of filing of the notice of completion or the date of completion or cessation of work must also be identified.

Effective July 1, 2012, "completion" is defined as the date of the owner's acceptance of the project or the 60th continuous day of cessation of labor, whichever occurs first. (Civ. Code, § 9200.) Among other things, this two-prong definition affects the timing of (a) the deadline for recording a notice of completion, and (b) the expiration of the subcontractor's 90-day period for giving the owner a stop payment notice.

## **N. Payment Bond for Public Works and Bond Approval.**

The law pertaining to payment bonds for public works was also renumbered with the stop payment notice legislation (stats. 2010, SB 189).

A public entity, including a school district, must require a contractor on any public work involving an expenditure in excess of \$25,000 to file a payment bond before entering upon the performance of the work. (Civ. Code § 9550; 52 Op. Att'y Gen. 8 (1969); 38 Op. Att'y Gen. 143 (1961).) Providers of architectural, engineering, and land surveying services for public works are not required to file a payment bond. (Civ. Code § 9550 subd. (b).) Nothing is substantively changed, but all the services above fall within the definition of "design professionals" pursuant to Civil Code section 3319 subd. (d)(2).

Regardless of the amount of the contract, the bond must be in a sum not less than one hundred percent of the total contractual amount payable. Civ. Code § 3248. The original contractor may require subcontractors to provide a bond to indemnify the original contractor for any loss sustained by the original contractor because of any default by the subcontractors. Civ. Code § 9554).

The purpose of the bond is primarily to insure that payment will be made on laborers' and materialmen's claims against the contractor and subcontractors for work done or materials furnished in connection with the project. The payment bond must provide that if the direct contractor or a subcontractor fails to pay any of the following, the surety will pay the obligation and, if an action is brought to enforce the liability on the bond, a reasonable attorney's fee, to be fixed by the Court: (1) a person authorized under Civil Code Section 9100 to assert a claim against a payment bond, that is, a person that provides work for a public works contract, if the work is authorized by a direct contractor, subcontractor, architect, project manager, or other person having charge of all or part of the public works contract; a laborer; or a person described in Section 4107.7 of the Public Contract Code; (2) amounts due under the Unemployment

Insurance Code with respect to labor or work performed under the public works contract; or (3) amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the contractor and subcontractors under Section 13020 of the Unemployment Insurance Code with respect to the work and labor. Civ. Code § 9554(b).

In *Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, the Fourth District Court of Appeal found that Civil Code sections 3247 and 3248, the predecessors of current sections 9550 and 9554, must be interpreted in conjunction with the Bond and Undertaking Law, Code of Civil Procedure section 995.010. The court also found that a public agency accepting a payment bond has a mandatory duty to obtain information about the sufficiency of the surety prior to approving the bond. The court found the public agency must require the corporate surety insurer to submit a county clerk's certificate showing it was an admitted surety insurer before the public agency accepts or approves the bond. Unfortunately in that case the surety became insolvent and the City became responsible for the damages the contractor suffered because the surety was inadequate.

The holding of the *Rankin* case was supplemented by the provisions of Code of Civil Procedure section 995.311 which became effective January 1, 2002. That section requires that any bond required on a public works contract must be executed by an admitted surety insurer. The public agency approving the bond on a public works contract has a duty to verify that the bond is being executed by an admitted surety insurer. This duty may be fulfilled by (1) printing out information from the website of the Department of Insurance confirming the surety is an admitted surety insurer and attaching it to the bond, or (2) obtaining a certificate from the county clerk that confirms the surety is an admitted insurer and attaching it to the bond. Code Civ. Proc. § 995.311.

It should also be noted that according to Government Code section 4421, a school district may approve the form, sufficiency, or manner of execution of the surety bonds or contracts of insurance furnished by the surety or insurance company selected by the bidder to underwrite the bonds or contracts of insurance.

## **O. Requirements for Admitted Surety Insurers (Code Civ. Proc. §§ 995.660 & 995.670.)**

In bidding situations where bonds are required to be furnished by an admitted surety insurer, some public agencies had imposed the requirement that the surety have a certain rating (e.g., at least a *Bests* rating of "A"). Code of Civil Procedure section 995.670 prohibits a state or local public entity from requiring an admitted surety insurer to comply with any requirements other than those stated in Code of Civil Procedure section 995.660 whenever an objection is made to the sufficiency of the admitted surety insurer on the bond or if the bond is required to be approved.

With respect to payment bonds, and also with respect to performance bonds, the requirements which can be imposed are that the surety submit (1) the original, or a certified copy, of the unrevoked appointment, power of attorney, bylaws, or other instrument entitling or authorizing the person who executed the bond to do so within 10 calendar days of the insurer's receipt of a request to submit the instrument; (2) a certified copy of the certificate of authority of the insurer issued by the Insurance Commissioner within 10 calendar days of the insurer's receipt of a request to submit the copy; (3) a certificate from the clerk of the county in which the court or

officer is located that the certificate of authority of the insurer has not been surrendered, revoked, canceled, annulled, or suspended or, in the event that it has, that renewed authority has been granted within 10 calendar days of the insurer's receipt of the certificate; and (4) Copies of the insurer's most recent annual statement and quarterly statement filed with the Department of Insurance pursuant to Article 10 (commencing with section 900) of Chapter 1 of Part 2 of Division 1 of the Insurance Code, within ten calendar days of the insurer's receipt of a request to submit the statements. Code Civ. Proc. § 995.660.

Upon submission of the required documents, if it appears that the bond was duly executed, that the insurer is authorized to transact surety insurance in the state, and that its assets exceed its liabilities in an amount equal to or in excess of the amount of the bond, then the insurer is sufficient and must be accepted or approved as surety on the bond, unless the insurer's liability on the bond exceeds ten percent of its capital and surplus as shown by its last statement on file in the office of the Insurance Commissioner. Code Civ. Proc. § 995.660.

#### **P. Specification of Insurer and Owner Controlled Insurance.**

As previously noted, according to Government Code section 4421, a school district may approve the form, sufficiency, or manner of execution of insurance furnished by an insurance company selected by a bidder.

In addition, Government Code section 4420.5 provides school districts and community college districts the legal authority to implement owner controlled or “wrap-up” insurance with regard to a construction or renovation project. To implement an Owner Controlled Insurance Program (OCIP) the district must determine prospective bidders, including subcontractors, meet minimum occupational safety and health qualifications based on a consideration of serious and willful workers compensation violations, their workers' compensation experience modification factor and their injury prevention programs. The district must also determine that the use of owner-controlled insurance will minimize the expenditure of public funds on the project in conjunction with the exercise of appropriate risk management. In addition, portions of Government Code section 4420 apply to such programs to require the OCIP program to maintain completed operation coverage insurance for a term which the Insurance Commissioner has determined that coverage is reasonably available, but not less than three years. Bid specifications for a project with an OCIP must inform bidders of the insurance coverage provided under the program and the minimum safety requirements which must be met. The OCIP cannot prohibit a contractor or subcontractor from purchasing additional insurance coverage, and the OCIP cannot include surety insurance. Safety requirements for the OCIP can be developed jointly between the district and the contractor. Collective bargaining agreements specified in Labor Code section 3201.5 are not to be affected by the OCIP.

#### **Q. Progress Payments and Substitution of Security.**

In general, progress payments by a school district are made as the governing board may specify in the bid documents. The governing board of a school district is required to determine the method of payment for construction contracts, including progress payments for completed portions of the work or for materials delivered on the ground or stored subject to the control of the board and unused. (See Educ. Code § 17603.)

