CHAPTER IV

COMPETITIVE BIDDING AND PUBLIC CONTRACTING

INTRODUCTION

Competitive bidding for public contracts is a widespread requirement in California. The reason for the statutory provisions governing bidding is to enhance competition and to prevent corruption and undue influence.[1]

The purpose of competitive bidding is to ensure fairness, efficiency, and security in the construction of public facilities.[2] Competitive bidding statutes were enacted for the benefit and protection of the public and not for the benefit of the bidders.[3] The purpose of competitive bidding statutes has been summarized as follows:

> "The provisions . . . 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 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."[4]

The guiding principles of contract law (e.g. offer and acceptance, consideration) apply to contracts let under the competitive bidding process.[5] Bids are irrevocable offers given to the public agency involved.[6] A contract is complete and binding when a valid bid is accepted.[7]

A contract is void and unenforceable if the public agency failed to comply with the applicable competitive bidding statute. Companies and individuals doing business with public agencies are presumed to be knowledgeable of the competitive bidding laws and where the public agency violated the competitive bidding statutes, no payments may be made by the public agency to the contractor. When a public agency makes payments to a contractor in violation of the competitive bidding statutes, taxpayers may file suit to recover payment.[8]

However, the courts have not applied the rule in all circumstances and where it would be unfair or unjust to require the contractor to make restitution or repay the funds received to the public agency, the courts will not require restitution.[9] In Advance Medical Diagnostic

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[1] Miller v. McKinnon, 20 Cal.2d 83, 88 (1942), 124 P.2d 34, 37.
[2] Reams v. Cooley, 171 Cal.150 (1915).
[3] Judson Pacific-Murphy Corp. v. Durkee, 144 Cal.App.2d 377 (1956).
[4] McQuillin, Mun. Corp. (3d ed.) Section 29.29.
[5] Pacific Architects Collaborative v. State of California, 100 Cal.App.3d 110, 123 (1979).
[6] M.F. Kemper Construction Company v. City of Los Angeles, 37 Cal.2d 696, 700, 704 (1951).
[7] City of Susanville v. Lee C. Hess Company, 45 Cal.2d 684, 694 (1955).
[8] Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34 (1942).
[9] Advance Medical Diagnostic Laboratories v. County of Los Angeles, 58 Cal.App. 3d 263, 274 (1976), 129 Cal.Rptr. 723; City of Long Beach v. Mansell. 3 Cal.3d 462, 496-497 (1970), 9 Cal.Rptr. 23.

Laboratories, a medical laboratory in its capacity as a taxpayer, sought a judicial declaration that agreements between the County of Los Angeles and other laboratories were null and void because they violated the county's administrative regulations and the competitive bidding statutes that apply to counties which limit the contracting authority of the county purchasing agent to contracts not exceeding $10,000. Contracts in excess of $10,000 must be approved by the Board of Supervisors. The medical laboratory sought to compel Los Angeles County to seek a return of the funds paid to the other laboratories under the agreement.

The Court of Appeal ruled that the agreements should have been approved by the Board of Supervisors. However, the Court of Appeal reviewed the contractors' plea of equitable estoppel (i.e. it would be unfair and unjust to require the contractors to repay millions of dollars to the County of Los Angeles where the services had been provided satisfactorily) and held:

> "The agreements before the court although void have expired and have been completely performed in all respects by the parties. Nothing in the record suggests corruption, favoritism, unreasonable pricing or lack of complete and quality performance in connection with the agreements. It is also clear that the County board of supervisors did have the general power to execute the agreements and did in fact appropriate funds with which to pay and permitted fulfillment of the agreements. Furthermore, the patent injustice and hardship that would result to RPIs if they were forced to return $3.4 million is undeniable. There is no suggestion that County or Davis will not abide by and accept the judgment of this court. The execution by County purchasing agent of similar agreements is not likely to recur unless the current statutes are enlarged. There does not appear to be any frustration of public policy that would result if County were estopped from denying the agreements. Under the balancing test as set forth in Mansell, a chancellor in equity could find that County would be estopped to proceed. . . ."[10]

Districts, however, should not rely on the holding in Advanced Medical Diagnostic Laboratories as the courts will, most likely, apply it only in limited circumstances. Districts should attempt to strictly comply with all competitive bidding requirements to avoid the possibility of taxpayer suits and other costly litigation.

BIDDING REQUIREMENTS FOR SCHOOL DISTRICTS AND COMMUNITY COLLEGE DISTRICTS

The Legislature amended provisions in the Public Contract Code relating to bid limits for community college districts and school districts in Senate Bill 429 (Polanco), effective January 1, 1996.[11]

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[10] Id. at 274.
[11] Stats.1995, ch. 897.

Public Contract Code sections 20111 and 20651 were amended to raise the bid limit to $50,000 for 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 Public Contract Code section 20115, except for public projects as defined in Section 22002.

The $15,000 bid limit was retained for public projects and construction services. Public Contract Code section 22002(c) defines a public project as follows:

1. Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.

2. Painting or repainting of any publicly owned, leased, or operated facility.

3. 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.

The $50,000 bid applies to maintenance work since the definition of public project set forth in Public Contract Code section 22002(d) does not include maintenance work. Public maintenance work includes:

1. Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.

2. Minor repainting.

3. Resurfacing of streets and highways at less than one inch.

4. Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.

5. 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 230,000 volts and higher.

Maintenance has also been defined as ordinary upkeep or repair work such as replacements in kind, repainting, replastering and reroofing.[12]

Sections 20113 and 20654 were amended with respect to emergency repairs to clearly state that an emergency bid does not eliminate the need for any bonds or security otherwise required by law. Our office and most school attorneys were previously advising districts that bonds or security otherwise required by law should continue to be provided for emergency repairs.

Sections 20111(d) and 20651(d) provide that the Superintendent of Public Instruction and the Board of Governors of the California Community Colleges shall annually adjust the $50,000 bid limit for inflation. The annual adjustments are rounded to the nearest $100. The current bid limit is $58,900 as of January 1, 2002.

The following questions are frequently asked by districts. The answers below should provide some guidance.

Question:

1. When do painting projects fall within the $15,000 bid limit as opposed to the $58,900 bid limit? Which bid limit applies to the painting of a single or wing of a building, the installation of fascia trim at several sites, and the upgrading, including painting of restrooms to comply with the Americans with Disabilities Act at all sites? Which bid limit applies if the work is part of a deferred maintenance program?

Answer:

1. As discussed above, Public Contract Code section 22002(c) defines a public project as the painting or repainting of any publicly owned, leased or operated facility. The $15,000 bid limit applies to public projects. Section 22002(e) defines a facility as follows:

> "For purposes of this chapter, 'facility' means any plant, building, structure, ground facility, utility system...real property, streets and highways, or other public work improvement."

Public project does not include maintenance work or minor repainting, therefore, the $58,900 bid limit applies to maintenance work and minor repainting. In order to determine which bid limit applies, it is necessary to draw a distinction between painting, repainting and minor repainting. In our opinion, minor repainting would include any painting which includes less than a whole facility or less than a whole plant, building, structure, ground facility, utility system, or real property. The painting of an entire school or an entire building or structure would fall under the definition of public project and the $15,000 bid limit. The painting of a room, wing or portion of an entire building or structure would be minor repainting and come within the $58,900 bid limit. Therefore, if the upgrading of restrooms involves the painting or repainting of an entire building or structure, it would fall within the $15,000 bid limit. The same criteria would apply to painting as part of a deferred maintenance plan. The installation of fascia trim

[12] Title 24, Section 4-314.

would fall under the $15,000 limit if it were a work of improvement or an alteration to a facility. If the trim replaced existing trim (i.e., maintenance), the $58,900 limit would apply.

Question:

2. When do roofing projects fall within the $15,000 bid limit as opposed to the $58,900 bid limit?

Answer:

2. With respect to roofing, the $15,000 bid limit for public projects would apply if the entire or whole roof is removed and replaced since this would involve construction or reconstruction or the erection of a new roof. However, if a portion of the roof is replaced or repaired, the $58,900 bid limit for maintenance work would apply since this would involve routine, recurring and usual work for the preservation or protection of the roof.

Question:

3. When do asphalt projects fall within the $15,000 bid limit as opposed to the $58,900 bid limit? Does the resurfacing of "streets & highways" at less than one inch include parking lots, access roads or the slurry coating of parking lots and access roads?

Answer:

3. There is no precise state statutory definition of streets and highways. Streets & Highways Code section 23 defines a highway as follows:

> "As used in this code, unless the particular provision or the context otherwise requires, 'highway' includes bridges, culverts, curbs, drains, and all works incidental to highway construction, improvement, and maintenance."

Vehicle Code section 590 states:

> "'Street' is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Street includes highway."

The term "public highways" includes streets in cities. Criswell v. Pacific Electric Railroad Company.[13] The word "street" in its usual and ordinary meaning denotes a public highway and does not include a private way. Loma Vista Investment, Inc. v. Roman Catholic Archbishop of Los Angeles.[14] A highway is a way publicly maintained and open to the use of the public for the purpose of vehicular traffic.[15] Webster's New World Dictionary (Third Edition) (1991) defines a "highway" as a road freely open to everyone, a public road, a main

[13] 48 Cal.App.2d 819 (1942).
[14] 158 Cal.App.2d 58 (1958).
[15] Vazquez v. Pacific Grey Hound Lines, 178 Cal.App.2d 628 (1960).

road or a thoroughfare. Webster's New World Dictionary defines "street" as a public road in a town or city.

Generally, parking lots and access roads maintained on school district property are not open to the public at all times, but may be fenced off or gated at night by school districts. Therefore, in our opinion, the exception for the resurfacing of streets and highways at less than one inch would not apply.

In our opinion, the same rule would apply to asphalt work as to roofing. The $15,000 bid limit for public projects would apply if the entire asphalt parking lot or access road is removed and replaced since this would involve construction or reconstruction of a new parking lot or access road. However, if a portion of the asphalt is replaced or resurfaced (e.g., slurry coating), the $58,900 bid limit for maintenance work would apply since this would involve routine, recurring and usual work for the preservation or protection of the parking lot or access road.

Question:

4. When do carpeting projects fall within the $15,000 bid limit as opposed to the $58,900 bid limit? Which limit applies to installation of carpeting in a wing of a building? Which limit applies when the District buys the carpet and district employees install the carpet?

Answer:

4. In our opinion, the same analysis would apply to carpeting as to asphalt and roofing work. The $15,000 bid limit for public projects would apply if the entire carpet is removed and replaced since this would involve renovation, alteration or improvement of a publicly owned, leased or operated facility. However, if a portion of the existing carpet is replaced or repaired, the $58,900 bid limit for maintenance work would apply since this would involve routine, recurring and usual work for the preservation or protection of the existing carpet. This analysis would apply whether the replacement involves a portion of a facility (e.g., wing of a facility) or an entire facility. The day labor and force account limits discussed in answer to question number seven would apply to the installation of carpeting by district employees.

Question:

5. When do electrical projects fall within the $15,000 bid limit as opposed to the $58,900 bid limit? Which limit applies to rewiring for a new phone system? To the replacement of old wiring?

Answer:

5. With respect to electrical, if the project involves replacement of existing wiring, or an existing electrical system that has failed, in our opinion, this would involve maintenance and would fall within the $58,900 bid limit for maintenance work. However, if the rewiring involves upgrading or improving the existing system to handle additional equipment or the need for additional power, or the upgrading of a phone system or a new phone system, we believe it falls within the definition of public project as an alteration or improvement, and the $15,000 bid limit would apply.

<u>Question</u>:

6. What are the bid limits with respect to transportation? Does the $10,000 limit under the Education Code still apply or do the new limits under Public Contract Code apply? Does this limit apply to community college districts? If a district enters into a five year transportation contact, how many more times can it be renewed?

<u>Answer</u>:

6. Education Code sections 39800, et seq., contain a number of specific provisions with respect to school buses and the provision of transportation to students in elementary and secondary schools. Similar provisions relating to community colleges, Education Code sections 82300, et seq., were repealed in 1981. Therefore, the more general provisions of the Public Contract Code apply (the $58,900 bid limit for services) to community colleges.

Education Code section 39802 requires bidding pursuant to the Public Contract Code whenever an expenditure of more than $10,000 is involved for the furnishing of transportation to students. Education Code section 39803(a) states that contracts may not be made for a term of more than five years, and may be renewed at the end of each term of the contract. When the contract is renewed, it must include all of the terms and conditions of the previous contract other than rates, including any provisions for increasing rates based on increased costs.

Education Code section 39803(b) states that a school district may enter into continuing contracts for lease or rental of school buses, not to exceed five years, except that if such a lease or rental contract provides that the district may exercise an option either to purchase the buses or to cancel the lease at the end of each annual period during the period of contract, then such contract may be made for a term not to exceed ten years. Education Code section 39803(c) authorizes continuing contracts may be negotiated annually within the contract period when economic factors indicate that such negotiation is necessary to maintain an equitable pricing structure. Such renegotiation must be subject to the approval of both contracting parties.

In our opinion, these provisions take precedence over the more general provisions of the Public Contract Code, and therefore, the $10,000 bid limit applies.

<u>Question</u>:

7. When may a district utilize day labor or force account? What effect do the day labor or force account provisions have on the $15,000 and $58,900 bid limit?

<u>Answer</u>:

7. Public Contract Code sections 20114 and 20655 state that school districts or community college districts may make repairs, alterations, additions or painting, repainting or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance by day labor or force account whenever the total number of hours does not exceed 350 hours. In school districts with an average daily attendance of 35,000 or more, or in community college districts with full time

equivalent students of 15,000 or more, the governing board, in addition, may make repairs to school buildings, grounds, apparatus or equipment, including painting or repainting and perform maintenance 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 material does not exceed $21,000.

These limits are limits separate and apart from the bid limits and may overlap on some occasions. In such circumstances, the school district or community college district may choose to use day labor or force account or go out to bid so long as the district does not exceed the limits set forth in Sections 20114 or 20655.

ADVERTISING FOR BIDS

Public Contract Code sections 20112 and 81641 require the governing board of a school district or community college district to advertise at least once a week for two weeks in a newspaper of general circulation published in the district, or if there is no such paper, then in a newspaper of general circulation in the county. Government Code section 6066 provides that publication for once a week for two weeks means two publications in a newspaper published once a week or more often, with at least five days intervening between the respective publication dates, not counting such publication dates, is sufficient.

The advertisement must state the work to be done, the materials and supplies required from the contractor, and the day and time the bids are due. The advertisement must also state the time and place where the bids will be opened and read to the public. While the bid is not required to be opened exactly at the time specified, bids may not be received after that time.

PREQUALIFICATION OF BIDDERS

School districts may, pursuant to Public Contract Code section 20111.5, on contracts exceeding the competitive bidding amount, require bidders to provide answers to questions contained in a standard form of questionnaire and financial statement, including a complete statement of the prospective bidder's financial ability and experience in performing public works. When completed, the questionnaire and financial statement must be verified under oath by the bidder in the manner in which pleadings in civil actions are verified.

A uniform system of rating bidders on the basis of questionnaires and financial statements, with respect to the size of the contract on which each is qualified to bid, must be used. The information provided by a bidder is not to be made public at any time. Bids received from any person who has not submitted a complete questionnaire and financial statement at least five days prior to the date fixed for the public opening of sealed bids or who has not been prequalified at least one day prior to that date will not be accepted. The school district can establish a prequalification process on a quarterly basis and can authorize that the bidders be prequalified for up to one calendar year.

Bids must be presented on the standardized proposal form supplied to contractors by the school district. Bids not presented on this form will be rejected.[16] When the bidder presents his or her bid for consideration, he or she is required to furnish information to ensure that he or she qualifies to be awarded the contract.

The two key issues with respect to the prequalification questionnaire are, first, whether the financial statements are public records, and second, whether the district must apply a uniform system for rating bidders on the basis of completed questionnaires and financial statements. To assure uniformity, the process for rating the responses to the questionnaire must be followed carefully. A prequalification committee can be used to evaluate and rate the questionnaires. Our office recommends that the committee have legal counsel available to provide advice with respect to issues that arise during the process of rating the bidders.

Although the authority for the prequalification process is clearly set forth in Public Contract Code section 20111.5, there are no cases which have addressed some of the unanswered questions that have arisen. With the prequalification process, a contract let under mandatory competitive bidding statutes must be awarded to the lowest responsible bidder.[17] Thus, a contract ordinarily must be awarded to the lowest responsible bidder, unless it is found that the 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 nonresponsibility may not necessarily connote untrustworthiness. Although the term "responsible" includes the attribute of trustworthiness, it also refers to the quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work.[18]

Determining whether a bidder is a responsible bidder is ordinarily a question of fact within the exercise of reasonable discretion by a 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 the low bidder's 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.[19] When the staff recommendation is to reject the low bidder as nonresponsible, the bidder should be notified of the evidence reflecting upon the bidder's responsibility and the bidder should be afforded an opportunity to present information to the board and have the board consider that information before the final decision is made to award the contract to another bidder.

The standard that applies to the prequalification process when a bidder is found not to be responsible as a result of the prequalification process is uncertain. We, therefore, recommend that bidders who have been disqualified and object to or question the disqualification be allowed to discuss the basis for the disqualification with the prequalification committee or a committee member. The bidder should be given an opportunity to respond to the information received by the committee or the committee member. Then the entire committee should consider any additional information provided and determine whether the bidder should remain disqualified.

[16] Public Contract Code section 20111.5.
[17] Public Contract Code section 20111.
[18] City of Inglewood - L.A. County Civic Center Authority v. Superior Court, 7 Cal.3d 861, 867 (1972).
[19] Id. at 871.

A sample standard form of questionnaire and financial statement is found in the Appendix.

BID SPLITTING

Public Contract Code sections 20116 and 20657 prohibit the splitting of a contract into smaller work orders or projects to avoid the requirement to competitively bid a project. Sections 20116 and 20657 provide 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."

Work or labor associated with the purchase of equipment or materials to be installed to improve an existing building should not be separated out from the equipment purchase for the purpose of avoiding the competitive bidding statutes.

In Advance Medical Diagnostic Labs v. County of Los Angeles,[20] a county purchasing agent issued various suborders below the $10,000 limit and thereby avoided the requirements of Government Code section 25502.5 which permit county purchasing agents to enter into 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. The Court held that the test of the agreements was not the estimated cost of the individual suborders but the estimated cost of the total project.

A project may be split into several trade oriented contracts in order to keep project costs low provided the competitive bidding requirement has been met.[21] Also, contracts for related school improvements have been held to be individual contracts in instances where each contract was decided on separately and independently of others.[22]

RELIEF OF BIDDERS

A contractor may, at any time prior to the scheduled closing for receipt of bids, withdraw his or her bid. After the scheduled closing time for bids, the contractor must seek relief from his or her bid by following the specific procedures of the Public Contract Code.[23] Prior to the enactment of the provisions in the Public Contract Code, the courts had allowed bidders to rescind their bids on much broader grounds.[24] A community college district or a school district may consent to relieve a bidder of a bid due to mistake following the preparation of a report in writing documenting the facts establishing the grounds for relief. The report shall be available

[20] Advance Medical Diagnostic Labs v. County of Los Angeles, 58 Cal.App.3d 263 (1976).
[21] 57 Ops.Cal.Atty.Gen. 417 (1974).
[22] Brown v. Bozeman, 138 Cal.App. 133 (1934).
[23] Public Contract Code sections 5100, et seq.
[24] M. F. Kemper Construction Company v. Los Angeles, 37 Cal.2d 696 (1951).

for inspection as a public record and shall be filed with the State Board of Control.[25] The failure of the contractor to adhere strictly to the statutory procedures for bid withdrawal can result in a waiver of the right to relief.[26]

If the public agency refuses to consent to the withdrawal of the bid, the bidder may file an action in court within 90 days after the opening of the bid.[27] The grounds for relief authorizing the withdrawal of the bid are as follows:

1. A mistake was made.

2. The bidder gave the public entity written notice within five days after the opening of the bids of the mistake specifying in the notice in detail how the mistake occurred.

3. The mistake made the bid materially different than he or she intended it to be.

4. The mistake was made in filling out the bid, not due to error in judgment or to carelessness in inspecting the site of the work or in reading the plans or specifications.[28]

The bidder must establish all of the above elements to the satisfaction of the court to prevail. The mistake cannot be due to error in judgment or carelessness in reading the plans or specifications. If the contractor accepts the award of the contract despite the mistake, the contractor may not later seek rescission or modification, even for a clerical error.[29]

A contractor who claims a mistake or who forfeits his or her bid security is prohibited from participating in further bidding on the project on which the mistake was claimed or security forfeited.[30] The prohibition from participating in further bidding applies to substantially similar projects as well.[31]

If the public entity deems it to be in the best interest of the district, it may, on refusal or failure of the successful bidder to execute the contract, award it to the second lowest bidder. If the second lowest bidder fails or refuses to execute the contract, the public entity may award it to the third lowest bidder. On the failure or refusal of the second or third lowest bidder to whom a contract is so awarded to execute it, their bidder security shall be forfeited.[32]

In Emma Corporation v. Inglewood Unified School District,[33] the Court of Appeal held that a school district could not enforce a contract for school construction against a contractor.

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[25] Public Contract Code section 5101.
[26] Public Contract Code section 5103(d); White v. Berrenda Mesa Water District, 7 Cal.App. 3d 894 (1970).
[27] Public Contract Code section 5102.
[28] Public Contract Code section 5103.
[29] Lemoge Electric v. County of San Mateo, 46 Cal.2d 659 (1956).
[30] Public Contract Code section 5105.
[31] Columbo Construction Company, Inc. v. Panama Union School District, 186 Cal.Rptr. 463 (1982), 136 Cal.App. 3d 868.
[32] Public Contract Code section 5106.
[33] 114 Cal.App.4th 1018 (2004).

Emma Corporation was a licensed building contractor that submitted the low bid on a school construction project proposed by the Inglewood Unified School District. As required, Emma Corporation included a bond issued by Fidelity and Deposit Company of Maryland for 10% of the bid, which would be forfeited if Emma won the contract but refused to perform. After it submitted its bid, Emma Corporation discovered that it had failed to include its plumbing subcontractor's cost in its bid and that its bid was nearly $800,000 too low.

Emma Corporation timely sent the district a letter withdrawing its bid. The district, but not Emma Corporation, realized that the letter did not provide all the information required by Public Contract Code sections 5101 through 5103 which authorize the withdrawal of competitive bids. The Court of Appeal found that as part of a deliberate strategy, the district told Emma Corporation that it would contact Emma Corporation if it needed more information but that the district did not do so. When the bid withdrawal period lapsed, the district claimed that Emma Corporation failed to comply with the bid withdrawal requirements and awarded Emma Corporation the contract at its original bid price.

Emma Corporation refused to perform the contract and the district gave the contract to the next lowest bidder. Emma Corporation then sued the district for rescission of the contract and exoneration of the bond. The school district cross-complained for breach of contract, seeking the difference between Emma Corporation's bid and the next lowest bid and payment of the bond.

The trial court found that Emma Corporation failed to substantially comply with the bid withdrawal statutes. However, the trial court also found that the district's conduct and response to Emma Corporation's attempted bid withdrawal estopped (i.e., prohibited or prevented) the district from enforcing the contract. The trial court entered judgment for the Emma Corporation and dismissed the school district's cross-complaint.

The school district appealed and the Court of Appeal affirmed the lower court's decision in favor of the Emma Corporation.

The Court of Appeal held that the common law doctrine of equitable estoppel may be asserted against government agencies by a private party if:

1. The party to be estopped was apprised of the facts.

2. The party to be estopped intended by conduct to induce reliance by the other party, or act so as to cause the other party reasonably to believe reliance was intended.

3. The party asserting estoppel was ignorant of the facts.

4. The party asserting estoppel suffered injury in reliance on the conduct.

In addition, the court held that the doctrine of equitable estoppel may be applied against a government agency if justice requires it.

The Court of Appeal held that in the Emma Corporation case, the district was statutorily empowered to permit Emma Corporation's bid withdrawal and that the district deliberately engineered an attempt to enforce a contract it knew was mistakenly low and that the district did so to try and extract the bid bond amount to cover the project's true cost.

For these reasons, the Court of Appeal upheld the trial court's decision and barred the school district from enforcing its contract with Emma Corporation.

In essence, the court held that where the facts of an individual case are egregious and the public entity did not act in a fair and equitable manner with respect to a bidder, the courts will not enforce the contract.

IDENTICAL BIDS

If two or more bids are identical in all respects, the district may determine by lot which bidder will be awarded the contract.[34] This requirement applies to competitive bidding for the purchase, sale or lease of real property, supplies, materials, equipment, services, bonds or the awarding of any contract. Public Contract Code section 20117 states:

> "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 contains identical language and applies to community college districts.

LENGTH OF CONTRACTS

Continuing contracts for work, services or apparatus or equipment may not exceed five years in length. Contracts for materials or supplies may not exceed three years.[35] There are several statutory provisions with respect to special types of contracts including legal services,[36] emergency security services,[37] energy services,[38] and pupil transportation.[39] Where specific statutory authority exists, the specific statute would control over the general statute.

[34] Public Contract Code section 20117; Government Code section 53064.
[35] Education Code sections17596 and 81644.
[36] Education Code sections 35041.5, 35204, 35205 (no maximum length of contract specified).
[37] Education Code section 38005.
[38] Education Code sections 81660, 81662 (maximum term of 15 years); Government Code section 4217.12.
[39] Education Code section 39803(a) (a term of 5 years which is renewable).

LOWEST RESPONSIVE BIDDER AND COMPLIANCE WITH SPECIFICATIONS

A bid will be deemed responsive if the bid promises to do what the bidding instructions demand. The term responsive refers to whether the bid, as submitted, complies with all of the requirements of the bidding documents. A determination of responsiveness can be made from the face of the bid.

> "Every 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."[40]

The goal of competitive bidding is to ensure fairness and efficiency. Therefore, a bid which fails to comply with substantive requirements, placing bidders on an unequal footing, must be rejected even if it is the lowest bid.[41]

A bidder held to be nonresponsive is entitled to notice of such findings and an opportunity to submit materials to rebut the findings.[42]

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 v. University of California,[43] the University of California awarded a bid for copy machines to the low bidder even though its bid deviated from the specifications. The specifications required a copier which could produce at least 40 copies per minute and had zoom magnification and reduction. However, the low bidder bid two machines, one which had the zoom features, but made only 35 copies per minute, and another which did not have zoom features but made 50 copies per minute. The University argued that the equipment bid by the low bidder was acceptable to it.

The Court of Appeal reviewed the facts before it to determine whether the deviations from the bid specifications 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. The 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 of the public agency to make bid comparisons.

The Court of Appeal held that bidders were entitled to expect that bids which did not meet the University's specifications would be rejected in favor of those which did, or that the contract would be rebid. Permitting the University to allow deviations from the advertised

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[40] McQuillin, Mun. Corp. (3d ed.) Section 29.44; See, Baldwin-Lima-Hamilton Corp. v. Superior Court, (1962) 208 Cal.App.2d 803.
[41] McQuillin, Mun. Corp. (3d ed.) Section 29.78.
[42] Taylor Bus Service, Inc. v. San Diego Board of Education, 195 Cal.App. 3d 1331, 1341 (1987).
[43] Konica Business Machines v. University of California, 206 Cal.App. 3d 449 (1988), 253 Cal.Rptr. 591.

specifications in its public call for bids would leave bidders in the unfair position of having to guess what would satisfy the University's needs.

Where it is found that no unfair advantage is given to a bidder, a district may waive a minor irregularity.[44] In Menefee, the Court of Appeal held that the low bidder's failure to sign the bid form (it was signed in other places and was accompanied by a signed bid bond) was a waiveable error and did not make the bid nonresponsive. The Court of Appeal reasoned that since the bidder was not attempting to avoid the contract due to the irregularity but was seeking to honor it, the bidder was not gaining an advantage over other bidders.[45]

In Valley Crest Landscape, Inc. v. City of Davis,[46] the city specified in its bid specifications that the subcontract work must be less than 50 percent of the project. The low bidder stated in his bid that 83 percent of the work would be subcontracted. The low bidder then requested that he be allowed to change his bid to state that 44.65 percent of the work would be subcontracted. The City approved the bidder's request waiving it as a minor irregularity and the second low bidder filed an action alleging that the low bid was nonresponsive and the City should not have approved the modification.