Public Contracts Code section 9203 provides that contracts with a local agency for the creation, construction, alteration, repair or improvement of a public work which will exceed a total of

\$5,000 must provide for the retention of a minimum of 5 percent of any progress payments as well as the withhold of not less than five percent of the contract price until final completion and acceptance of the project. At any time after fifty percent of the work has been completed, the legislative body, if it finds that satisfactory progress is being made, may make any remaining progress payments in full for actual work completed. (Pub. Contract Code § 9203.) Previously, public agencies have typically withheld 10% of the contract price, in reliance on section 9203. Senate Bill 293 enacted a new statute, Public Contract Code section 7201, which was amended in September, 2014. The current version provides that for contracts entered into after January 1, 2012, a public entity cannot withhold more than 5% of progress payments as retention. However, section 7201 also provides that the public agency may withhold more than 5% on specific projects where the governing body of the public entity or designee finds that the project is "substantially complex" and therefore requires a higher retention amount. In that case, the bid documents must include details explaining the basis for the finding in addition to the actual retention amount, and the finding must describe the specific project and why it is a unique project that is not regularly, customarily, or routinely performed by the agency or licensed contractors. Pub. Contract Code § 7201(b)(5). Section 7201 is in effect until January 1, 2018, at which time it will be deemed repealed unless a new statute is enacted before that time.

Therefore, standard school district construction contract documents should provide for a five percent retention on progress payments with the final payment of five percent of the value of work done under the contract to be made within sixty days after acceptance of the work by the school district in accordance with Public Contract Code section 7107.

Public Contract Code section 20104.50 provides that "[a]ny local agency which fails to make any progress payment within thirty days after receipt of an undisputed and properly submitted payment request from a contractor on a construction contract shall pay interest to the contractor equivalent to the legal rate set forth in subdivision (a) of Section 685.010 of the Code of Civil Procedure." The section also requires review of payment requests "as soon as practicable after receipt." In addition, it provides that any payment request found improper "shall be returned to the contractor . . . not later than seven days after receipt." The returned request must be accompanied by a statement in writing as to why the payment request was not proper. The time after which interest may be due on late payment of a progress payment is shortened if improper payments are not clarified within seven days of receipt. Disputed payments may not necessarily be subject to the same interest payment obligations. See *Breda Costruzioni Ferroviarie v. Los Angeles County Metropolitan Transportation Authority* (1977) 56 Cal. App. 4th 1433. Also, progress payments do not include the final retention payment.

Whenever bid or contract documents require the retention of a percentage of the contract price by a public agency to ensure performance, they must also include provisions to permit the substitution of securities for the monies withheld by the public agency. Failure to include these provisions in bid and contract documents will void any provisions for performance retentions in the public agency contract. Such substitution of securities provisions are not, however, required where federal regulations or policies do not allow the substitution of securities. Pub. Cont. Code § 22300.

At the request and expense of the contractor, securities equivalent to the amount withheld may be deposited with the public agency or with a state or federally chartered bank as the escrow agent. Securities eligible for deposit include those listed in Government Code section 16430, bank or savings and loan certificates of deposit, interest-bearing demand deposit accounts, standby letters of credit, or any other security mutually agreed to by the contractor and the public agency. Upon deposit of the securities, the public agency must then pay the monies

withheld to the contractor. The contractor is the beneficial owner of the securities substituted for monies withheld and receives any interest thereon. Upon satisfactory completion of the contract, the securities are returned to the contractor. Pub. Cont. Code § 22300. In order to be valid, the escrow agreement must be substantially similar to the form set forth in Public Contract Code section 22300.

As an alternative to the contractor depositing securities with an escrow agent so that the owner would pay the retention to the contractor, Public Contract Code section 22300 requires that the owner, upon written request of the contractor must pay retentions earned directly to the escrow agent. Public Contract Code section 22300 further provides that the contractor may direct the investment of the payments into securities and shall receive the interest earned on the investments. Upon satisfactory completion of the contract, the escrow agent gives the contractor all securities, interest, and payments received by the escrow agent from the owner.

#### **R. Removal or Relocation of Main or Trunkline Utility Facilities Not in Specifications (Gov't Code § 4215.)**

Section 4215 of the Government Code provides that a public agency assume the responsibility for the timely removal, relocation, or protection of existing main or trunkline utility facilities located on the site of any construction project if such utilities are not identified by the public agency in the plans and specifications. Section 4215 further provides that the contract documents include provisions that the contractor (1) shall be compensated for the costs of locating, repairing damage not due to the failure of the contractor to exercise reasonable care, and removing or relocating such utility facilities not included in the plans and specifications with reasonable accuracy, and (2) shall not be assessed liquidated damages for delay in completion of the project, when such delay was caused by the failure of the public agency or the owner of the utility to provide for removal or relocation of such utility facilities. Such provisions must be included school district construction contract documents to meet the requirements of this section.

#### **S. Construction Management.**

School districts are allowed to hire a construction manager ("CM") to assist with the district's management of a construction project if the district does not have any employees who possess adequate experience. (Ed. Code §17070.98.) This usually occurs with large or complex projects, or an entire construction program funded by a bond. Districts typically issue a Request for Proposal and hire a CM pursuant to the procedures in Government Code section 4525, *et seq.* (to the extent applicable). The CM merely acts as an agent for the school district and as an extension of the district's staff – the contractor, not the CM, is directly at risk for the project finishing on time or under budget. The CM must be a licensed general contractor, architect, or engineer. (Gov. Code §§4525(e) and 4529.5; and 78 Op.Atty.Gen. 48.)

#### **T. Alternative Delivery Methods.**

The most common method of public works construction is known as "design-bid-build", in which the owner accepts competitive bids from contractors based on a completed design of the project. The owner then awards the contract to the lowest responsive and responsible bidder, and that prime contractor may enter subcontracts with trade contractors for portions of the work.

However, other delivery methods are available that may better meet a school district's needs for a particular project:

### **1. Multiple Prime.**

Instead of competitively bidding the entire design of a project for a contract with one prime contractor, a school district may split the design into multiple "bid packages" and competitively bid each bid package separately. Thus, the district would have multiple prime contracts with contractors who typically are subcontractors to a single prime contract. This delivery method allows a district to put the design for early stages of construction out for bid before the design for the entire project is complete, thus "fast tracking" the construction. It also eliminates the cost of overhead and profit from a single prime contractor. However, this delivery method shifts the burden to the district for coordination and scheduling of the multiple prime contractors, thus increasing its construction management costs and the risk for any mistakes in the coordination and scheduling.

### **2. Design-Build Contract for School Facility Exceeding \$2,500,000.**

Since 2002, the Legislature has authorized school districts to use a design-build contract project delivery system as an optional, alternative procedure for bidding and building school construction projects. Educ. Code §§ 17250.10-17250.50. Section 17250.35 specifies that the Project inspection must be under the direction of the Department of General Services or a competent qualified agent of the District. Until 2008, design-build was authorized only for projects over \$10,000,000. In 2007, that number was reduced to \$2,500,000, effective January 1, 2008. The authorization for design build is currently set to sunset on January 1, 2020. (Educ. Code, §§ 17250.10, *et seq.*)

The term "design-build" means a procurement process in which both the design and construction of a project are procured from a single entity. The design-build entity must be able to provide appropriately licensed contracting, architectural, and engineering services as needed. The ostensible benefits of a design-build project delivery system include an accelerated completion of the project, cost containment, reduction for construction complexity, and reduced exposure for the school district by shifting the liability and risk for cost containment and project completion to the design-build entity.

In order to authorize use of a design-build contract the governing board of a school district must evaluate the traditional design, bid, and build process and the design-build process in a public meeting and make written findings that use of the design-build process on the specific project will reduce comparable project costs, expedite the project's completion, or provide features not achievable through the traditional design-bid-build method.

Statutory provisions (and guidelines being developed by the Superintendent of Public Instruction), contain specific requirements with respect to the request for proposals, prequalifications of design-build entities, the procedure to be used for selection of a design-build entity, and other matters. Educ. Code §§ 17250.25, 17250.30.

### **3. Lease-Leaseback Contracts.**

Lease-leaseback contracts were commonly referred to as "design-build" contracts prior to the enactment of the Design Build law discussed above. The two are similar because like design-build, lease-leaseback projects provide for the design and construction of the project from a

single entity. The basic authority for a lease-leaseback project is Education Code section 17406, which states in part that “the governing board of a school district, without advertising for bids, may let . . . to any person, firm, or corporation any real property that belongs to the district if the instrument by which such property is let requires the lessee to construct on the demised premises, or provide for the construction thereon of, a building or buildings for the use of the school district during the term thereof, and provides that title to that building shall vest in the school district at the expiration of that term. . . .” Lease-leaseback avoids competitive bidding because it is intended to be a financing vehicle. In order to enter into a lease-leaseback contract, the district should articulate some reason to avoid competitive bidding and utilize this method of financing. The basic documents required to enter into a lease-leaseback typically consist of a resolution authorizing the contract, a site lease, a sublease agreement, and a lease-leaseback agreement.

Lease-leasebacks have become increasingly popular in recent years because they avoid competitive bidding and can be structured as a lump sum or a guaranteed maximum price (“GMP”) for completion of the project, which ostensibly puts more of the risk of cost overruns on the contractor. Because lease-leaseback avoids competitive bidding, however, these types of contracts should be approached cautiously and only with the assistance of legal counsel. In 2005 the Legislature passed a bill (AB 1097) requiring that competitive proposals be obtained (similar to the design build discussed above) in order for districts to enter into lease-leaseback contracts. The bill, however, was vetoed by the Governor. In his veto message, the Governor stated that while he was “generally supportive of using a competitive process for public works projects . . . this bill imposes restrictions on lease-leaseback contracts that could limit competition, inadvertently limit flexibility for schools, and drive higher administrative costs, thereby potentially increasing the overall cost of building school facilities.” Some think the Governor’s veto essentially validated lease-leaseback financings and there is also a prior Attorney General opinion recognizing the validity of the lease-leaseback model. In *Los Alamitos Unified School District v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222, further guidance was provided when a California appellate court confirmed that a school district need not comply with competitive bidding when constructing facilities under a “lease-leaseback” arrangement. Shortly thereafter, the Governor signed into law a bill requiring prequalification for lease-leaseback contractors in certain circumstances. For projects awarded on or after January 1, 2015, the Education Code requires that general contractors and certain mechanical, engineering and plumbing subcontractors on lease-leaseback projects must meet the prequalification requirements under Public Contract Code section 20111.6. Although school districts have the option to prequalify contractors on competitive bid projects on a per-project, quarterly, or annual basis, school districts are required to prequalify lease-leaseback contractors on a quarterly or annual basis only. (See Section I.A.3 of the Guide for further discussion of prequalification.)

Under Education Code section 17424, lease-leaseback agreements must require that general prevailing rates will be paid, and must also require that work performed by any workman employed upon the project in excess of eight hours during any one calendar day shall be permitted only upon compensation for all hours worked in excess of either hours per day at not less than 1.5 times the basic rate of pay.

#### **4. Construction Management at Risk (CMAR).**

Occasionally, a CM will assume the responsibilities of a general contractor by accepting the risk for a project finishing on time and under budget, which is known as a Construction Manager At Risk (CMAR). The general rule is that a CMAR agreement must be competitively bid, so this

delivery method is usually seen on school district projects under the design-build or lease-leaseback delivery method which are exempt from competitive bidding. The CMAR agreement typically is structured with a GMP, and sometimes includes contingencies and/or allowances, although it can be structured as a lump sum. The CMAR entity typically identifies various trade contractors to perform the work, and the trade contractors either enter contracts with the CMAR or the district directly.

There is no specific statute or regulation that expressly allows or forbids public school districts from entering into CMAR agreements without competitive bidding. Because there is no specific statutory authorization or prohibition of CMAR projects, the legality of CMAR projects likely hinges on whether a CMAR will act more like a contractor or a construction manager. If a CMAR is fundamentally comparable to a contractor, the project may have to be bid; if a CMAR is more comparable to a construction manager, then the project can be awarded based upon a competitive process that does not include bidding. (See, *City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court* (1972) 7 Cal.3d 861.)

## **U. DSA Approval.**

The construction of school buildings—regardless of whether those buildings are constructed elsewhere and brought to the campus, or built directly on school property—is governed by the Field Act (for purposes of elementary and secondary education, see Article 3 of Chapter 3 of Part 10.5 of the California Education Code, commencing with section 17280, and Article 6 of Chapter 3 of Part 10.5 of the California Education Code, commencing with section 17365.) The Field Act governs safety requirements for school buildings to ensure they are fit for student occupancy, vesting authority over the planning, design, and construction process with the state's Department of General Services, which encompasses the Division of State Architect (DSA). Pursuant to Education Code section 17280:

The Department of General Services under the police power of the State shall supervise the design and construction of any school building or the reconstruction or alteration of or addition to any school building, if not exempted under Section 17295, to ensure that plans and specifications comply with the rules and regulations adopted pursuant to this article

Specifically, DSA regulates building code and education code requirements for school construction related to structural safety, fire and life safety and accessibility. In order to obtain DSA certification for a project, a project must pass through three stages of approval. These are the: (1) Pre-Construction Phase where project plans are approved by DSA; (2) the Construction Phase where DSA engages in construction oversight and approval of changes to any plans; and finally; (3) the Project Closeout and Certification Phase which involves verification that the project has been constructed in accordance with all applicable codes and regulations. If such requirements are met, DSA issues a letter of project certification.

Not only is DSA project certification important for verifying the safety of new school construction, but school board members may be personally liable for projects until they receive certification (See California Education Code § 17370) and DSA will not approve any new proposed projects for a school district that has uncertified projects or project left open with DSA.

Due to the fact that obtaining DSA approval and certification is a very document oriented process, it is necessary to keep accurate copies of all documents and make sure architects,

contractors and subcontractors are contractually required to keep accurate, orderly records and assist a school district in obtaining final approval and certification from DSA.

## **V. CALGREEN BUILDING CODE / CALRECYCLE**

As of January 1, 2011, school construction projects, in certain instances, must comply with the 2010 California Green Building Standards Code (CALGreen). The mandatory provisions of CALGreen apply to all projects that involve all new construction on a new campus site or new construction on an existing site cleared of all existing structures. (California Code of Regulations, Part 11 of Title 24.) Thus, DSA will review all projects for compliance with the mandatory measures of CALGreen, if applicable.

Public Resources Code sections 40004, 41730, *et seq.*, 42926, 44004, and 50001 set forth the requirements of the statewide mandatory commercial recycling program. The purpose of the program is to reduce greenhouse gas (GHG) emissions by diverting commercial solid waste to recycling efforts and to expand the opportunity for additional recycling services and recycling manufacturing facilities in California. The law requires businesses and public entities that generate four cubic yards or more of commercial solid waste per week to arrange for recycling services. School districts and community college districts can contact their local recycling coordinator for more specific information, or consult the following website: [www.calrecycle.ca.gov/Recycle/Commercial](http://www.calrecycle.ca.gov/Recycle/Commercial).