The Court of Appeal stated that in determining the validity of the bid, the issue was whether the contractor 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. The court held that misstating the correct percentage of work to be done by a subcontractor is in the nature of a typographical or arithmetical error and 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. Therefore, the low bidder had an unfair advantage over other bidders, since the low bidder could have withdrawn its bid. As a result, the low bidder had an unfair advantage over the second low bidder and the percentage of subcontracting work could not be corrected by waiving it as an irregularity. In addition, the Court of Appeal held that since the City specified that no more than 50 percent of the work could be done by subcontractors, it became a material element of the bid, and therefore, the City could not waive the requirement as an irregularity after receiving a nonresponsive bid from the low bidder.[47]

In most cases, a determination of nonresponsiveness can be determined from the face of the bid and does not depend on an outside investigation and does not affect the reputation of the bidder. For these reasons, the courts have held that a bidder determined to be non-responsive is entitled to notice of nonresponsiveness and an opportunity to submit materials to rebut the determination of nonresponsiveness. A district is not, however, required to conduct a formal public hearing or produce written findings.[48] If a finding of nonresponsiveness is to be based upon information or an outside investigation, the bidder should be given that information and also be given the opportunity to present information or meet with the district official responsible for making a recommendation to the governing board of the district.

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[44] Menefee v. County of Fresno, 163 Cal.App.3d 1175, 1180 (1985); see, also, Ops.Cal.Atty.Gen. No. 02-1012 (June 3, 2002) (A public entity may accept a bid that does not specify the business location of each listed subcontractor but does provide the state contractor's license number.)
[45] Ibid.
[46] Valley Crest Landscape, Inc. v. City of Davis, 41 Cal.App.4th 1432 (1996).
[47] Id. at 1443.
[48] Taylor Bus Service v. San Diego Board of Education, 195 Cal.App.3d 1331, 1343 (1987).

Generally, the following defects cannot be waived:

1. Failure to comply exactly with the publication requirements;

2. Failure to issue a notice inviting bids; and

3. Failure of the bidder to submit a bid which substantially conforms to the call for bids.

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. The bidder remedied the defect prior to award of the contract.[49]

The lack of the contractor's signature on a performance bond or payment bond may be waived if signed before the award.[50]

LOWEST RESPONSIBLE BIDDER

A contract must be awarded to the lowest responsible bidder unless it is found that that bidder is not responsible (i.e. not qualified to do the particular work that is being bid). The word "responsible" in the context of the competitive bidding statutes, while it includes trustworthiness, it also refers to the quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work.[51]

Whether a bidder is "responsible" is a question of fact within the exercise of reasonable discretion by the governing board. Prior to awarding a contract to the next lowest bidder, the board must notify the low bidder of any evidence reflecting upon the bidder's responsibility received from others or adduced by independent investigation and afford the bidder an opportunity to rebut the adverse evidence against the contractor at a public meeting of the governing board. Where the recommendation is to reject the low bidder as a nonresponsible bidder, the bidder should be notified of the evidence reflecting negatively upon the bidder's responsibility and the bidder should be afforded an opportunity to present information to the governing board before the final decision is made to award the contract to the second lowest bidder. However, the Court of Appeal stated that a quasi-judicial administrative hearing prior to disqualification of the low bidder as nonresponsible was not required.[52]

[49] Cameron v. City of Escondido, 138 Cal.App.2d 311, 316 (1956).
[50] C. Gandahl Lumber Co. v. Thompson, 205 Cal. 354 (1928); Pacific M.&T. Company v. Bonding and Insurance Co., 192 Cal. 278 (1923).
[51] City of Inglewood – L.A. County Civic Center Authority v. Superior Court, 7 Cal.3d 861 (1972).
[52] Supra. 7 Cal.3d 861 at 871.

A district may not reject a low bid because it considers the second low bidder more responsible. The rejection of a low bid must be based on a determination that the low bidder is not responsible.[53]

REJECTION OF ALL BIDS

Public Contract Code sections 20111 and 20651 state that school districts and community college districts shall let contracts to the lowest responsible bidder who shall give security as the board requires or else reject all bids. The courts have held that even where statutory provisions do not specifically state that districts may reject all bids, districts may do so for any reason and at any time before it accepts a bid unless the district exercises that right in an arbitrary and capricious manner.[54]

BID SECURITY

Public Contract Code sections 20111 and 20651 state that all bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bid security:

1. Cash,
2. A cashier's check made payable to the district,
3. A certified check made payable to the 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 district beyond 60 days from the time the award is made.

The purpose of a bid security is to guarantee that the successful bidder signs the contract after being awarded the bid. The bidder forfeits the bid security if the bidder fails to execute the contract.[55] Bids for materials and supplies may require bid security at the discretion of the district.

REQUESTS FOR PROPOSALS

A request for proposals differs conceptually from the competitive bid process. In asking for proposals, a district asks vendors to submit proposals with suggested specifications that

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[53] Boydston v. Napa Sanitation District, 222 Cal.App.3d 1362, 1368-1369 (1990).
[54] Universal By-Products, Inc. v. City of Modesto, 43 Cal.App.3d 145, 156 (1974); Laurent v. City and County of San Francisco, 99 Cal.App.2d 707, 710-11 (1950).
[55] 53 Cal.Jur.3d Section 22, Public Works and Contracts, p. 203.

conform to general requirements. The proposals must explain how their product meets the general requirements and the advantages of their product to the district. When requesting proposals, the district 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 and functions for the price. In many cases, the district will negotiate with one or more of the companies which made proposals with respect to the terms and conditions under which the equipment or services will be furnished and the price to be paid. Requests for proposals may be used by districts only when permitted by law or where competitive bidding is not required by statute.

Government Code section 4217.16 authorizes districts to request proposals from qualified persons with respect to the energy service contracts. After evaluating the proposals, the public agency may award a contract on the basis of the experience of the contract, the type of technology employed by the contractor, the cost to the local agency and any other relevant considerations.

SPECIAL BIDDING REQUIREMENTS FOR SPECIFIED PRODUCTS AND SERVICES

A. Data Processing Systems and Supporting Software

Public Contract Code section 20118.1 and Education Code section 81645 authorize districts to acquire computer hardware and software from one of the three lowest responsible bidders. Public Contract Code section 20118.1 states:

> "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."

While Education Code section 81645 (applicable to community college districts) authorizes the acceptance of competitive proposals or competitive bids, Public Contract Code section 20118.1 (applicable to school districts) does not. Education Code section 81645 states:

> "The governing board of any community college district may contract with a party who 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."

The request for competitive proposals must be advertised in the same manner as competitive bids pursuant to Education Code section 81641. Education Code section 81645 also provides that a community college district may contract in accordance with procedures and criteria established by the governing board. These procedures and criteria, which the district will

use to evaluate proposals and determine which of the three lowest bids or proposals will be accepted, should be established prior to the publication of a notice calling for bids or proposals. The established procedures and criteria should be included in the request for proposals along with a notice stating that the community college district may award to any one of the three lowest bidders or proposals meeting the district's requirements.

B. Transportation Contracts

Education Code section 39802 establishes a competitive bid limit of $10,000 for transportation contracts let by school districts. A similar provision for community college districts was repealed. Therefore, the general bidding requirements of Public Contract Code sction 20651 apply to community college districts.

Education Code section 39802 states:

> "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."

Even though the statute states that a school district may award a contract to a contractor other than the lowest bidder, the courts have held that a higher bid may not be accepted for the same services.[56] However, if the school district first determines that the prevailing bidder could provide better service under the standards enunciated in the specifications in the bid, it may award to other than the lowest bidder.[57]

In addition, transportation contracts may be renewed for the same term and under the same terms and conditions.[58]

CONFLICT OF INTEREST

Independent contractors who assist districts in preparing bid documents may not bid on the contract they prepared for the district. An independent contractor or consultant who bids on contracts prepared by that consultant would be violating Government Code section 1090 which prohibits conflicts of interest. Section 1090 states 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 of which they are members. Contracts include preliminary discussions,

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[56] Educational and Recreational Services, Inc. v. Pasadena Unified School District, 65 Cal.App.3d 775 (1977).
[57] Id. at 783.
[58] Education Code section 39803.

negotiations, the drawing up of plans, specifications and solicitations for bids.[59] Contracts entered into in violation of Section 1090 are invalid and willful violations of Section 1090 are a criminal offense.[60]

The purpose of Government Code section 1090 is to ensure the absolute loyalty and undivided allegiance of a public officer or employee to the best interest of the public agency and to remove all direct and indirect influence of an interested officer or employee and to discourage deliberate dishonesty.[61] Under Government Code section 1090, no person can faithfully serve two masters.[62]

The California Attorney General has stated that an architect or structural engineer employed by a manufacturer, contractor or builder of portable structures violates Section 1090 when he or she also represents the school district as an agent to prepare plans, specifications and estimates to acquire relocatable structures and assist the school district in obtaining the required state approval for the relocatables while still in the employ of the manufacturer, contractor or builder of the portable structures.[63] Therefore, in our opinion, independent contractors and consultants who prepare plans and specifications for a district may not subsequently participate in submitting a bid on that same contract.

UNIT BID PRICING

Districts may competitively bid for unit prices when the exact amount of work or materials that will be required is not known.[64] The advertisement for bids for unit prices should contain sufficient information regarding the work or materials to enable bidders to calculate their bids and to compete on an equal basis.[65] The time period of the unit price contract should be specified in the call for bids, an estimate of the number of units which may be required should be given, and if a certain number of units will be needed immediately, this information should also be included in the call for bids. The bid form or notice to bidders should also specify the basis for determining the low bidder.

District should be cautioned in the usage of unit bid pricing as a result of an Attorney General opinion, issued on January 9, 2001.[66] The Attorney General concluded that a school district may not enter into a job order contract (JOC) based upon unit prices for the performance of public works projects. A JOC was defined as a competitively bid, firm fixed price, indefinite quantity contract for the performance of minor construction as well as the renovation, alteration, painting and repair of existing public facilities. The Attorney General found that the unique features of a JOC, detailed repair and construction tasks including task descriptions, specifications, units of measurement and unit prices for each task, including the lack of

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[59] Stigel v. City of Taft, 58 Cal.2d 565, 569-571 (1962); Millbrae Association for Residential Survival v. City of Millbrae, 262 Cal.App.2d 222, 237 (1968).
[60] Government Code sections 1092 and 1097.
[61] Fraser-Yamor Agency, Inc. v. County of Del Norte, 68 Cal.App.3d 201, 215 (1977).
[62] Thompson v. Call, 38 Cal.3d 633, 637 (1985).
[63] 51 Ops.Cal.Atty.Gen. 135 (1968).
[64] Bent Brothers, Inc. v. Campbell, 101 Cal.App. 456, 466 (1929); McQuillin Municipal Corporations (3d ed.) Section 29.54.
[65] McQuillin, Mun. Corp. (3d ed.) Section 29.54.
[66] 84 Ops.Cal.Atty.Gen. 5 (2001)

information regarding specific projects at the time of submitting the competitive bids, was entirely inconsistent with the language of Public Contract Code section 20111.

AWARD OF MULTIPLE CONTRACTS FROM ONE BID

Districts may bid for different portions of a project if called for in the notice to bidders.[67] Districts may not reserve the right to divide the work after the bids are received. Districts may however, call for the submission of alternative bids.[68] For example, where a contract may 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 subsections or sections as the bidder might select and a bid which included three schedules (for the first section, for the second section and for both sections combined) would not be invalid.

If the advertisement for bids requests bids for the entire project, a bid for less than the entire project must be disregarded.[69] If the bid documents call for bids upon separate parts of a project, a bid upon the whole project must be rejected.[70]

A notice for bids may require alternate bids so that bidders may bid on several alternate propositions, thereby allowing a district the option of choosing or eliminating various items.[71] A notice to bidders requesting the submission of alternate bids which list several options with respect to the kind or quality of work and materials have been upheld.[72] The district then decides after all bids are received and reviewed which material to use and which alternative to choose. Once it decides which alternative, if any, to use, the bid must be awarded to the low bidder for that alternative. The notice to bidders should clearly state whether a bidder must bid on all items, the basis upon which the lowest responsible bidder will be determined and reserve to the district the authority to select the alternatives, additives or deductions it wishes to award.

BIDDING LIMITED TO A SPECIFIED PRODUCT OR MANUFACTURER

When competitive bidding is required by statute, specifications cannot be drawn to limit bidding to one company, corporation or individual where others are engaged in the same business and can do the work or supply the materials.[73] A notice for bid should not restrict competition and should give all responsible bidders an opportunity to compete.[74]

Public Contract Code section 3400 prohibits a district from drafting specifications for bids in connection with the construction, alteration or repair of public works so as to limit the bidding directly or indirectly to any one specific concern or from calling for a designated

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[67] Id. at 29.76.
[68] Id. at 29.65.
[69] Stimson v. Hanley, 151 Cal. 379 (1907).
[70] McQuillin, Mun. Corp. (3d ed.) Section 29.49.
[71] 18 Ops.Cal.Atty.Gen.1 (1951).
[72] McQuillin Mun. Corp. (3d ed.) Section 29.55.
[73] Id. at 29.49.
[74] Id. at 29.44.

material, product, or service by specific brand or trade name, unless at least two brand names or trade names of comparable quality are specified and followed by the words "or equal." In cases involving a unique or novel product application required to be used in the public interest, or where only one brand or trade name is known to the district, it may list only one. The specifications must 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 a substitution of "an equal" item. If no time period is specified, data may be submitted anytime within thirty five (35) days after the award of the contract. The prohibition in Public Contract Code section 3400 is not applicable if the governing board or its designee makes a finding that is described in the invitation for bids or requests for proposals that a particular material, product, thing, or service is designated by specific brand or trade name for either 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, or

2. In order to match other products in use on a particular public improvement either completed or in the course of completion.