## **VI. PERSONAL PROPERTY CONTRACTS**

### **A. Statutory Requirements for Lease or Lease-Purchase of Equipment.**

Any school district may, as a lessee, enter into a lease or lease-purchase agreement for equipment with any person, firm, corporation, or public agency. Educ. Code §§ 17450/81550. Equipment includes school buses, other motor vehicles, test materials, educational items, audiovisual materials, and all other items defined as equipment or service systems in the California School Accounting Manual (for school districts) or the Community College Budget and Accounting Manual (for community colleges). The term of any lease or lease-purchase agreement may not exceed the estimated useful life of the item but in no event shall the term exceed 10 years. A lease, but not a lease-purchase agreement, may be renewable at the option of the lessee and the lessor, jointly, at the end of each term at a rate not more than 12 percent annually above the rate set pursuant to the existing agreement. In no event shall the combined period of the original lease and renewals or extensions exceed 10 years (although any contract for the lease or lease-purchase of equipment or service systems which was in existence prior to April 22, 1975, shall remain in effect). (Ed. Code, § 17452.)

Before a lease or lease-purchase agreement may be entered into by a school district, the school district must comply with all applicable provisions for bids and contracts prescribed by Education Code section 17595/81641 and Public Contract Code section 20651. Educ. Code §§ 17451/81551. Public Contract Code section 20111/20651 require competitive bidding if the cost of materials or supplies to be sold or leased to a district exceeds \$50,000. (Note: See Guide, section 1, a, (ii), footnote 4 for the annual percentage change amounts)

### **B. Financing Equipment.**

A common method of "financing" the acquisition of equipment by school districts is through a lease with option to purchase as part of the bid for the acquisition of the equipment. In many instances, the bidder, after the award of the bid and execution of the lease-purchase agreement will assign the lease to a financing company. It is also possible for a school district, after having put the acquisition of equipment out to bid, to enter into a sale and lease back of major items of equipment under Education Code section 17597/81645.5. We discuss each of these in detail below. It seems likely that these agreements would be subject to a maximum term of 5 years per Education Code section 17596, as contracts for work or services, or apparatus or equipment. (See Guide, section VII.A.1.)

Financing agreements typically require an opinion of counsel certifying the legality of the financing. It is recommended that school districts allow sufficient time prior to a funding deadline for counsel to conduct the due diligence that is required of the opinion of counsel form, including but not limited to ensuring that the school district has complied with the legal requirements for procurement of the equipment.

### **1. Lease With Option to Purchase.**

The primary legal concern in connection with a lease with option to purchase is to avoid a violation of the constitutional debt limitation. Article XVI, section 18, of the California Constitution provides in relevant part as follows:

No county . . . board of education, or school district shall incur any indebtedness or liability in any manner for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose . . .

(Note: Although the Constitutional provision here refers to a county board of education and a school district, this provision has been found to be applicable to a community college district in *City of Saratoga v. Huff*, 24 Cal. App. 3d 978, 1006 (1972).

The purpose of this provision has been stated to be prevention of:

[t]he great and ever-growing evil to which the municipalities of the state were subjected by the creation of a debt in one year, which debt was not, and was not expected to be, paid out of the revenues of that year, but was carried on into succeeding years, increasing like a rolling snowball as it went, until the burden of it became most unbearable upon the taxpayers. *McBean v. City of Fresno*, 112 Cal. 159 (1896).

It has long been held that this provision means that "[e]ach year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year." *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641 (1882). Early in the history of judicial construction of this section, it was held that the debt limitation is not applicable to a continuing contract for services to be rendered over future years, such that the aggregate amount payable over the life of such contract could never be claimed at any one time. *State v. McCauley & Tevis*, 15 Cal. 429 (1860). In the leading case of *City of Los Angeles v. Offner*, 19 Cal. 2d 483 (1942), the court enunciated the general principles in the following language:

[i]f the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year, no violence is done to the constitutional provision. [Citations omitted.] If, however, the instrument creates a full and complete liability upon its execution, or if its designation as a 'lease' is a subterfuge and it is actually a conditional sales contract in which the 'rentals' are installment payments on the purchase price for the aggregate of which an immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void. [Citations omitted.] *City of Los Angeles v. Offner, supra*, 19 Cal. 2d at 486.

Leases have been upheld in which the aggregate amount paid exceeded the annual revenues of a city, county, or school district, provided the aggregate amount could not, under the agreement, become due at any one time. Such agreements provided for each month's rental to be due, for example, only in consideration of the right to possess, occupy and use the building the preceding month. *County of Los Angeles v. Byram*, 36 Cal. 2d 694 (1951). Thus, liability must be restricted to periodic payments, and the instrument must create no right on the part of lessor to accelerate liability for periodic payments on default. *County of Los Angeles v. Nesvig*, 231 Cal. App. 2d 603 (1965).

Despite the foregoing case law, companies either unfamiliar with California law or unfamiliar with contracting with public agencies, may include an illegal acceleration clause in their form agreements. As such, it is recommended that the agreements be carefully reviewed prior to execution.

The determination of whether an agreement is a conditional sales agreement or lease with an option to purchase requires an examination of facts such as who has the title to the property during the period of the agreement, how the total of the lease payments compare with the purchase price of the equipment plus interest or carrying charges, how the obligation to maintain the property imposed by the lease compares with the obligations of ownership, whether any risk is assumed by the lessor, whether there is merely a nominal option to purchase, and whether the lessor has the right to accelerate payment of the debt on default. Generally speaking, there is no clear line between provisions which will cause the agreement to be found to be a conditional sales contract rather than a lease under California Constitution article XVI, section 18. However, the courts have said that provisions which would accelerate payment of the debt on default would render the agreement unconstitutional, *County of Los Angeles v. Nesvig, supra*, 231 Cal. App. 2d 603, and that the fact that a company retains title to the leased property for security purposes only is the outstanding characteristic of a contract of conditional sale. *County of San Diego v. Davis*, 1 Cal. 2d 145 (1934). Suffice it to say that the more provisions contained in the agreement which tend to characterize it as a conditional sales contract, the greater the possibility a court will hold it to be a violation of the constitutional debt limit. Conversely, the fewer the provisions in an agreement which tend to characterize it as a conditional sales contract, the greater the possibility the court will hold it not to be a violation of the constitutional provision.

The provision for interest payments in such an agreement would likely be construed as one indication that the agreement is in reality a conditional sales contract. In order to allow for the identification of the portion of the payments which represent tax-exempt interest under the Internal Revenue Code, and also to assure that the agreement is not construed as a conditional sales contract, it is recommended that agreements include a "non-appropriation clause".

Sample Non-Appropriation Clause:

TERMINATION AND NON-FUNDING. Notwithstanding any of the foregoing provisions, if, for any fiscal year of this Agreement the governing body of Lessee fails to appropriate or allocate funds for future periodic payments under the Agreement, Lessee will not be obligated to pay the balance remaining unpaid beyond the fiscal year for which funds have been appropriated or allocated and either party hereto may terminate the Agreement. Upon termination of the Agreement by either party hereto as provided herein, Lessee will return the leased property to Lessor at Lessee's expense, free of liens and encumbrances, in the same condition as when received, normal use, wear and tear excepted, at a location within the State of California designated by Lessor. Upon termination of the Agreement as provided herein, Lessor will recalculate the time balance and refund to Lessee any portions of interest or other charges unearned or allocable to fiscal years subsequent to the effective date of such termination or charge Lessee all amounts due and payable to Lessor to date of termination, including the applicable portion of the unpaid current year's interest and principal.