The principle set forth in Public Contract Code section 3400 should also apply to the purchase of supplies, materials and equipment and specifications may not be drawn which would limit bidding to one product.[75]

CHANGE ORDERS AND CONTRACTS ENTERED INTO AFTER COMPETITIVE BIDDING

The competitive bidding laws require districts to enter into contracts that are consistent with the notice given to bidders. The contract entered into must contain substantially the same terms and conditions as the terms and conditions specified in the bid documents.[76]

Slight variations or incidental changes in the proposed form of the contract will not require rebidding. Major changes in the terms and conditions or the substitution of terms and conditions favorable to the low bidder which were not included in the bid documents or specifications are void.[77] Changes in the contract amount, the date, time and place of performance, the method of payment, and in the number or relations of parties have been deemed to constitute a substantial or material change in the contract.[78]

The courts generally do not allow substantial changes from the bid documents and apply the general rules of contract law holding that bids are irrevocable offers or options given to the district involved and a contract is complete and binding upon the parties when a valid bid is accepted.[79] Therefore, additional or different contract terms cannot be negotiated after a bid is awarded.[80]

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[75] Baldwin-Lima-Hamilton Corp. v. Superior Court, 208 Cal.App.2d 803, 821 (1962); 47 Ops.Cal.Atty.Gen. 158, 160 (1966).
[76] Warren v. Chandos, 115 Cal.382 (1896); Bent Brothers, Inc. v. Campbell, 101 Cal.App. 456, 469 (1929).
[77] 64 Am.Jur.2d, Public Works & Contracts, section 66.
[78] 3 Cal.Jur.3d, Alteration of Instruments, sections 24-38; Greer v. Hitchcock, 271 Cal.App.2d 334 (1969).
[79] M.F. Kemper Construction Company v. City of Los Angeles, 37 Cal.2d 696, 700, 704 (1951); City of Susanville v. Lee C. Hess Company, 45 Cal.2d 684, 694 (1955).
[80] 18 Ops.Cal.Atty.Gen. 1, 3 (1951); 73 Ops.Cal.Atty.Gen. 417, 423 (1990).

However, Public Contract Code sections 20118.4 and 20659 authorize the change or alteration of a contract after a bid is awarded without further bidding under certain circumstances. The cost must be agreed upon in writing between the district and the contractor. It may not exceed the bid amounts applicable to the original contract or 10 percent of the original contract price.

Pursuant to Public Contract Code sections 20118.4 and 20659, a contract may be increased or decreased after the bid is awarded due to changes that might arise during the course of the contract. These changes are limited to the bid limits or to 10 percent of the original contract price whichever is greater. The purpose of Sections 20118.4 and 20659 was to allow some flexibility following the award of the bid, and to ensure that substantial changes were not made which would constitute the making of a new contract.[81] In effect, the change order provisions allow districts to negotiate changes to a contract provided the contract is not materially altered by the change order to such an extent that it would create a new project or contract which should be bid separately.

EXCEPTIONS TO COMPETITIVE BIDDING

A. Joint Purchasing Agreements

Pursuant to Government Code sections 6500, et seq., community college districts and school districts may enter into joint powers agreements to exercise powers common to them by a Joint Powers Agency.[82] The districts may utilize the provisions of Government Code sections 6500, et seq., to enter into joint powers agreements to establish a Joint Powers Agency to purchase equipment, materials and supplies. The governing board of each district must approve the formation of the joint powers agency.

Generally, joint powers agreements establish the manner in which the Joint Powers Agency will be administered. The purpose of the Joint Powers Agency, the relationship between each member district and the Joint Powers Agency, and the manner in which it will purchase equipment, materials and supplies should be set forth in the joint powers agreement. The agreement should also indicate how costs should be shared. However, Joint Powers Agencies may not delegate authority to a private company to purchase on behalf of the joint powers agency.[83]

B. Purchases Through Other Public Agencies

Public Contract Code sections 20118 and 20652 authorize districts to lease data processing equipment, purchase materials, supplies, equipment, automotive vehicles, tractors, or other personal property without advertising for bids by utilizing another public agency's contract. These provisions do not authorize districts to "piggyback" on other public agency's service contracts.

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[81] 73 Ops.Cal.Atty.Gen. 423 (1990).
[82] 15 Ops.Cal.Atty.Gen. 108 (1950).
[83] 71 Ops.Cal.Atty.Gen. 266, 275 (1988).

Pursuant to Sections 20118 and 20652, the governing board must first determine that it is in the best interest of the district to enter into the contract, lease, requisition or purchase order. Upon receipt of the personal property, provided the property complies with the specifications set forth in the contract, lease, requisition or purchase order, the district may draw a warrant in favor of the vendor for the amount of the approved invoice.

In order for districts to purchase through another public agency's contract, the district should review the awarding public agency's bid carefully and, in particular, the following items:

1. Verification of advertisement,

2. The specific terms and conditions of the bid including the clause which gave notice to potential bidders that other agencies may purchase/lease identical items at the same prices and upon the same terms and conditions,

3. The award of contract (copy of the agenda item explaining the award),

4. Verification that the awarding agency actually purchased/leased the personal property,

5. Extensions of the contract, if any.

The district should obtain all documents from the awarding public agency, not the vendor. Any construction and/or installation services are not allowed under Section 20118 and 20652.

The following questions are frequently asked by districts regarding bidding, relocatable classrooms and Public Contract Code sections 20118 and 20652.

1. What are the bid limits for relocatable classrooms?

Public Contract Code sections 20111 and 20651 set the bid limits at $50,000 plus an inflation factor. Presently, the amount is $58,900 and will increase in the next calendar year. This bid limit applies to the purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district. The bid limit for construction, reconstruction, alteration, or renovation is $15,000. If the installation of relocatables includes extensive construction, reconstruction, alteration, or renovation, the $15,000 bid limit would apply.

2. How does the district determine who is the lowest responsive bidder?

A bid will be deemed responsive if the bid promises to do what the bidding instructions demand. The term responsive refers to whether the bid as submitted complies with all of the requirements of the bidding documents. A determination of responsiveness can be made from the face of the bid. Responsiveness sets a common standard by which all bidders are to be measured, ensuring fairness and efficiency. The award of the bid where the bidder failed to conform to specifications as called for in a request for bids could result in the setting aside of the

contract as awarded.[84] Therefore, the bidder seeking to supply the district with relocatable classrooms in response to a bid must promise to do what the bidding instructions demand.

3. Following the award of the bid, may the district alter or change the terms and conditions set forth in the bid documents?

No. The contract entered into must contain substantially the same terms and conditions as the terms and conditions specified in the bid documents. The competitive bidding laws require districts to enter into contracts that are consistent with the public notice provided to bidders as set forth in the public advertisement. Slight variations or incidental changes in the proposed form of the contract will not require rebidding. Major changes in the terms and conditions or the substitution of terms and conditions favorable to the low bidder, which were not included in the bid documents or specifications, are void. Changes in the contract amount, the date, time, and place of performance, the method of payment, and in the number or relations of parties have been deemed to constitute a substantial or material change in the contract. Additional or different contract terms cannot be negotiated after a bid is awarded.[85]

However, Public Contract Code sections 20118.4 and 20659 authorize the change or alteration of a contract after a bid is awarded, without further bidding, under certain circumstances. The cost must be agreed upon in writing between the district and the contractor, and it may not exceed the bid amounts applicable to the original contract, or 10% of the original contract price. The change order provisions allow districts to negotiate changes to a contract due to changes arising after the contract is entered into, provided the contract is not materially altered by the change order to such an extent that it would create a new project or contract which should be bid separately.

4. Are purchases or leases through other public agencies (also known as "piggybacking") an exception to the competitive bidding laws?

Yes, Public Contract Code sections 20118 and 20652 authorize districts to acquire materials, supplies, equipment, automotive vehicles, tractors, data processing equipment or other personal property without advertising for bids by utilizing another public agency's contract. These provisions do not authorize districts to "piggyback" on other agencies' <u>service</u> contracts.

Pursuant to Section 20118 and 20652, the governing board must first determine that it is in the best interests of the district to enter into such contract, lease, requisition, or purchase order for the personal property.

The key to "piggybacking" is that the purchase or lease of the personal property must be on the terms and conditions as the original bid.

In order for districts to purchase or lease through another public agency's contract, the public agency which awarded the original contract should have included a clause in the bid which gave notice to potential bidders that other agencies may purchase or lease identical items at the same price and upon the same terms and conditions. Districts should obtain a copy of the

[84] Konica Business Machines v. University of California, 206 Cal.App. 3d 449 (1988).
[85] 18 Ops.Cal.Atty.Gen. 1 (1951); 73 Ops.Cal.Atty.Gen. 417, 423 (1990).

other agency's bid documents to check the terms and conditions. Districts should not rely on oral representations made by vendors describing the terms and conditions.

5. What is the definition of a relocatable?

Education Code section 17405(c), defines a relocatable structure as any structure that is designed to be relocated. Section 81521 contains the same definition for community college relocatable structures. Districts may "piggyback" for relocatables pursuant to Public Contract Code sections 20118 and 20652.

6. What is the maximum length of time a district may "piggyback" off another district's bid?

Education Code sections 17596 and 81644 set forth the maximum length of continuing contracts for districts at five years for work or services, apparatus or equipment. If the original bid does not specify how long it remains in effect, Sections 17596 and 81644, being the most closely analogous statutes, would control, and the original bids would remain in effect for five years. However, if the original bid specifies a shorter period of time, that time period would control.

7. What is the maximum length of time a school district or community college district may lease a relocatable?

Education Code section 81526 (formerly Education Code sections 15557 and 15352) authorizes a community college district to lease a relocatable structure for a term not to exceed ten years. The corresponding statutory provision for school districts, Education Code section 39246, was repealed.[86] In repealing Section 39246 and other provisions, the Legislature stated:

> "Whenever in this act a power, authorization, or duty of a school district governing board, county board of education, or county office of education, is repealed or otherwise deleted by amendment, <u>it is not the intent of the Legislature to prohibit the board or office from acting as prescribed by the deleted provisions</u>. Rather, it is the intent of the Legislature, that the school district governing boards, county boards of education, and county superintendents of schools, respectively, shall have the power, in the absence of other legislation, to so act under the general authority of Section 35160 of the Education Code."[87] [Emphasis added.]

In 1986, former Section 39246 was amended to authorize the lease of relocatable structures for a period not to exceed twenty years. The Legislature clearly indicated at the time of the repeal that it was not the intent of the Legislature to prohibit a school district from acting as prescribed by the deleted provisions. Rather, it was the intent of the Legislature to authorize school districts to have the power in the absence of other legislation to act under the general

[86] Stats.1987, ch. 1452, section 283.
[87] Stats.1987, ch. 1452, section 1.

authority of the "permissive" Education Code section 35160. In addition, Education Code section 17575 authorizes the governing board of any school district, when leasing a building for housing of school district employees, to lease such building for any period as they deem necessary. Therefore, in our opinion, a school district could competitively bid for the lease of a relocatable structure for up to twenty years, and a community college district could competitively bid for the lease of a relocatable structure for up to ten years.

It should be kept in mind, as discussed above, if the bid specifications provide for a shorter lease term (e.g., 7 years) then districts piggybacking off that district's bid may only lease the relocatables up to the maximum term specified in the original bid specifications since Sections 20118 and 20652 require that the "piggyback" be on the same terms and conditions as the original bid.

8. How should a district competitively bid or "piggyback" for relocatables when it is uncertain how long it will need the relocatables?

Districts may competitively bid for the lease of relocatables for up to a maximum of twenty years (ten years for community college districts), and include a clause which allows the district to terminate the lease at any time, upon written notice (e.g., 30 days, 180 days). Districts may also wish to include an option to purchase the relocatables since, when the lease term ends, the relocatables must be removed and returned to the manufacturer unless the district purchases the relocatables.

We would not recommend that a district enter into short-term leases for relocatables (e.g., three years, five years) without a purchase option if the district is not sure how long it will need the relocatables since, at the end of the lease term, the district may still need the relocatables and when the lease term expires, without a renewal clause or purchase option in the original bid documents, the relocatables would have to be returned to the manufacturer. Districts wishing to "piggyback" for relocatables would be subject to the same terms and conditions as the awarding district.

C. Emergency Repair Contracts

Public Contract Code sections 20113 and 20654 authorize districts to enter into a contract in writing for the performance of labor and furnishing of materials or supplies without advertising for or inviting bids. The emergency repairs, alterations or work of improvement to any public school facilities must be necessary to permit the continuance of existing school classes or to avoid danger to life or property. The governing board of the district, by unanimous vote, with the approval of the county superintendent of schools, must approve the emergency contract or authorize the use of day labor or force account to make a repair, alteration or work of improvement.

The Court of Appeal in Marshall v. Pasadena Unified School District,[88] held that the definition of emergency contained in Public Contract Code section 1102, limited the utilization of emergency resolutions to sudden unexpected occurrences that pose a clear and imminent

[88] 15 Cal.Rptr.3d 344 (2004).

danger and require immediate action to prevent or mitigate the loss or impairment of life, health, property or essential public services.

In Marshall, the Pasadena Unified School District publicly advertised for bids for a project to modernize Longfellow Elementary School in September 2000. B.F. Construction, Inc., submitted a bid for the project and was determined to be the lowest responsible bidder. On November 29, 2000, the district entered into a $5.9 million dollar contract with B.F. Construction to do the work.

In January 2002, B.F. Construction advised the district that they were unable to proceed effectively and that the project should be terminated for convenience by the owner. On February 1, 2002, the district invoked its expressed contractual right to terminate its contract with B.F. Construction for the convenience of the district.

The contract between B.F. Construction and the district provided that in the event of a termination for convenience, B.F. Construction would be entitled to payment for work actually performed and in place as of the effective date of the termination. B.F. Construction submitted a claim to the district seeking payment of approximately $1.7 million dollars. The district disputed the claimed amount.

On May 16, 2002, B.F. Construction assigned its claim against the district to Marshall and on July 31, 2002, Marshall sued the district.

On April 1, 2002, two months after the district terminated its contract with B.F. Construction, the district's Board of Education adopted an emergency resolution to award a contract for completion of the modernization project to Hayward Construction Company. The Los Angeles County Superintendent of Schools subsequently approved the emergency resolution.

The lawsuit filed by Marshall alleged that the district's award of the contract to Hayward was unlawful and that no emergency existed which would allow the district to avoid compliance with competitive bidding requirements. The lawsuit sought to prohibit the district from making any payments to Hayward and to require the district to advertise publicly for bids to complete the project and award the contract to the lowest responsible bidder.

The Los Angeles Superior Court ruled against the school district and held that the district failed to comply with the competitive bidding requirements set forth in the Public Contract Code. The trial court held that the district failed to present substantial evidence of an emergency as defined by Public Contract Code section 1102, and ordered the district to publicly advertise for bids to complete the work and to award the contract to the lowest responsible bidder.

Public Contract Code section 1102 was enacted by the Legislature in 1994 and states:

> "'Emergency,' as used in this code, means 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."

The Court of Appeal held that the definition of emergency in Section 1102 must be read into the provisions of Public Contract Code section 20113 which was enacted in 1985 and states in part:

> "In an emergency when any repairs, alterations, work or improvement is necessary to permit the continuance of existing school classes, or to avoid danger to life or property, the board may, by unanimous vote, with the approval of the county superintendent of schools, do either of the following:
> (a) 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.
> (b) Notwithstanding Section 20114, authorize the use of day labor or force account for the purpose."

The school district in Marshall contended that Section 20113 contained its own definition of emergency which should prevail over the definition contained in Section 1102. However, the Court of Appeal held that while Section 20113 may have conferred certain powers upon the school district in the event of an emergency and provided procedures for exercising those powers, Section 1102 became the controlling statute with respect to the definition of emergency when it was enacted in 1994. The Court of Appeal held that the use of the phrase "as used in this code" was unambiguous and was intended to define the term "emergency" for the entire Public Contract Code. Therefore, the definition of emergency in Section 1102 must be read into Section 20113.

To support its conclusion, the Court of Appeal noted that the legislative history shows that the Legislature intended to add a common definition of "emergency" in the Public Contract Code due to the previously conflicting requirements and definitions regulating emergency situations.[89] The Court of Appeal noted that the Legislature did not create an exemption for school districts when it enacted Section 1102 and that the clear language of Section 1102 ("as used in this code") shows the Legislature sweeping intent to establish a common definition of "emergency" throughout the Public Contract Code.

The Court of Appeal further stated:

> "Further, given the strong public policy favoring competitive bidding, an emergency exemption thereto should be strictly construed and restricted to circumstances which truly satisfy statutory criteria."

The Court of Appeal reviewed the legislative history of Assembly Bill 3348[90] which enacted Public Contract Code section 1102 and noted that Section 1102 definition of emergency was derived from the California Environmental Quality Act (CEQA).[91] The definition of emergency under CEQA is extremely narrow and limits an emergency to an "occurrence" not a

[89] See, Concurrence and Senate Amendments, Bill Analysis, AB 3348 (1993-94 Reg.Sess. as amended August 29, 1994).
[90] Stats.1994, ch. 803.
[91] See Public Resources Code section 21060.3.

"condition" and the occurrence must involve a clear and imminent danger demanding immediate action.[92] In Los Osos, the Court of Appeal held that a City Council's ordinance that declared an emergency during a drought and authorized the City to supply its residents with water drawn from the ground was invalid. The court found that no emergency existed and held that the City made a political choice over time. The court in Los Osos Valley Associates stated:

> "The term 'emergency'… has long been accepted in California as an unforeseen situation calling for immediate action. … Not only must urgency be present, the magnitude of the exigency must factor. … Emergency is not synonymous with expediency, convenience, or best interest… and it imports more than merely a general public need. … Emergency comprehends a situation of 'grave character and serious moment.' It is evidenced by an imminent and substantial threat to public health or safety…."[93]

The Court of Appeal went on to conclude that the Pasadena Unified School District decision to terminate its contract with B.F. Construction for the district's own convenience was not a sudden unexpected occurrence posing a clear and imminent danger requiring prompt action to protect life, health, property or essential public services. The Court of Appeal noted that the CEQA definition of emergency includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as a riot, accident or sabotage.[94]

In summary, districts may not utilize emergency resolutions to bypass regular competitive bidding procedures unless there is a sudden unexpected occurrence that poses a clear and imminent danger requiring prompt action to protect life, health, property or essential services. As set forth in Public Contract Code section 1102 occurrences such as fire, flood, earthquake or other soil or geologic movements, as well as such occurrences as riot, accident or sabotage, which were sudden, unexpected and pose a clear and imminent danger requiring prompt action to protect life, health, property or essential public services will qualify as emergencies. Conditions or events that do not meet these standards will not be considered sufficient to authorize the passage of an emergency resolution to bypass regular competitive bidding procedures.

D. Work by Day Labor or Force Account

Public Contract Code sections 20114 and 20655 authorize districts to make repairs, alterations, additions or painting, repainting or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the 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. In districts having an average daily attendance of 35,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus or equipment, including painting or repainting and perform maintenance 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 material does not exceed $21,000. For purposes of Sections 20114 and 20655,

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[92] See Los Osos Valley Associates v. City of San Luis Obispo, 30 Cal.App. 4th 1617, 1682, 36 Cal.Rptr. 2d 758 (1994).
[93] Id. at 1681.
[94] See, Public Resources Code section 21060.3.

day labor includes the use of maintenance personnel employed on a permanent or temporary basis.

E. Contract for Special Services

Government Code section 53060 creates an exception to the competitive bidding laws for special services and advice. Government Code section 53060 states in part:

> "The legislative body of any public or municipal corporation or district may contract with and employ any 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."

In order to qualify as special services under Government Code section 53060, the services must be provided by specially trained, experienced and competent persons. In Jaynes v. Stockton, the Court of Appeal stated:

> ". . . [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 attainable 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 services of a particular individual may be special in that, because of his outstanding skill, they may not be duplicated."[95]

Generally, persons who are highly trained and technically skilled in the sciences or a profession (e.g. doctors, lawyers, engineers, architects) may be retained as independent contractors without competitive bidding.[96] A sample agreement for an independent contractor is found in the Appendix.

F. Contracts for Education Materials

Public Contract Code section 20118.3 and Education Code section 81651 authorize districts to purchase supplementary textbooks, library books, educational films, audio-visual materials, test materials, workbooks, instructional computer software packages, or periodicals in any amount needed for the operation of the schools without taking estimates or advertising for bids.

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[95] Janes v. Stockton, 193 Cal.App.2d 47, 52 (1961).
[96] Cobb v. Pasadena City Board of Education, 134 Cal.App.2d 93 (1955).

G. Perishable Food Stuffs, Seasonable Commodities and Surplus Federal Property

Public Contract Code section 20660 authorizes community college districts to purchase perishable food and seasonable commodities needed in the operation of cafeterias and food services without advertising for bids. Section 20660 states:

> "Perishable foodstuffs and seasonal commodities needed in the operation of cafeterias and food services may be purchased by the community college district in accordance with rules and regulations for such purchase adopted by the governing board of said district notwithstanding any provisions of this code in conflict with such rules and regulations."

A similar provision in the Public Contract Code relating to school district was repealed in 1996. However, Education Code section 38083 provides that:

> "Perishable foodstuffs and seasonal commodities needed in the operation of cafeterias may be purchased by the school district in accordance with rules and regulations for such purchase adopted by the governing board of said district notwithstanding any provisions of this code in conflict with such rules and regulations."

Education Code sections 17602 and 81653 authorize districts to purchase surplus property from the federal government or any agency of the federal government in any amount needed for the operation of the schools of the district without competitive bidding.

H. Energy Conservation Contracts

Government Code sections 4217.10 through 4217.18 authorize public agencies, including community college districts and school districts, to develop energy conservation, cogeneration and alternate energy supply source agreements without competitive bidding. Districts may enter into energy service contracts in a facility ground lease on terms and conditions which the governing board determines are in the best interest of the district. The governing board must make the determination at a regularly scheduled public hearing and give the public two weeks advance notice. The board must find:

1. 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

2. That the difference, if any, between the fair rental value of 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 agreement.[97]

[97] Government Code section 4217.12.

Government Code section 4217.13 authorizes districts to enter into facility financing agreements and facility ground leases on terms and conditions determined by the board to be in the best interest of the district. If the determination is made at a regularly scheduled public meeting, and if the governing board finds that the 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 enter into the contract. Districts may also enter into contracts for the sale of electricity, electrical generating capacity or thermal energy produced by the energy conservation facility.

In addition, Section 4217.16 authorizes the awarding or entering into an agreement or lease by seeking proposals from qualified persons. After evaluating the proposals, the district may award the contract on the basis of the experience of the contractor, the type of technology employed by the contractor, the cost of the local agency and any other relevant considerations.

Government Code sections 15814.10 and 15814.11 authorize districts to enter into energy conservation contracts for public buildings for the reduction of 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. Section 15814.12 authorizes districts to enter into agreements with the State Public Works Board for energy service contracts.

Education Code sections 81660 through 81662 authorize community colleges to enter into energy management agreements for energy management systems with the lowest responsible bidder considering the net cost or savings to the district for a term not to exceed fifteen years. Similar provisions applying to school districts were repealed effective January 1, 1988, as part of legislation to more fully implement the permissive code provisions of Education Code section 35160. Section 1 of the legislation, Statutes of 1987, Chapter 1452, states that whenever a provision was repealed by that legislation, it was not the intent of the Legislature to prohibit the school district from acting as prescribed by the deleted provisions. The legislative intent was to allow school districts to act under the general authority of Education Code section 35160. Therefore, in our opinion, 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. School districts, however, are not limited to a fifteen year term as are community college districts.

I. Completion of Construction Contracts Upon Default of Contractor

Generally, competitive bidding statutes do not require districts to rebid projects when the contractor has failed to carry out the work and the contract provides the district shall have the right to complete the construction contract and deduct the amount expended from the agreed price of the contract. In such circumstances, the district may complete the contract in accordance with the terms of the contract without readvertising for bids.[98]

[98] Garvey School District v. Paul, 50 Cal.App. 75 (1920); Shore v. Central Costa Sanitary District, 208 Cal.App.2d 465 (1962).

J. Sole Source

As discussed earlier, the purpose of competitive bidding statutes are to protect the public from extravagant contracts and to exclude favoritism and corruption and to promote competition among bidders so as to ensure that all public contracts are entered into as the lowest possible price.[99] However, where competitive bidding proposals do not produce an advantage, the competitive bidding statutes do not apply. For example, competitive bidding is not required where there is one supplier of a needed commodity.[100]

In Hodgeman, the Court of Appeal held that only one type of parking meter was available to meet the needs of the City of San Diego. Therefore, the court stated:

> ". . . There could have been no competitive bidding because but one meter could have been described and there could have been but one bidder under them. Under such circumstances, advertising for bids, was unnecessary . . ."[101]

Sole sourcing a particular vendor will require an opinion from an independent consultant with expertise regarding the particular product or service required by a District. The opinion should be obtained prior to an award of any contract. A sole source opinion should include the following:

1. A description of the consultant's experience with the product or service and the sources of such product or service;

2. An analysis of the District's proposed or current needs which can be performed by visiting the District (or specific school sites) and interviewing District staff;

3. The method utilized by the consultant to render an opinion; and

4. The conclusion(s) clearly justified by the consultant's analysis which must specifically state that it is the opinion of the consultant that the "sole source" provider of the product and/or service is the specified vendor.

K. Contracts for Trash Collection

Districts are not required to contract with trash collection companies that have exclusive contracts for trash collection in the cities in which they were located.[102] In Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc., the Court of Appeal held that school districts, as state agencies, are immune from the city's trash collection regulations and are, therefore, free to

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[99] 64 Am.Jur.2d, Public Works & Contracts, section 37.

[100] Los Angeles Gas & Electric Corporation v. Los Angeles, 188 Cal. 307 (1920) (sole source for electrical power); Los Angeles Dredging Company v. Long Beach, 210 Cal. 348 (1930) (sole source when dredging pipes could only be rerouted by the on site dredging company); Hodgeman v. City of San Diego, 53 Cal.App.2d 610 (1942) (sole source for a parking meter); County of Riverside v. Whitlock, 22 Cal.App.3d 863 (1972) (public utility).

[101] Id. at 618.

[102] Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc., 43 Cal.App.4th 630 (1996).

independently contract with other trash haulers pursuant to the competitive bidding provisions of Public Contract Code section 20111. This decision would apply to community colleges as well.

The Court of Appeal held that school districts are a political subdivision of the state and are independent and separate governmental agencies distinct from counties or cities. In Hall v. City of Taft,[103] the California Supreme Court held that school districts are agencies of the State for local operation of the state school system and are not subject to municipal building ordinances which are preempted by the state school building laws. The Court held that cities may not enforce local ordinances which conflict with state law.

Public Resources Code section 40059(a)(2) states that each district or other local governmental agency may determine whether solid waste handling services should be provided by means of nonexclusive franchise, contract, license, permit or otherwise, either with or without competitive bidding or if, in the opinion of the governing body, the public health, safety and well-being shall require, by partially exclusive or wholly exclusive franchise, contract, license, permit or otherwise.

Therefore, community college districts and school districts may competitively bid contracts for trash collection pursuant to Public Contract Code sections 20651 and 20111 or adopt a resolution authorizing the governing board of the district to contract by exclusive franchise or nonexclusive franchise with or without competitive bidding.

L. California Multiple Award Schedules (CMAS)

School districts and community college districts can participate in the California Multiple Award Schedules (CMAS) for the acquisition of materials, equipment, and supplies including electronic data processing or telecommunications goods and services provided that such acquisitions can be made by the Department of General Services upon the same terms, conditions and specifications at a price lower than the districts can obtain through their normal acquisition procedures.[104]

Assembly Bill 1684,[105] effective January 1, 2001, amended various provisions relating to CMAS. The effect of this legislation was to reestablish the CMAS program as it applies to community college districts and school districts and to clarify that goods, information technology and services come within the provisions of CMAS.

Assembly Bill 1684 repealed Public Contract Code sections 10324 and 12110 which, in the past, provided legal authority for community college districts and school districts to utilize the CMAS program. However, Assembly Bill 1684 added Public Contract Code section 10298, which specifically authorizes state and local agencies to contract with suppliers who are awarded CMAS contracts without further competitive bidding. The definition of contracts that may be awarded under CMAS has been expanded under Sections 10290, 10290.1, and 12100 to include information technology goods and services. Information technology is defined in Government Code section 11702 as including, but not limited to, all electronic technology systems and services, automated information handling, system design and analysis, conversion of data,

[103] Hall v. City of Taft, 47 Cal.2d 177.
[104] Education Code section 17595.
[105] Stats.2000, ch. 918, section 4.