If, of course, the contract terminates at the end of any fiscal year if the funds for the contract payments for the next fiscal year are not appropriated, then it is clear that the total contract amount does not become due at the beginning of the contract and the constitutional mandate of article XVI, section 18 is not violated.

## **2. Assignment of Contract by Bidder.**

Where a lease for several years, with option to purchase, has been awarded to a bidder, the bidder will frequently assign the lease to a bank or other financial institution in order that the bidder may receive full payment at the beginning of the contract. In such cases, the school district will normally be asked to review the form of "Assignment and Warranty of the Title" which the bidder (assignor) executes in assigning the lease to the financial institution (assignee), and to execute an "Acknowledgement and Consent to Assignment." Additionally, an opinion of counsel addressed to the financial institution concerning the validity of the lease is usually requested.

The agreement which may be assigned is the one which the bidder was required under the bid documents to enter into. A school district may not in conjunction with consenting to the assignment of an agreement which is the result of competitive bidding enter into a new agreement with the assignee containing substantial provisions beneficial to the assignee which were not included in the bid specifications.

In order to render an opinion of counsel concerning the validity of the lease, counsel should be furnished copies of all relevant documents including the notice to bidders, the information for bidders, the bid, any list of subcontractors, the bid bond, the performance bond, any payment bond, the general and special conditions and specifications, the lease agreement, the board action awarding the bid to the low bidder and designating the person who is to execute the lease on behalf of the District, the assignment and warranty of title and the acknowledgment, consent of assignment and any additional related documents .

### **3. Sale and Leaseback of Major Items of Equipment (Educ. Code §§ 17597/81645.5.)**

Where a school district, after awarding a contract for the purchase or lease with option to purchase of equipment desires to obtain its own "financing" it may be able to accomplish this through a sale and leaseback of the equipment pursuant to Education Code section 17597/81645.5. Education Code section 17597 provides as follows:

In addition to utilizing the procedures specified in Article 14 (commencing with Section 17545) of Chapter 4, any school district or any county board of education may, by direct sale or otherwise, sell to a purchaser any electronic data-processing equipment, other major items of equipment, or any relocatable building owned by, or to be owned by, the school district or county board, if the purchaser agrees to lease the equipment back to the school district or county for use by the school district or county following the sale.

The approval by the governing board of the school district or of the county superintendent of schools of the sale and leaseback shall be given only if the governing board of the school district or the county superintendent of schools finds, by resolution, that the equipment is data-processing equipment, another major item of equipment, or a relocatable building within the meaning of this section and that the sale and leaseback is the most economical means for providing electronic data-processing equipment, other major items of equipment, or relocatable building to the school district or county. For purposes of determining the area of existing adequate school construction under the Leroy F. Greene State School Building Lease-Purchase Law of 1976, any portable relocatable classroom acquired under this section and used for classroom purposes shall be considered owned by the district.

Education Code section 81645.5 governing community colleges is substantially similar to Education Code section 17597 except that it does not contain the references to relocatable buildings. In order to employ Education Code section 17597/ 81645.5, the governing board of a school district must find, by resolution, that the equipment is a major item of equipment and that the sale and leaseback is the most economical means of providing the equipment to the school district.

In the absence of compliance with section 17597/81645.5, the law is unclear with respect to the authority of a school district to obtain financing without competitive bidding where the school district has entered into a contract, or is obligated to enter into a contract, let after competitive bidding, with a supplier of equipment for the lease-purchase of the equipment over a period of years. Even if the request for bids reserves to the school district the right to obtain financing, it is not clear that such a reservation is valid. A low bidder, which desires to finance the lease-purchase itself over the period of years, could assert that it has the right to provide the equipment pursuant to the terms of its bid and that any other agreement, such as with a financing agency, is invalid as in conflict with competitive bidding laws.

Where a school district intends to use Education Code section 17597/81645.5 in order to obtain its own financing after competitive bidding, it is preferable for the bid package to be structured to request bids for an outright purchase rather than for a lease with an option to purchase. After awarding the bid to the low bidder for the purchase of the equipment, the district may enter into

an agreement for the sale and leaseback of the equipment with a financial institution of its own choosing.

Alternatively, a school district may request bids for the outright purchase and for a lease with option to purchase equipment. Alternative bids would give a school district the alternative of entering into a lease with option to purchase agreement with the low bidder of that alternative, should the school district not be able to obtain financing for an outright purchase.

If a school district only requests bids for a lease with the option to purchase and then attempts to use Education Code section 17597/81645.5 to obtain its own financing, it must award the bid to the low bidder for the full lease term even if that bidder is not the lowest price for an outright purchase. The district may then make a sale and lease-back pursuant to Education Code section 17597/81645.5 at such time as it may exercise its option to purchase equipment under the terms of the agreement with the low bidder.

In situations where a school district has called for bids to purchase equipment with the intention of financing the purchase of the equipment through a sale and lease-back pursuant to Education Code section 17597/81645.5, the agreement with the financing company should be entered into soon after the award of the bid, so that the financing company makes the payment to the bidder. If the school district were to pay the bidder and then enter into a sale and lease-back with the finance company, sales tax may be imposed on the sale of the equipment to the finance company.

Additionally, as noted above, school districts should carefully review financing agreements and related documents prior to execution. It is important to note that school district obligations under a financing agreement may vary from the terms and conditions of a service agreement for the same equipment. In fact, in some instances, the terms and conditions of a financing agreement have been found to be in direct conflict with service agreements. Problems have also arisen regarding clauses related to non-appropriation, termination, and condition of property, among others. Therefore, it is recommended that school districts have the form of sale and lease agreement proposed to be used by the finance company and all related documents, reviewed by counsel at the earliest practicable date, preferably before the acceptance of the low bid, in order to determine whether the form of agreement is acceptable. In instances where the financing agreement containing illegal clauses has been executed by a school district, an "opinion of counsel" letter, as required by the financing company.

#### **4. Reverse Auctions.**

There has been a recent increase in the procurement of property through "reverse auction." In fact, the San Diego Grand Jury recently encouraged public entities in San Diego to use the reverse auction process for the procurement of property. Reverse auction is defined as "a competitive online solicitation process for fungible goods or services in which vendors compete against each other online in real time in an open and interactive environment." (Pub. Cont. Code § 10290.3.) A reverse auction allows bidders to see other bids during the bidding process. The bidder can then adjust his/her bid lower and this continues until the cut off point. The low bidder is determined by whomever cut their price the most.

The criticism of reverse auctions is that initial bids may be inflated in order to gain flexibility and leverage when bidding against other contractors. It is also argued that reverse auctions tend to result in artificially low bids, with contractors submitting unrealistic bids in order to win contracts.

Accordingly, critics contend that the low bid from a reverse auction may be artificially low and result in change orders.

## **VII. SERVICES CONTRACTS**

### **A. Statutory Authority.**

A district contemplating contracting for the services of an outside person or firm should assure that it is acting pursuant to statutory authority. Some older cases have implied from the statutory authority to carry out a function or project the authority to contract for necessary services as in *Miller v. Boyle* (1919) 43 Cal. App. 39, where contracting with an architect to prepare plans for a schoolhouse was approved. However, more recent cases have emphasized the limited powers of school boards and the necessity for particular statutory authority. *Grasko v. Los Angeles City Board of Education* (1973) 31 Cal. App. 3d 290 (1973). There are several statutes which authorize contracts for services, the most often used of which are Education Code section 17596/81644 relating to "continuing contracts" and Government Code section 53060 relating to contracts for "special services and advice."