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.

In addition, Senate Bill 1667 and Assembly Bill 2866 added Public Contract Code section 10299, which authorizes the Director of General Services to consolidate the needs of multiple state agencies for information technology goods and services and to establish contracts, master agreements, multiple award schedules, and cooperative agreements to leverage the state's buying power. Section 10299 specifically states that state agencies and local agencies may contract with suppliers awarded these contracts without further competitive bidding. Section 10299(b) states that the director may make the services of the Department of General Services available to any school district and that school districts may, without further competitive bidding, utilize contracts, master agreements, multiple award schedules, cooperative agreements, or other types of agreements established by the Department of General Services for use by school districts for the acquisition of information technology, goods, and services. Education Code section 17595 and Public Contract Code section 20653 authorize school districts and community college districts to purchase materials, equipment or supplies through the Department of General Services.

Pursuant to these statutory provisions, the Department of General Services has issued a statement regarding CMAS, stating that local agency purchase orders should be issued directly to the CMAS contractor on local agency forms. The Department of General Services has also issued general guidelines regarding CMAS procedures.

In order to utilize the CMAS procedures, the purchase must be made at a price lower than the district can obtain through its normal acquisition process. This finding or a finding that the CMAS purchase is in the best interest of the district (e.g., timelines, quality of the product or work, price, technical expertise, cost of developing specifications and coordination with existing infrastructure may be considered) should be made by the governing board of the district or by an employee who has been delegated the authority to make such a finding pursuant to Education Code sections 17604 or 81655. If the district delegates such authority to an administrator, the administrator's finding of lower price or best interest pursuant to Sections 17604 and 81655 requires the governing board to ratify the administrator's decision by a motion duly passed and adopted at a public meeting. Such ratification may be part of a motion which is duly passed to approve a consent calendar of a group of items. The administrator should submit documentation with information to the governing board such as the price, name of CMAS vendor, services, materials, equipment or supplies being purchased, the CMAS contract number and the relevant findings made by the administrator.

Utilization of CMAS may include services such as installation of wiring or cabling. Civil Code section 3100 defines public works as, ". . . any work of improvement contracted for by a public entity." Civil Code section 3106 defines a "work of improvement" as including, but not being restricted to, the construction, alteration, addition to, or repair of any building. Public Contract Code section 1101 defines a public works contract as "an agreement for the erection, construction, alteration, repair or improvement of any public structure, building, road or other public improvement of any kind."

In our opinion, installation of wiring or cabling would be a public works which would require a payment bond if the cost of the project exceeds $25,000. Therefore, where the installation of wiring or cabling is involved, the project exceeds $25,000 and is not just an incidental part of the project, a payment bond is required.

PUBLIC WORKS CONSTRUCTION CONTRACTS

A. Definition of Public Works

Civil Code section 3100 defines public works as, ". . . Any work of improvement contracted for by a public entity." Civil Code section 3106 defines a work of improvement as follows:

> "'Work of improvement' includes but is not restricted to the construction, alteration, addition to, or repair, in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road, the seeding, sodding, or planting of any lot or tract of land for landscaping purposes, the filling, leveling, or grading of any lot or tract of land, the demolition of buildings, and the removal of buildings. Except as otherwise provided in this title, 'work of improvement' means the entire structure or scheme of improvement as a whole."

Public Contract Code section 1101 defines a "public works contract" as "an agreement for the erection, construction, alteration, repair or improvement of any public structure, building, road or other public improvement of any kind."[106] For purposes of the prevailing wage laws, Labor Code section 1720 defines "public works" as any of the following:

> "(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph 'construction' includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.
>
> "(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.
>
> "(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or

[106] See, also, Public Contract Code section 22002(d) which defines a "public project."

public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

"(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

"(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

"(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code."[107]

B. Public Works Bid Limits/Notice of Mandatory Pre-Bid Conference

Public works projects and construction services have a bid limit of $15,000 pursuant to Public Contract Code section 20111 and 20651. Public Contract Code section 6610 requires that all notices inviting bids for public works projects that include a requirement for any type of mandatory pre-bid conference, site visit or meeting must include the time, date and location of the mandatory pre-bid conference, site visit or meeting, and when and where project documents, including final plans and specifications will be available. Any mandatory pre-bid conference, site visit or meeting cannot occur within five (5) calendar days from the publication of the initial notice inviting bids. In addition, the school district or community college district seeking bids for public works projects must set forth in the bid invitation a date and time for closing of submission of bids by contractors. The date and time must be extended by no less than 72 hours in the event the school district or community college district issues any material change, addition or deletion to the bid within 72 hours prior to the bid closing.[91] Material change means a change with a substantial cost impact on the total bid as determined by the district.

C. Licensing of Contractors

Public Contract Code section 3300 states:

"(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.

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[107] Labor Code sections 1720, et seq.; see, also, City of Long Beach v. Department of Industrial Relations, 33 Cal.4th 942, 22 Cal.Rptr.3d 518 (2004), in which the California Supreme Court ruled that the 2000 amendments adding design and preconstruction to the definition of public works was not retroactive.

[91] Public Contract Code section 4104.5.

> "(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."

Districts may not lawfully award contracts to unlicensed contractors. Business and Professions Code sections 7000, et seq., make it a misdemeanor for any person to engage in business or act in the capacity of the contractor without a license. Districts should determine prior to the award of a contract that the contractor to whom the contract is being awarded is licensed by state law.

In addition, Business & 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 without having the appropriate license. Business & Professions Code section 7028.15 requires districts, before awarding a contract or issuing a purchase order, to verify that the contractor was properly licensed when the contractor submitted the bid. A bid submitted by a contractor who was not properly licensed must be considered nonresponsive and rejected by the district. Any contract awarded to a contractor who is not properly licensed is void.

Any officer or employee of a district who knowingly awards a contract or issues a purchase order to an unlicensed contractor may be cited and assessed civil penalties by the Contractor's State License Board. However, a public officer or employee is not subject to citation if the officer or employee made an inquiry to the Contractor's State License Board for the purpose of verifying a license status of any person or contractor and the State Contractor's License Board failed to respond to the inquiry within three business days.

D. Noncollusion Affidavit

Public Contract Code section 7106 states that all public works contracts must include a noncollusion affidavit in the form required by Public Contract Code section 7106. The form is as follows:

"Any public works contract of a public entity shall include an affidavit, in the following form:

NONCOLLUSION AFFIDAVIT TO BE EXECUTED
BY BIDDER AND SUBMITTED WITH BID

State of California)
) ss.
County of __________)

____________, being first duly sworn, deposes and says that he or she is ________ of ________ the party making the foregoing bid that the bid is not made in the interest of, or on behalf of, any undisclosed person, partnership, company, association, organization, or corporation; that the bid is genuine and not collusive or sham; that the bidder has not directly or indirectly induced or

solicited any other bidder to put in a false or sham bid, and has not directly or indirectly colluded, conspired, connived, or agreed with any bidder or anyone else to put in a sham bid, or that anyone shall refrain from bidding; that the bidder has not in any manner, directly or indirectly, sought by agreement, communication, or conference with anyone to fix the bid price of the bidder or any other bidder, or to fix any overhead, profit, or cost element of the bid price, or of that of any other bidder, or to secure any advantage against the public body awarding the contract of anyone interested in the proposed contract; that all statements contained in the bid are true; and, further, that the bidder has not, directly or indirectly, submitted his or her bid price or any breakdown thereof, or the contents thereof, or divulged information or data relative thereto, or paid, and will not pay, any fee to any corporation, partnership, company association, organization, bid depository, or to any member or agent thereof to effectuate a collusive or sham bid."

The above affidavit should be notarized by the bidder.

E. Designation of Subcontractors

The Subletting and Subcontracting Fair Practices Act[108] sets forth the law to prevent bid shopping and bid peddling in connection with construction, alteration and repair of public improvements, since such practices 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, loss of wages to employees and other evils. Public Contract Code section 4104 requires prime contractors to submit with their bid a list of all subcontractors to whom it intends to subcontract work, including all fabrication and installation work for more than one half of one percent of the total bid. The prime contractor must give the name and location of the place of business of each subcontractor. Any additional information required from the prime contractor may be submitted up to twenty four (24) hours after bid deadline. Only one subcontractor may be listed for each portion of the work as defined by the prime contractor in its bid. Therefore, if the prime contractor intends to use a subcontractor for any portion of the work in an amount in excess of one half of one percent of the total bid, then the prime contractor is required to list the subcontractor.

If the prime contractor fails to list the subcontractor or list more than one subcontractor for the same portion of the work, the prime contractor agrees that the prime contractor is fully qualified to perform that portion of the work itself and that it will perform that portion.[109] The prime contractor may not subcontract 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 of the work except where a change order causes changes or deviations from the original contract.[110] In the event of an emergency, after a written finding by the district setting forth the facts constituting the emergency, the prime contractor may subcontract work where no subcontractor was listed on the original bid. The prime contractor may not circumvent the statutory requirements for listing subcontractors by listing another contractor who will, in turn, subcontract portions of the work constituting a majority of the work covered by the prime contract.[111]

[108] Public Contract Code sections 4100, et seq.
[109] Public Contract Code section 4106.
[110] Public Contract Code section 4107.
[111] Public Contract Code section 4105.

Following the award of a bid, the prime contractor may not substitute another subcontractor for the listed subcontractor unless approved by the district for one of the following reasons:

1. The listed subcontractor failed or refused to execute a contract presented by the prime contractor;

2. The listed subcontractor became bankrupt or insolvent;

3. The listed subcontractor failed or refused to perform the subcontract;

4. The listed subcontractor failed or refused to meet the bond requirements of the prime contractor;

5. The prime contractor demonstrates to the district or its duly authorized officer that the name of the subcontractor was listed as a result of an inadvertent clerical error;

6. The listed subcontractor is not licensed pursuant to state law;

7. The awarding authority or its duly authorized officer determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial compliance with the plans and specifications or that the subcontractor is substantially delaying or disrupting the progress of the work.

The listed subcontractor is ineligible on a public works project pursuant to 1777.1 or 1777.7 of the Labor Code.

The awarding authority determines that a listed subcontractor is not a responsible contractor.[112]

The district, prior to approving a prime contractor's request to substitute a subcontractor, 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 has five working days within which to submit written objections to the district. Upon the filing of written objections, the district must give at least five working days' notice to the listed subcontractor of a public hearing by the awarding authority on the request for substitution. If the listed subcontractor does not file written objections to the prime contractor's request for substitution, the failure to file objections is deemed to be consent to the substitution.[113]

Where a prime contractor claims inadvertent clerical error in a listing of a subcontractor, the prime contractor shall, within two working days after the time of the prime bid opening by the district, give written notice to the district and copies of that notice to both the subcontractor

[112] Public Contract Code section 4107.
[113] Ibid.

he or she claims to have listed in error and the intended subcontractor who had provided a bid to the prime contractor prior to the bid opening. Any listed subcontractor notified by the prime contractor as to an inadvertent clerical error shall be allowed six working days from the time of the prime bid opening within which to submit to the district and to the prime contractor written objection to the prime contractor's claim of inadvertent clerical error. Failure of the listed subcontractor to file the written notice within six working days shall be primary evidence of his or her agreement that an inadvertent clerical error was made.[114]

The district shall, after a public hearing, consent to the substitution of the intended subcontractor if:

1. The prime contractor, the subcontractor listed in error and the intended subcontractor each submit an affidavit to the district along with such additional evidence as the parties may wish to submit that an inadvertent clerical error was in fact made, provided that the affidavits from each of the three parties are filed within eight working days from the time of the prime bid opening; or

2. The affidavits were filed by both the prime contractor and the intended subcontractor within the specified time, but that the subcontractor whom the prime contractor claims to have listed in error does not submit within six working days to the district and to the prime contractor, written objections to the prime contractor's claim of inadvertent clerical error.[115]

If the listed subcontractor files an affidavit, the district shall investigate the claims of the parties and shall hold a public hearing to determine the validity of those claims. Any determination made shall be based on the facts contained in the declaration submitted under penalty of perjury by all three parties and supported by testimony under oath and subject to cross-examination. The district may, on its own motion or that of any other party, admit testimony of other contractors, any bid registries or depositories, or any other party in possession of facts which may have a bearing on the decision of the district.[116]

If the prime contractor violates the laws relating to subcontracting, the district may, in its discretion, cancel the contract or 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 canceled or a penalty assessed against the prime contractor, the prime contractor must be given a public hearing within five days with five days prior notice of the time and place.[117] In addition, a violation of these provisions is grounds for disciplinary action by the Contractor's State License Board.[118]

A subcontractor who is wrongfully deprived of the benefit of a subcontract due to an invalid substitution may recover from the prime contractor the benefit of the bargain (i.e., profit)

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[114] Public Contract Code section 4107.5.
[115] Ibid.
[116] Ibid.
[117] Public Contract Code section 4110.
[118] Public Contract Code section 4111.

the subcontractor would have realized.[119] Districts, however, are not liable even if the district consented to the substitution.[120] A subcontractor may also recover even if the prime contractor made an excusable clerical mistake if the statutory procedures are not complied with.[121]

If the district approves the substitution of a subcontractor pursuant to Public Contract Code section 4107 or 4107.5, the subcontractor may file a writ of mandate action to challenge the district's decision. If the subcontractor is successful in overturning the district's decision, it may then pursue a cause of action for damages.[122]

F. Bonding of Subcontractors

Public Contract Code section 4108 authorizes a general contractor to request a faithful performance and payment bond from a subcontractor. The general contractor's written or published request for subbids must specify the amount and requirements of the bond or bonds to be provided by the subcontractor. If the subcontractor fails to provide the requested faithful performance or payment bond, the general contractor may reject the subcontractor's subbid and make a substitution of another subcontractor.[123] If the general contractor fails to specify the bond requirements in the subbid documents, the general contractor is precluded from imposing bond requirements thereafter.[124]

Districts may, in their request for bids, require the general contractor to require that its subcontractors furnished payment and performance bonds. The district may require the general contractor to submit with its bid copies of its written or published requests for subbids specifying the amount and requirements of the bonds to be provided by its subcontractors.