#### **1. Continuing Contracts Under Education Code Section 17596/81644.**

This Education Code provision authorizes a broad range of services to be performed under a "continuing contract" for a term not to exceed five years, as follows:

Continuing contracts for work to be done, services to be performed, or for apparatus or equipment to be furnished, sold, built, installed, or repaired for the district, or for materials or supplies to be furnished or sold to the district may be made with an accepted vendor as follows: for work or services, or for apparatus or equipment, not to exceed five years; for materials or supplies, not to exceed three years.

With respect to the duration of the term, districts should consult with their attorneys to determine whether a contractual provision for the automatic, as to opposed to an optional, renewal of the term of a service contract which could cause it to exceed five years violates section 17596/81644.

A contract for services under section 17596/81644 is subject to the several limitations and requirements discussed at paragraph F-2 below.

#### **2. Special Services and Advice Under Government Code section 53060.**

The Legislature has broadly authorized contracting for specified "special" services at Government Code section 53060, which provides,

The legislative body of any public or municipal corporation or district may contract with and employ persons for the furnishing to the corporation or district special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.

The authority herein given to contract shall include the right of the legislative body of the corporation or district to contract for the issuance and preparation of payroll checks.

The legislative body of the corporation or district may pay from any available funds such compensation to such persons as it deems proper for the services rendered.

To be authorized under this section, the proposed services must be done in one or more of the specified categories, must be provided by specially trained, experienced and competent persons, and, must be "special" in nature. The Court of Appeal in *Jaynes v. Stockton* (1961) 193 Cal. App. 2d 47, discussed the meaning of the term "special" in a challenge to contracting out for certain legal services, stating it is necessary to consider,

[v]arious factors; at once apparent are those which relate the nature of the services required to the subject matter thereof, . . . to the qualifications of the person capable of furnishing them, . . . to their availability from public sources, and to the temporary basis of the employment through which they are obtained. . . . [T]he services desired may be special services as far as the school district is concerned because they are in addition to those usually, ordinarily and regularly obtainable through public sources, even though they are the usual, ordinary and regular services rendered by a person in the particular field of endeavor of which the desired services are a part. . . .

[T]he service of a particular individual may be special in that, because of his outstanding skill, they may not be duplicated. *Ibid.* at p. 52; (citations omitted.)

Various types of services have been authorized under section 53060, including for example, community college district bookstore management services. *SEIU, Local 715 v. Board of Trustees of the W. Valley/Mission Community College Dist.* (1996) 47 Cal. App. 4th 1661.

A contract authorized by section 53060 need not be put out to competitive bidding. *Cobb v. Pasadena City Bd. of Education* (1955) 134 Cal. App. 2d 93. (See also, Pub. Contract Code, § 20111(c).)

### **3. Miscellaneous Statutory Services Contracts.**

Several statutes other than the sections discussed above exist which authorize contracting for particular kinds of services. Examples include legal services, Educ. Code §§ 35041.5, 35204, and 35205, emergency security services, Educ. Code § 38005, energy services, Educ. Code § 81660; Gov't Code § 4217.12, repair of football equipment, Educ. Code § 17580, pupil transportation, Educ. Code § 39800, one year contracts for management consulting services relating to food service, Educ. Code § 45103.5, and others. In each case, the statutory authority must be reviewed and any special requirements imposed by the statutory authority must be followed.

Contracts for architects, landscape architecture, engineering, environmental, land surveying and construction project management services are addressed in Government Code sections 4525 through 4529.5. While school districts are not required to follow the formal procedures set forth in these sections for obtaining the services of such professionals, these sections nevertheless

require, particularly for State funded projects, that such persons or firms be hired "on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required." Gov't Code § 4526. The procedures for choosing such professionals which are discussed in detail in these sections are mandatory for state agencies and not for school districts, but these statutes may offer helpful guidance to school districts as to procedures which districts may choose to use before contracting with such professionals.

Government Code sections 4529.10 through 4529.20 were added effective November 8, 2000, in connection with the adoption of initiative Proposition 35. Government Code section 4529.10 states that "architectural and engineering services" covered by these statutes include "architectural, landscape architectural, environmental, engineering, land surveying, and construction project management services." Government Code section 4529.12 provides that "[a]ll architectural and engineering services shall be procured pursuant to a fair, competitive selection process which prohibits governmental agency employees from participating in the selection process when they have a financial or business relationship with any private entity seeking the contract, and the procedure shall require compliance with all laws regarding political contributions, conflicts of interest or unlawful activities." Because there is no statutory definition of the term "competitive selection process," when hiring an architect, engineer, construction project manager or environmental consultant, districts should create a request for proposals, advertise for responses, request known qualified companies to respond, and analyze all responses based on objective and fair standards that are reduced to writing. The standards for analyzing responses should be identified before the responses are analyzed.

## **B. Legal Requirements and Limitations.**

### **1. Competitive Bidding.**

The first legal requirement to consider when contracting for services is whether the contract must be put out to bid. The requirement of Public Contract Code section 20111/20651 to bid contracts for services, except construction services, involving an expenditure of more than \$50,000 discussed above, applies generally to services contracts. Public Contract Code section 20111/20651 states, however, that its provisions do not apply to "professional services or advice, insurance services, or any other purchase or service otherwise exempt from this section." As noted above, contracts for special services and advice under Government Code section 53060 do not require bidding. As one court stated in response to an argument that an architect's contract should be bid,

An architect is an artist. His work requires taste, skill, and technical learning and ability of a rare kind. Advertising might bring many bids, but it is beyond peradventure that the lowest bidder might be the least capable and most inexperienced, and absolutely unacceptable. As well advertise for a lawyer, or civil engineer for the city, and entrust its vast affairs and important interests to the one who would work for the least money. *Cudell v. Cleveland*, 16 Ohio C. Rep. (N.S.) 374, quoted in *Miller v. Boyle* (1919) 43 Cal. App. 39, 44.

### **2. Classified Service/Contracting Out.**

A second legal requirement, which may limit the authority to contract for services, is the statutory requirement to employ classified personnel. Education Code section 45103/88003 provides in part,

The governing board of any school district [community college district] shall employ persons for positions not requiring certification qualifications [that are not academic positions]. The governing board shall, except where . . . [a merit system or city charter applies], classify all such employees and positions. The employees and positions shall be known as the classified service.

Additionally, Education Code sections 45104/88004 provide in part that "Every position not defined by this code as a position requiring certification qualifications and not specifically exempted from the classified services according to the provisions of Section 45103/88003 or 45256/88076 shall be classified as required by those sections and shall be a part of the classified service." These sections operate similarly to a typical state, city or county civil service provision to prohibit the employer from avoiding civil service protections by hiring non-civil service employees for ordinary work normally performed by civil servants. (See e.g., *Stockburger v. Riley* (1937) 21 Cal. App. 2d 165. It was held that the state civil service provisions prohibited the state from contracting out for window washing services. Similarly, the state civil service provisions were the basis for invalidating a legal services contract in *State Compensation Ins. Fund v. Riley* (1937) 9 Cal. 2d 126.)