G. Workers' Compensation Insurance Coverage

The general contractor is required by Labor Code section 3700 to provide workers' compensation insurance coverage for its employees. A workers' compensation certificate testifying to the fact that a general contractor maintains a policy of workers' compensation insurance should be provided to the district.

H. Progress Payments and Substitution of Securities

Many public works' contracts pursuant to Education Code section 17603 provide for progress payments. The district is required to determine the method of payment for construction contracts and specify in the bid documents how payment will be made.

Public Contract Code section 9203 requires districts to retain a minimum of 5 percent of any progress payment as well as withhold not less than 5 percent of the contract price until final completion and acceptance of a project which will exceed a total of $5,000.00 when it involves construction, creation, alteration, repair or improvement of a public work. However, if at any

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[119] Southern California Acoustics Company v. C.V. Holder, Inc., 71 Cal.2d 719, 727 (1969).
[120] Ibid.
[121] Coast Pump Associates v. Stephen Tyler Corp., 62 Cal.App.3d 421 (1976).
[122] Code of Civil Procedure section 1094.5; Interior Systems, Inc. v. Del E. Webb Corp., 121 Cal.App.3d 312, 320 (1981).
[123] Public Contract Code sections 4107 and 4108.
[124] Public Contract Code section 4108(c)(3).

time after 50 percent of the work has been completed, the governing board of the district finds that satisfactory progress has been made, it may make any of the remaining progress payments in full for actual work completed.[125]

Public Contract Code section 7107 allows a district to withhold 150 percent of the disputed amount from the general contractor in a public works contract. The bid packet prepared by this office and many of the bid packets prepared by other counties provide for a 10 percent retention on progress payments with the final payment of 10 percent of the value of the work done under the contract to be made within 35 days after acceptance of the work and the filing of the Notice of Completion with the County Recorder by the district.

Whenever bid documents require the retention of a percentage of the contract price by a district, the district must include provisions in any invitation for bid and in the contract documents to permit the substitution of securities for any monies withheld by the district. With the exception of certain federal contracts, at the request and expense of the contractor, securities equivalent to the amount withheld shall be deposited with the public agency or with a state or federally chartered bank in California as the escrow agent who shall pay those monies to the contractor. Upon satisfactory completion of the contract, the securities shall be returned to the contractor.[126]

In the alternative, the contractor may request and the owner shall make payment of retentions earned directly to the escrow agent at the expense of the contractor. At the expense of the contractor, the contractor may direct the investment of the payments into securities and the contractor shall receive the interest earned on the investments upon the same terms provided for securities deposited by the contractor. Upon satisfactory completion of the contract, the contractor shall receive from the escrow agent all securities, interest and payments received by the escrow agent from the owner pursuant to the terms of Public Contract Code section 22300. The contractor shall pay to each subcontractor, not later than 20 days of receipt of the payment, the respective amount of interest earned, net of costs attributed to retention withheld from each subcontractor, on the amount of retention withheld to insure the performance of the contractor.[127]

The securities eligible for investment under Public Contract Code section 22300 are those listed in Government Code section 16430: bank or savings and loans certificates of deposit; interest- bearing demand deposit accounts; stand-by letters of credit and any other security mutually agreed to by the contractor and the public agency. The contractor shall be the beneficial owner of any securities substituted for monies withheld and shall receive any interest thereon. Failure to include these provisions in bidding contract documents voids any provisions for performance retentions in a public agency contract.[128] Public Contract Code section 22300(e) sets forth the form of the Escrow Agreement for Security Deposits in Lieu of Retention and this form is included in the Appendix.

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[125] Public Contract Code section 9203.
[126] Public Contract Code section 22300.
[127] Public Contract Code section 22300(b).
[128] Public Contract Code section 22300.

I. Sureties

A district may not require a bidder on a public works contract to make application to or furnish financial data to or obtain or procure any surety bond or contract of insurance specified in the bid documents from a particular surety, insurance company, agent or broker.[129] In addition, no district or any person acting on behalf of a district, shall negotiate, apply for, obtain or procure any surety bond or contract of insurance which can be obtained by the bidder, contractor or subcontractor except contracts of insurance for builder's risk or owner's protective liability.[130] Districts, however, 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.[131]

Based upon Walt Rankin & Associates, Inc. v. City of Murrieta,[132] school districts and community college districts now have a mandatory duty to investigate the sufficiency of a surety prior to approving a faithful performance bond and/or payment bond. Only California admitted surety insurers will be acceptable for the issuance of bonds. "Admitted" means that a surety insurer is permitted by the State Department of Insurance (DOI) to issue surety bonds in California. To be an "admitted insurer" in California, the surety must submit periodic financial audits and be subject to specific reserve requirements that meet DOI standards.

District must verify the status of the surety by one of the following ways:

1. Printing out information from the website of the California 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 for the county in which the district is located that confirms the surety is an admitted surety insurer and attaching it to the bond.[133]

If the admitted surety insurer still appears questionable, then districts may impose certain requirements upon sureties. These requirements include:

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 ten 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 ten calendar days of the insurer's receipt of a request to submit the copy;

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[129] Government Code section 4420(a).
[130] Government Code section 4420(b).
[131] Government Code section 4421.
[132] Walt Rankin & Associates, Inc. v. City of Murrieta, 84 Cal.App.4th 605 (2000).
[133] Code of Civil Procedure section 995.311.

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 ten 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 within ten days of the insurer's receipt of the request to submit the statements.[134]

If the surety submits the required documents and it appears that the bond was properly executed, if the insurer is authorized to transact surety business in the State of California and if 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 10 percent of its capital and surplus as shown by its last statement on file in the office of the Insurance Commissioner.[135]

J. Payment Bonds and Faithful Performance Bonds

The contractor must provide a payment bond for all public works projects which exceed $25,000.00 before beginning the performance of the work.[136] Architects, engineers and land surveyors providing professional services for public works are not required to file a payment bond.[137]

The purpose of a payment bond is to ensure that laborers' and materialmen's claims against the contractor and subcontractors for work done or materials furnished in connection with the public works project will be paid. The payment bond must provide that the surety shall pay all amounts if the original contractor or subcontractor fails to pay any person furnishing labor or materials or fails to pay amounts due under the Unemployment Insurance Code with respect to labor or work performed under the contract and fails to pay any amounts required to be deducted, withheld and paid over to the Employment Development Department from the wages of employees of the contractor and subcontractors.[138] A general contractor who fails to file a payment bond with the district cannot be paid even when the job is completed satisfactorily and all claims for labor and materials have been satisfied. The failure to file the bond is a breach of a broad public policy.[139]

The payment bond must be 100 percent of the contract price.[140] The general contractor may require subcontractors to provide a payment bond to indemnify the general contractor for any loss sustained by the original contractor because of any default by the subcontractor.[141]

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[134] Code of Civil Procedures section 995.660.
[135] Code of Civil Procedure section 995.660(a)(3).
[136] Civil Code section 3247; 52 Ops.Cal.Atty.Gen. 8 (1969); 38 Ops.Cal.Atty.Gen. 143(1961).
[137] Civil Code section 3247(c).
[138] Civil Code section 3248.
[139] 38 Ops.Cal.Atty.Gen. 143 (1961).
[140] Civil Code section 3248.
[141] Civil Code section 3248.

Faithful Performance Bonds (100%) are not required by law but are strongly recommended in projects over $25,000. A faithful performance bond requires a surety to complete a project in the event the contractor defaults.

K. Stop Notices

Persons performing labor or supplying materials or equipment for works of improvement on privately owned property may file mechanics' liens to guarantee payment for their services.[142] However, mechanics liens' may not be filed on public works projects.[143] Consequently, persons, providing labor, supplying materials or equipment on public works, file stop notices for claims against a general contractor's payment bond.

A stop notice is a demand by a claimant that the owner withhold, for the claimant's benefit funds, that which would otherwise be paid to the general contractor. In theory, the filing of a valid stop notice imposes a trust upon the district holding the funds and if the agency fails to comply with the stop notice, even unintentionally, it may be liable to the claimant.[144] Civil Code section 3186 provides in part:

> "It shall be the duty of the public entity, upon receipt of a stop notice . . . , to withhold from the original contractor, . . . money . . . due or to become due to that contractor in an amount sufficient to answer the claim stated in the stop notice and to provide for the public entity's reasonable cost of any litigation thereunder. The public entity may satisfy this duty by refusing to release money held in escrow pursuant to Section 22300 of the Public Contract Code."

After stop notices are filed, the general contractor loses the right to collect the amount of those claims on behalf of the subcontractors, and the district is required to pay those claims to the stop notice claimant.[145] The general contractor cannot recover from the district the amounts the district was obligated to pay the stop notice claimants.[146]

A claimant may file a stop notice only if the claimant has given the preliminary 20 day notice as required and filed the stop notice before the expiration of 30 days after the recording of a notice of completion or notice of cessation or if no notice of completion or notice of cessation is recorded, 90 days after the completion or cessation.[147] If the general contractor or subcontractor disputes the correctness, validity or enforceability of any stop notice, the district may, in its discretion, permit the general contractor to file with the district a bond executed by a corporate surety in an amount equal to 125 percent of the claims stated (i.e. a release bond) in the stop notice, conditioned for the payment of any sum which the stop notice claimant may recover on the claim together with costs of suit in the action. Upon the filing of a release bond with the district, the district shall not withhold any money or bonds from the general contractor on

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[142] Civil Code section 3110.
[143] Civil Code section 3109.
[144] United States Fidelity and Guarantee Company v. Oak Grove Union School District, 205 Cal.App.2d 226, 231 (1962); Civil Code section 3186.
[145] Stanislaus Loss Pump Machinery and Construction Corporation v. City of Modesto, 200 Cal.App.3d 1442, 1447 (1988).
[146] Ibid.
[147] Civil Code sections 3098, 3183 and 3184.

account of the stop notice. The surety or sureties upon such bond shall be jointly and severally liable to the stop notice claimant with the surety or sureties upon any payment bond furnished by the general contractor. Therefore, the release bond should be obtained from a different surety.[148]

If the general contractor asserts that the claim upon which the stop notice is based is not included within the types or classifications of claims set forth in the Civil Code or that the claimant is not one of the persons named in Civil Code section 3181 or the amount of the claim as specified in the stop notice is excessive or there is no basis in law for the claim set out in the stop notice, the general contractor may have the issues determined in a summary court proceeding.[149] As part of the summary proceedings, the general contractor shall serve upon the district an affidavit and a copy thereof alleging the legal grounds upon which the general contractor disputes the stop notice.[150] The district shall then serve upon the stop notice claimant the affidavit and demand for release of funds with a written notice stating that the public entity will release such money or bonds as demanded by the general contractor unless the stop notice claimant files with the public entity a counter affidavit within 20 days after service upon the claimant of the copy of such affidavit.[151]

If the stop notice claimant contests the general contractor's affidavit and demand for release of funds, the claimant shall serve upon the district a counter affidavit alleging the details of the claim and the specific facts upon which the claimant contests or rebuts the allegations in the general contractor's affidavit with proof of service of such counter affidavit upon the general contractor. If a counter affidavit is not served upon the district within the time allowed, the district shall forthwith release the money or bonds without further notice to the stop notice claimant and the district shall not be liable in any manner for making such release. The district shall not be responsible for the validity of the affidavit and counter affidavit.[152] If a counter affidavit with proof of service is appropriately filed, the general contractor or the claimant may file an action in superior court for a declaration of the respective rights of the parties.[153]

At the request of the general contractor or the stop notice claimant, the hearing must be granted by the superior court within 15 days from the date of making an appropriate motion unless continued by the court for good cause.[154] At the hearing, the general contractor has the burden of proof. The district shall file the affidavit and counter affidavit with the court and the affidavit and counter affidavit shall constitute the pleadings. The court may make a decision based upon the affidavit and counter affidavit or order a more extensive hearing. At the conclusion of the hearing, the court shall make and enter its order determining whether the demand for release of the stop orders shall be allowed and the general contractor shall serve a copy of such order on the public entity.[155]

Timelines for filing a stop notice may be extended by the courts where the courts find that the district influenced the stop notice claimant not to pursue enforcement of the stop

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[148] Civil Code section 3196.
[149] Civil Code section 3197.
[150] Civil Code section 3198.
[151] Civil Code section 3199.
[152] Civil Code section 3200.
[153] Civil Code section 3201.
[154] Ibid.
[155] Civil Code section 3203.

notice.[156] A subcontractor registered as a hazardous waste hauler may also serve a stop notice upon a district if a contractor who has entered into a contract with a district for investigation, removal or remedial action or disposal relative to the release or presence of a hazardous material or hazardous waste, fails to pay the subcontractor within ten days after the investigation, removal or remedial action or disposal is completed.[157]

L. Damages for Breach of Construction Contracts

In Lewis Jorge Construction Management, Inc. v. Pomona Unified School District,[158] the California Supreme Court ruled that a general contractor may not recover damages for potential lost profits which the general contractor claimed would have been earned on future construction contracts but did not due to the contractor's impaired bonding capacity. The California Supreme Court held that potential profits from future contracts were not a proper item of general damages in an action for breach of contract and ruled that the contractor did not prove special damages in this particular case. The ruling in Lewis Jorge should be beneficial to school districts in future cases.

In 1994, the Pomona Unified School District solicited bids for building improvements at one of its elementary schools. The district awarded the contract to Lewis Jorge Construction Management, Inc., the low bidder. The contractor did not complete the project on the specified day and the district withheld payments to the contractor. On June 5, 1996, the district terminated the contract and made a demand on the contract as surety to finish the project under the performance bond the surety had provided for the project. The surety then hired another contractor to complete the school project.

Lewis Jorge sued the district, alleging the school district breached the contract by declaring Lewis Jorge in default and terminating it from the construction project. At trial, Lewis Jorge presented evidence from its bonding agent, that its bonding limit of $10 million per project with an aggregate limit of $30 million for all work in progress was reduced to $5 million per project with an aggregate limit of $15 million. Lewis Jorge contended that some time in 1998, due to the loss of bonding capacity, it ceased bidding on public projects and eventually went out of business.

At trial, Lewis Jorge's expert witness testified that Lewis Jorge lost approximately $3,148,107 as a result of the loss of bonding capacity. The jury ruled in favor of Lewis Jorge, finding the district liable for $362,671 owed on the school construction contract, and awarded $3,148,197[159] in profits Lewis Jorge did not realize due to the loss or reduction of its bonding capacity. The school district did not appeal the ruling that it breached the contract with Lewis Jorge but appealed the award of damages for future profits.

The California Supreme Court reversed the award of damages of future projects by the trial court and the Court of Appeal. The California Supreme Court held that the damages

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[156] Structural Steel Fabricators, Inc. v. City of Orange, 234 Cal.App.3d 1206 (1991); J.H. Thompson Corporation v. D.C. Contractors, 4 Cal.App.4th, 1355 (1992); W.F. Hayward Company v. Transamerican Insurance Company, 16 Cal.App.4th 1101 (1993).

[157] Public Contract Code section 4107.7; Health and Safety Code section 25163.

[158] 34 Cal.4th 960, 22 Cal.Rptr.3d 340 (2004).

[159] The jury returned an award ninety dollars greater than the lost profit sum calculated by the expert witness.

awarded to an injured party for breach of contract are supposed to be equivalent to the benefit of the plaintiff's contractual bargain. The damages cannot exceed what it would have received if the contract had been fully performed on both sides.

The court noted that contractual damages fall into two categories: general damages or direct damages, and special damages or consequential damages. The court defined general damages as those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. The court defined general damages as a natural and necessary consequence of a contract breach that are within the contemplation of the parties and are predictable at the time the contract was entered into.

The court defined special damages as those losses that do not arise directly and inevitably from a similar breach of any similar agreement. Special damages are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties. Special damages are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party, or were matters of which the breaching party should have been aware at the time of contracting. A party assumes the risk of special damages liability for unusual losses arising from special circumstances only if the party was advised of the facts concerning special harm which might result from the breach. Damages beyond the expectation of the parties are not recoverable as special damages. Special damages for breach of contract are limited to losses that were either actually foreseen or were reasonably foreseeable when the contract was formed.

The California Supreme Court held that in the Lewis Jorge case, the facts do not support an award of general damages or special damages for loss of profits on future contracts. The court held that the district's termination of the school construction contract did not directly or necessarily cause Lewis Jorge's loss of potential profits on future contracts. The loss resulted from the decision of the surety at the time of the breach to cease bonding Lewis Jorge. The court also held that the future lost profits could not be awarded as special damages because there was insufficient proof and the claims of Lewis Jorge were uncertain and speculative. The court held that at the time the school district entered into a contract with Lewis Jorge, it did not know what Lewis Jorge's bonding capacity was or how the surety would evaluate Lewis Jorge's bonding limits.

The California Supreme Court reversed the lower court's award of $3,148,197 for lost profits.

Based on the Lewis Jorge case, it will be difficult for general contractors to recover potential lost profits in future cases against school districts and community college districts.

M. Liability to Contractor for Delay by District

Public Contract Code section 7102 prohibits districts from limiting the recovery of damages by a general contractor or subcontractor due to delays in construction caused by the district. Section 7102 specifically states that contract provisions limiting such damages are void.[160]

[160] Public Contract Code section 7102.

N. Prevailing Wage Rates

Districts must pay the prevailing wage rate established by the Director of the Department of Industrial Relations on public works projects if the project exceeds the amount specified by statute.[161] When contracting for public works, districts must obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the work is to be performed for each craft classification or type of workman needed to execute the contract from the Director of the Department of Industrial Relations.[162] Districts must specify in any contract for public works and in the call for bids for the contract and the bid specifications, the general rate of per diem wages due or include a statement that copies of the prevailing rate of per diem wages are on file at the district office and shall be made available to any interested parties upon request. The district is also required to post a copy of the prevailing wage rate at each job site.[163]

Public works for purposes of prevailing wage rates include construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds. Construction includes work performed during the design and pre-construction phases of construction including, but not limited to, inspection and land surveying work. The laying of carpet done under a building lease maintenance contract and paid for out of public funds and the laying of carpet in a public building done under contract and paid for in whole or in part out of public funds are also considered public works for purposes of the payment of prevailing wages.[164] If there is any uncertainty regarding the appropriate general prevailing rate of per diem wages, then Districts may wish to request an advisory opinion from the Chief of the Division of Labor Statistics and Research (DLSR) or the Director of the Department of Industrial Relations.

O. Alternates

Effective January 1, 2001, Assembly Bill No. 2182[165] adds provisions to the Public Contract Code which specify the procedure for alternative bids. The legislation puts limits on the use of alternative bids.

Assembly Bill No. 2182 adds Public Contract Code section 20103.8, which authorizes a local agency to let a bid for public works to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted. The legislation requires that whenever additive or deductive items are included in a bid, the bid solicitation must specify which of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided in No. 1 may be used:

1. The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

[161] Labor Code sections 1770, et seq.
[162] Labor Code section 1773.
[163] Labor Code section 1773.2.
[164] Labor Code section 1720.
[165] Stats.2000, ch. 292, Public Contract Code sections 10126, 10780.5, 20103.8.

2. The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified and the bid solicitation is being used for the purpose of determining the lowest bid price.

3. The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items taken in order from a specifically identified list of those items, depending on available funds as identified in the solicitation.

4. The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

A responsible bidder who submitted the lowest bid as determined using one of the methods above shall be awarded the contract if it is awarded. Once the contract has been awarded, adding to or deducting from the contract any of the additive or deductive items is not prohibited. The purpose of the legislation, as stated by the Legislature, is to limit the selective use of additive and deductive bid items to determine the lowest responsible bidder.

P. Disabled Veteran Business Enterprises

On July 19, 1999, the Governor approved a new Section 17076.11 to the Education Code, which requires that any school district using funds allocated pursuant to the Leroy F. Greene School Facilities Act of 1998 for the construction or modernization of a school building shall have a participation goal of at least 3% per year of the overall dollar amount expended each year by the school district Disabled Veteran Business Enterprise (DVBE). The intent of this section was to ensure applicability of the DVBE requirements under the new facilities act. A sample Disabled Veteran Business Enterprises Certification form is found in the Appendix.

Q. Criminal Record Check

Education Code section 45125.1 provides that if the employees of any entity that has a contract with a school district may have any contact with pupils, those employees shall submit or have submitted their fingerprints in a manner authorized by the Department of Justice together with a fee determined by the Department of Justice to be sufficient to reimburse the Department for its costs incurred in processing the application.

The Department of Justice shall ascertain whether the individual whose fingerprints were submitted to it has been arrested or convicted of any crime insofar as that fact can be ascertained from information available to the Department. When the Department of Justice ascertains that an individual whose fingerprints were submitted to it has a pending criminal proceeding for a violent felony listed in Penal Code section 1192.7(c), or has been convicted of such a felony, the Department shall notify the employer designated by the individual of the criminal information pertaining to the individual. The notification shall be delivered by telephone and shall be confirmed in writing and delivered to the employer by first-class mail.

The contractor shall not permit an employee to come in contact with pupils until the Department of Justice has ascertained that the employee has not been convicted of a violent or serious felony. The contractor shall certify in writing to the governing board of the school district that none of its employees who may come in contact with pupils have been convicted of a violent or serious felony. A sample form for a Criminal Record Check Certification can be found in the Appendix.

Penal Code section 667.5(c) lists the following "violent" felonies: murder; voluntary manslaughter; mayhem; rape; sodomy by force; oral copulation by force; lewd acts on a child under the age of 14 years; any felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant inflicts great bodily injury on another; any robbery perpetrated in an inhabited dwelling; arson; penetration of a person's genital or anal openings by foreign or unknown objects against the victim's will; attempted murder; explosion or attempt to explode or ignite a destructive device or explosive with the intent to commit murder; kidnapping; continuous sexual abuse of a child; and carjacking.

Penal Code section 1192.7 lists the following "serious" felonies: murder; voluntary manslaughter; mayhem; rape; sodomy by force; oral copulation by force; a lewd or lascivious act on a child under the age of 14 years; any felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant personally inflicts great bodily injury on another, or in which the defendant personally uses a firearm; attempted murder; assault with intent to commit rape or robbery; assault with a deadly weapon on a peace officer; assault by a life prisoner on a noninmate; assault with a deadly weapon by an inmate; arson; exploding a destructive device with intent to injure or to murder, or explosion causing great bodily injury or mayhem; burglary of an inhabited dwelling; robbery or bank robbery; kidnapping; holding of a hostage by a person confined in a state prison; attempt to commit a felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant personally uses a dangerous or deadly weapon; selling or furnishing specified controlled substances to a minor; penetration of genital or anal openings by foreign objects against the victim's will; grand theft involving a firearm; carjacking; and a conspiracy to commit specified controlled substances offenses.

R. Delegation of Authority

Frequently, the issue of how much authority a governing board may delegate to a school administrator arises. Education Code section 35161 states:

> "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 my delegate to an officer or employee of the district any of those powers or duties. The governing board, however, retains ultimate responsibility over the performance of those powers or duties so delegated."

Education Code section 70902 authorizes the governing board of a community college district to adopt a rule delegating any power not expressly make nondelegatable by statute to the district's chief executive officer or any other employee the governing board may designate.

While Sections 35161 and 70902 contain broad provisions allowing the delegation of authority, other provisions in the Education Code place limitations on the delegation of authority with respect to contracting for the purchase of supplies, materials, equipment and services.

Education Code sections 39656 and 81655 allow the governing board of a district by a majority vote to delegate the power to contract to its district superintendent who may in turn designate an employee of the district to perform certain duties. The delegation to contract may be limited by the governing board with respect to time, money or subject matter or it may provide for a broad authorization. However, no contract may by designated employees is valid or enforceable unless and until it has been approved or ratified by the governing board.[166] In Persh, a landowner sought to enforce a contract against a school district for the purchase of land for a junior high school. The court held that although the deputy superintendent and the landowner reached an agreement, the contract was held invalid because the contract had not been approved or ratified by the governing board of the district.[167]

In addition, Education Code sections 39657 and 81656 authorize governing boards to delegate to employees of the district the authority to purchase supplies, materials, apparatus, equipment and services up to the bid limits. Any purchase above the bid limits would require competitive bidding and the prior approval of the governing board. The officer or employee invested with the authority to contract for purchases can be held personally liable for any misconduct or wrongdoing in office and may be held personally liable for any and all district funds paid out as a result of such misconduct or wrongdoing.[168]

S. Design Build Projects

School districts may use a design build construction process for school projects greater than ten million dollars ($10,000,000) , until January 1, 2007.[169] Design build is defined as a procurement process in which both the design and construction of a project are procured from a single entity. Upon making a determination that it is in the best interest of the school district, the governing board of a school district may enter into a design build contract for both the design and construction of a school facility if that expenditure exceeds ten million dollars ($10,000,000) if, after evaluation of the traditional design-bid-build process of school construction and of the design build construction process in a public meeting, the governing board makes written findings in a resolution that use of the design build construction process on the specific project under consideration will accomplish one of the following objectives:

1. Reduce comparable project costs,

2. Expedite the project's completion, or

[166] Santa Monica Unified School District v. Persh, 5 Cal.App.3d 945 (1970).
[167] Ibid.
[168] Education Code sections 39656 and 81655; Education Code sections 39657 and 81656.
[169] Education Code sections 17250.10 – 17250.50.

3. Provide features not achievable through the traditional design-bid-build method.

Design build construction process must proceed according to specific statutory parameters and guidelines developed by the Superintendent of Public Construction.[170]

T. Maintenance Plan

The Leroy F. Greene School Facilities Act of 1998 (Greene Act) provides funding to school districts to finance the construction and modernization of school facilities. Effective January 1, 2002, any school district applying for funding pursuant to the Greene Act must annually review its maintenance plan, update it as needed, and certify that it is in compliance with the plan.[171] School districts must certify that its maintenance plan includes prescribed criteria identifying the major maintenance needs of the school district and a schedule for completion of the major maintenance. The plan must include the following components:

1. Identification of the major maintenance needs.

2. Specification of a schedule for completing the major maintenance.

3. Specification of a current cost estimate for the scheduled major maintenance needs.

4. Specification of the school district's schedule for funding a reserve to pay for the scheduled major maintenance needs.

5. Review of the plan annually as a part of the school district's annual budget process and update, as needed, the major maintenance needs, the estimates of expected costs, and any adjustments in funding of the reserve.

6. Availability for public inspection of the original plan, and all updated versions of the plan at the office of the superintendent of the school district during the working hours of the school district.

MISCELLANEOUS

A. Sale or Lease of Surplus Property

Education Code section 17453.1 states that notwithstanding any other provision of law, a school district may sell or lease Internet appliances or personal computers to parents of students within the school district for the purpose of providing access to the school district's educational computer network, at a standard price, not to exceed the cost incurred by the school district in purchasing the Internet appliance or personal computer. A school district that elects to sell or lease Internet appliances or personal computers shall provide access to the school district's

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[170] Education Code section 17250.20.
[171] Education Code section 17070.77.

educational network for those families that cannot afford access to the school district's educational network. In conducting a sale or lease pursuant to Section 17453.1, a school district shall not be required to call for bids or to sell or lease Internet appliances or personal computers to the highest bidder. For purposes of Section 17453.1, an Internet appliance is a technological product that allows a person to connect to, or access, an online educational network.

B. Community College Districts – Surplus Personal Property

Education Code section 81450.5 authorizes a community college district, without providing public notice and advertising in the newspaper, to exchange for value, sell for cash, or donate any personal property belonging to the community college district if all the following criteria are met:

1. The district determines that the property is not required for school purposes, that it should be disposed of for the purpose of replacement, or it is unsatisfactory or not suitable for school use.

2. The properties exchanged with, or sold or donated to, a school district or community college district that has had an opportunity to examine the property proposed to be exchanged, sold or donated.

3. The recipient of the property would not be inconsistent with any applicable districtwide or schoolsite technology plan of the recipient district.

In addition, Education Code section 81452 has been amended to allow the community college district, by unanimous vote of its governing board, to sell surplus personal property up to five thousand dollars ($5,000) in value by private sale conducted by an employee.