In *California School Employees Asso. v. Willits Unified Sch. Dist.* (1966) 243 Cal. App. 2d 776, the school district's attempt to contract for janitorial services was challenged. The district asserted that such services were within the subjects for which continuing contracts are authorized by Education Code section 17596/81644. The court received argument on behalf of school districts that many new services were necessary to maintain modern schools, such as servicing air conditioning equipment, swimming pool maintenance, landscape gardening, typewriter service and photocopier maintenance.

The court agreed that many of the highly technical services are necessarily the subject of contracting out, but held that section 45103/88003 mandates that persons performing janitorial services be classified employees of the district. The court noted that there are statutory provisions applicable to employees - both those benefitting the employee (such as provisions for leaves) and those protecting the public (such as the fingerprinting requirement) - which would not apply to non-employees. The court characterized janitors as "an essential and intimate part of the operation of the schools." It therefore enjoined the school district from contracting out for janitorial services.

The basis for the *Willits* decision was Education Code section 45103 (equivalent to Education Code section 88003 for community college districts). The court found that the statute "is cast in mandatory terms" and "is intended to impose an obligation which cannot be avoided by the use of contracts." *California School Employees Ass. v. Willits Unified School District, supra*, p. 784. The court also noted that the listing of exemptions for some positions in that section "implies that others [i.e., positions] are included in the mandatory terms of the section."

The *Willits* case was applied in *California School Employees Assn. v. Sequoia Union High School Dist.* (1969) 272 Cal. App. 2d 98, in which the court upheld a school district's ability to contract for vending machines to dispense foodstuffs prepared off the school premises to students within the district. Although finding that the case before it involved a different factual situation than the *Willits* case, the court noted as follows:

Insofar as persons are employed or engaged in the food service activities conducted on the school premises, application of the principles enunciated in the

Willits case would require that they be hired by the district as part of the classified service. [Citation omitted.]

It may be assumed that it would have been improper to accept that part of the offered services under which the supplier proposed to operate a manual snack bar and a change bar, to supervise the machines, and to prepare French fries and milkshakes on the school campus, unless the employees so engaged were somehow embraced within the district's classified service. On the other hand, since the proposition as accepted required that sales be made through the vending machines, and limited the sales to food items which had been prepared and packaged before being delivered to the school premises, no such employees were involved. *California School Employees Association v. Sequoia Union High School District*, supra, pp. 109-110.

In *California School Employees Association v. Sunnyvale Elementary School District* (1973) 36 Cal. App. 3d 46, a contract for research and development service which included management and control of school property, custodial operations, installation of carpeting and other services was upheld. *California Sch. Employees Assn. v. Sunnyvale Elementary Sch. Dist.* (1973) 36 Cal. App. 3d 46. In the *Sunnyvale* case, it was determined that the services fell within the exemption from the classified employment requirement of section 45103/88003 which those sections provide for "professional experts employed on a temporary basis for a specific project, regardless of length of employment."

In *California School Employees Association v. Del Norte County Unified School District* (1992) 2 Cal. App. 4th 1396, the Court of Appeal ruled that the portion of a ServiceMaster Contract which provided for supervisory services over maintenance and custodial employees in a merit system district is in violation of the Education Code sections discussed above. The court stated that supervisors over maintenance and custodial employees fall within the classified service because "[regular supervisors are not professional experts, whatever skills ServiceMaster's personnel may bring to the job." The court, quoting Education Code sections 45104 (equivalent to Education Code section 88004) and 45256 (equivalent to Education Code section 88076), stated that the statutory scheme "has been interpreted to mandate that all persons, including supervisors, who are regularly employed by school districts and are not specifically exempted by the statutes are part of the classified service." *California School Employees Assn. v. Del Norte County Unified School Dist.*, supra, p. 1403, citing the *Willits* and *Sequoia* cases.

Following the *Willits* case, many attorneys advise clients that services which can routinely be performed by district employees may not be contracted out unless there is a specific statutory authority to contract for such services. It is recommended that districts consult legal counsel when considering contracting out such services as food services, word processing operator, receptionist, and secretary.

In the years since the enactment of the "Permissive Education Code" section (Educ. Code § 35160 for K-12 and § 70902 for community college districts), the argument has been raised that the Permissive Code section made the *Willits* case obsolete. The first appellate court decision to deal with this issue was *California School Employees Assn. v. Del Norte County Unified School Dist.* (1992) 2 Cal. App. 4th 1396 (1992). In that case, the court found that the school district's contract with ServiceMaster Management Services Corporation to provide regular supervision for maintenance and custodial employees of a merit system district was invalid. The court in the *Del Norte* case also quoted the *Willits* court language that the statutory scheme is intended to impose an obligation which cannot be avoided by the use of contracts. The court

in the *Del Norte* case specifically rejected the argument that the permissive code section authorized such a contract, because that section "does not authorize a contract which is prohibited by other sections of the Education Code."

In *California School Employees Assn. v. Kern Community College Dist.* (1996) 41 Cal. App. 4th 1003, the district subcontracted for certain groundkeeping services, which did not require a layoff, or a reduction in hours, of classified district employees. CSEA sued alleging that the contract between the district and the lawn service company was in violation of Education Code sections 88003 and 88004. The Court held that "[a]bsent other specific provisions mandating employment of such individuals, section 88003 does not require all work to be performed by classified employees." *California School Employees Assn. v. Kern Community College Dist.* (1996) 41 Cal. App. 4th 1003, 1012. With respect to the *Willits* case, the Kern Court said that its holding was expressly limited to janitorial employees and was primarily based upon the existence of a specific statutory provision mandating the employment of janitors by school districts. The Court of Appeal distinguished the *Del Norte* case as being limited to merit system districts and held that nonmerit system districts were not prohibited from contracting out non-academic services. Because the subcontracting before the Court was not prohibited or preempted by other sections of the Education Code, the Court found that it was authorized by the "permissive code" section of the Education Code.

In *SEIU, Local 715 v. Board of Trustees of the W. Valley/Mission Community College Dist.* (1996) 47 Cal. App. 4th 1661, the union challenged the district's contract with a private entity for operation of its campus bookstore. The Court held that the district could contract out its bookstore operations under the general authority of Education Code section 70902, the "Permissive Code" section, without specific statutory authorization. Relying on the *Kern* case, it further held that because the West Valley/Mission Community College District was not a merit district, Education Code section 88003 did not prohibit the contract.

As a result of the recent *Kern* and *West Valley/Mission* decisions most attorneys agree that nonmerit system community college districts may use the services of individuals who are not classified employees by subcontracting out for temporary office services under the authority of Education Code section 70902.

### **3. Availability From A Public Source.**

A third limitation on the authority to contract for services has been noted where the services are available from a public source. In 1949, the California Attorney General opined that a school district is without authority to contract for consulting services to survey the educational needs of the district, when similar services are available from the Department of Education. 14 Op. Att'y Gen. 205 (1949). In a 1952 opinion, the Attorney General amplified upon this principle, ruling that Government Code section 53060 does not authorize a contract for services which could be rendered by the district attorney. 19 Op. Att'y Gen. 153 (1952). This reasoning was again followed in a later opinion by the Attorney General, which concluded that a consultant contract for a unification survey was beyond the school district's powers because such services are available (by statute) from the County Committee on School District Unification. 20 Op. Att'y Gen. 21 (1952).

The courts have agreed with the Attorney General. In *Jaynes v. Stockton* (1961) 193 Cal. App. 2d 47, it was held that services could not be considered "special" so as to authorize an outside contract under section 53060, when a law designates a public officer to perform them. In a passage citing many other cases, the court reasoned,

In many cases, the courts of this state have expressly stated or impliedly recognized the rule that a public agency created by statute may not contract and pay for services which the law requires a designated public official to perform without charge, unless the authority to do so clearly appears from the powers expressly conferred upon it . . . , or unless the services required are unavailable for reasons beyond the agency's control, such as inability, refusal or disqualification of the public official to act. . . . This rule is based on sound principles. The law will not indulge an implication that a public agency has authority to spend public funds which it does not need to spend; that it has authority to pay for services which it may obtain without payment; or that it may duplicate an expenditure for services which the taxpayers already have provided. *Id.* at p. 54; citations omitted. (See also *California Sch. Employees Assn. v. Sunnyvale Elementary Sch. Dist.*, supra, 36 Cal. App. 3d 46 at 61, where the court inquired for purposes of section 53060, "The only question remaining is whether the services contracted for under the agreement are available to school districts from public sources in the sense that there is a public agency available and presently able to provide the services.")

The above cases and opinions pre-date the "Permissive Code," Education Code sections 35160/70902 (which was added in 1974), and it could be argued that they have less importance in light of that expanded authority. However, in the more recent case of *Darley v. Ward* (1982) 136 Cal. App. 3d 614 (1982), part of the evidence cited by the court in determining that Government Code section 53060 authorized a county's contract for hospital administration services was a statement, "that there were not public sources within the county or elsewhere which could have been called upon by a board of supervisors to perform the functions and give the consultation, advice and service . . . ." *Id.* p. 629.

#### **4. Personal Services Currently or Customarily Performed by Classified Employees (Cal. Educ. Code §§ 45103.1 and 88003.1.)**

Education Code sections 88003.1 and 45103.1 respectively for community college and K-12 districts. Subdivision (a) of each section authorize "personal services contracting for all services currently or customarily performed by classified school employees to achieve cost savings" under certain conditions, notwithstanding any other provisions of the respective Education Code chapters on classified employees, unless otherwise prohibited. In addition, subdivision (a) of the respective sections sets forth ten conditions governing the conditions under which districts must analyze cost savings and enter into contracts. Subdivision (b) of the respective sections also authorizes personal services contracting under certain conditions, regardless of cost savings. In addition to a consideration of the case law that is discussed above, these two new statutes must be considered in detail when personal services contracts are being considered.

#### **5. Duty to Negotiate.**

A fourth requirement to consider before contracting for services arises from collective bargaining. It has been held by the California Public Employees Relations Board (PERB) that contracting for services which can be performed by employees who are members of bargaining units under provisions of the Educational Employment Relations Act ("EERA") is a subject within the "scope of representation" of the EERA and thus is a mandatory subject of negotiation with the bargaining unit. *California School Employees Association, Charging Party v. Arcoha Union School District, Respondent* (Nov. 23, 1983) 7 PERC. 14294. Under the EERA the employer is

obligated to negotiate any decision to subcontract bargaining unit work when the decision involves labor costs. *San Diego Community College District* (1988) PERB Dec. No. 662, 12 PERC 19054, p. 230; *California Department of Personnel Administration* (1987) PERB Dec. No. 648-S, 12 PERC 19014, p. 59.

However, PERB has determined that a management rights clause authorizing a school district to "contract out work, which may be lawfully contracted for," constituted a clear and unmistakable waiver by the employee organization of its right to bargain over a decision to subcontract pupil transportation and vehicle maintenance services customarily performed by unit employees. *California School Employees Association v. Barstow Unified School District*, PERB Order No. 1138, February 20, 1996.

#### **6. Disclosure of Cost of Contract in Document or Written Report.**

When a document or written report prepared for or under the direction of a local agency is prepared in whole or in part by nonemployees, the document or written report must contain the numbers and dollar amounts of all contracts and subcontracts relating to the preparation of the document or written report, if the total cost of the work performed by nonemployees exceeds \$5,000. Gov't Code § 7550. The contract and subcontract numbers and dollar amounts are to be contained in a separate section of the document or written report.

### **VIII. DELEGATION OF POWERS/LIABILITY OF AGENTS**

#### **A. Delegation of Contracting Powers (Educ. Code §§ 35161, 70902, 17604 / 81655.)**

Education Code section 35161 provides a general authority for the board to delegate to an officer or employee of a school district, any of its powers or duties. Section 35161 provides as follows:

The governing board of any school district may execute any powers delegated by law to it or to the district of which it is the governing board, and shall discharge any duty imposed by law upon it or upon the district of which it is the governing board, and may delegate to an officer or employee of the district any of these powers or duties. The governing board, however, retains ultimate responsibility over the performance of these powers or duties so delegated.

Similarly, Education Code section 70902 authorizes the board of a community college district to adopt a rule delegating any power not expressly made nondelegable by statute to the district's chief executive officer or any other employee or committee the governing board may delegate. The rule delegating authority must prescribe the limits of the delegation. Educ. Code § 70902.

Section 35161 suggests that the governing board may delegate its powers without any limitations to the officers or employees of a school district.

The Education Code, however, places limitations on the delegation of powers or duties pertaining to contracting or purchasing of supplies, materials, apparatus, equipment and services.

Wherever the power to contract is invested in the governing board of a school district, the district may delegate such authority to its district superintendent by a majority vote. The district superintendent may, in turn, designate an officer or employee of the district to perform such duty. Educ. Code §§ 17604/81655. If there is no district superintendent, the board itself may designate who is to perform the contracting duties.

The delegation to contract may be limited by the board as to time, money or subject matter, or it may issue a blanket authorization in advance of its exercise. But, no contract made by the board-designated authority is valid or enforceable unless and until it has been approved or ratified by the governing board. Educ. Code §§ 17605/81655. In *Santa Monica Unified Sch. Dist. v. Persh* (1970) 5 Cal. App. 3d 945, a landowner attempted to have a contract enforced against a school district for the purchase of land for a junior high school. Although the court acknowledged that an offer was tendered and accepted between the deputy superintendent and the landowner, the contract was held invalid because the contract had not been approved or ratified by the governing board, pursuant to then Education Code section 15961, currently Education Code section 17604/81655.

In the event that the designee committed malfeasance in approving a contract, the designee shall be held personally liable to the school district for any and all moneys of the district that were paid out as a result of such malfeasance. Educ. Code § 17604.

**B. Delegation of Authority to Make Purchases (Educ. Code §§ 17605 / 81656; Pub. Cont. Code § 20111.)**

By a majority vote, the governing board of a school district may adopt a rule delegating to any officer or employee of the district, the authority to purchase supplies, materials, apparatus, equipment and services without requiring bids. Such expenditures may not be in excess of \$15,000 for public projects, and \$50,000 for the purchase of equipment, materials or supplies. Any purchase above the limitations would invoke the bidding requirement as set forth by Public Contract Code section 20111. Educ. Code §§ 17605, 81656.

The board-adopted rule shall prescribe the limits of the purchaser's authority as to time, money and subject matter. All transactions shall be reviewed by the governing board every 60 days. Educ. Code §§ 17605/81656.

**C. Personal Liability of Contracting Agent/Designated Purchaser (Educ. Code §§ 17605 / 81656; Pub. Cont. Code § 20111.)**

In the event of misconduct or wrongdoing in office, the officer or employee invested with the authority to contract for purchases will be held personally liable to the employing school district for any and all moneys of the district, paid out as a result of the misconduct or wrongdoing. Educ. Code §§ 17604/81655. This liability for misconduct or wrongdoing also extends to the board's designee for purchasing supplies, materials, apparatus, equipment and services authorized in the absence of a bidding requirement. Educ. Code §§ 17605/81656; Pub. Cont. Code § 20111.

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