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TO: ALL K-12 AND COMMUNITY COLLEGE DISTRICT CLIENTS
FROM: CHRISTOPHER P. BURGER, WILLIAM A. HORNBACK,
ALAN B. HARRIS, BUSINESS PRACTICE GROUP
RE: INCREASE IN BID THRESHOLD AND
COMPETITIVE BIDDING REFRESHER

This letter will update you on the recent increase in the bid threshold for certain non-public works contracts, as well as provide a refresher on some of the issues you need to remember in connection with competitive bidding. Please circulate this to all appropriate personnel in the district with purchasing authority.

1. Increase In Bid Threshold Effective January 1, 2018.

Effective January 1, 2018, the bid threshold for the award of contracts for the purchase of equipment, materials, supplies, services (except "construction services"), and certain repairs and maintenance which are not a "public project," has been adjusted upward to **\$90,200** from \$88,300.

As you know, the Public Contract Code requires school and community college districts to competitively bid contracts for these items exceeding \$50,000. This figure is adjusted annually for inflation by the State Superintendent of Public Instruction for K-12 districts and the California Community College Chancellor's Office for community college districts, using an indicator published by the United States Department of Commerce based upon the prior fiscal year.

The threshold for construction services/public works is not adjusted and remains at \$15,000 (\$45,000 for districts that have adopted the uniform construction cost accounting principles referred to in Public Contract Code Section 22000 and following).

Remember that the bid threshold applies whether the transaction is in the form of a sale or lease to the district. In addition, many multi-year contracts for the purchase of goods and services may not exceed the limits in any single year, but if the aggregate amount exceeds the threshold, these contracts should normally be competitively bid.

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Failure to observe competitive bidding requirements brings harsh results. A contract awarded in violation of the bidding laws is *illegal, void, and unenforceable*. Absent certain special circumstances, a vendor or contractor is generally not permitted to recover from a district for goods or services provided under an illegal contract. People doing business with districts are presumed to be aware of the competitive bidding requirements and understand the risks of violating them.

2. What Is A Public Work?

Public Contract Code Section 20111[20651] provides that contracts involving an expenditure of more than \$15,000 for a "public project" as defined in Public Contract Code Section 22002(c) must be competitively bid. (Citations in brackets refer to the statutes applicable to community college districts.) As mentioned above, this threshold is not adjusted for inflation.

Under Public Contract Code Section 22002, a "public project" includes "construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility," and includes painting or repainting, other than "minor repainting" for maintenance purposes.

The statute indicates that a public project does not include maintenance work, defined to include routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purpose, minor repainting, resurfacing of streets and highways at less than one inch, landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.

The scope of what may be considered alteration or improvement of a public facility is not always clear. If the work physically impacts a facility in some way, districts are advised to consider whether it may be considered a public project. (This can include, for example, even the bolting or affixing of furniture or equipment to a public building.) In addition, the line between a public project and repairs and maintenance is not always easy to distinguish.

Remember that a complete set of public works bid documents, including notices calling for bids and bid forms, is available for your use and posted on the Schools Legal Service website, www.schoolslegalservice.org, Business & Construction Section.

3. What Are The Basic Rules For Competitive Bidding?

The basic competitive bidding rules appear in the Public Contract Code, in Sections 20110-20118.4 for K-12 districts and Sections 20650-20659 for community colleges. A competitively bid project or contract is one in which a notice calling for bids describing the project or the item to be purchased is advertised, sealed bids are timely received and considered, and an award is made to the lowest responsible bidder whose bid is responsive to the bid specifications, unless the district opts to reject all bids.

To secure competitive bids, the governing board must publish a notice calling for bids 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. (Public Contract Code

Section 20112 [Education Code Section 81641]. See also Government Code Section 53068.) K-12 districts may (but are not required to) post the notice on the district website or electronic portal, specifying the same information, as well as the website where bids will be "opened."

The notice must state the work to be done or materials or supplies to be furnished, and the time and place where bids will be opened. For notices involving construction projects, a variety of other information is required by various statutes (for example, information concerning prevailing wage, bid alternates, etc.).

Public Contract Code Section 20112 provides that whether or not bids are opened exactly at the time fixed in the public notice for opening bids, a bid shall not be received after that time.

4. What Are The Alternative Bidding Procedures?

The Legislature has adopted an alternative bidding process for districts willing to adopt certain construction accounting procedures. By passing a resolution formally adopting the Uniform Construction Cost Accounting Procedures and notifying the State Controller, districts can take advantage of a higher bid threshold and other flexibility in lieu of the usual procedures. The alternative bidding procedures are available for construction projects only, or for the purchase of materials consumed on a public project. (Public Contract Code Section 22000 and following.)

The following is a summary of the alternative procedures:

- Projects up to \$45,000 may be performed either by (1) employees of the public agency by force account, (2) negotiated contract, or (3) purchase order, without competitive bidding (Section 22032).
- "Informal" bidding procedures may be used for contracts of \$175,000 or less (or up to \$187,500 if all bids come in over \$175,000 and the governing board by a 4/5 vote adopts a resolution to award at the higher amount). This means that instead of advertising in the newspaper, a district can mail a notice requesting informal bids to a list of interested contractors maintained by the district, a list of specified trade journals, or both. The district must still award to the lowest responsible bidder.
- Formal bid procedures, slightly different than the usual rules, apply for projects over \$175,000. Publication is required only once, at least 14 calendar days prior to bid opening. Notice must also be mailed to the specified trade journals at least 15 calendar days prior to bid opening.

These amounts are periodically adjusted by the State Controller's Office.

For forms to adopt the Uniform Construction Cost Accounting Procedures, see the Business & Construction page on the Schools Legal Service website, www.schoolslegalservice.org, which includes a link to the Cost Accounting Policies and Procedures Manual maintained on the State Controller's website.

5. Are Some Contracts Exempt From The Competitive Bidding Requirements?

Public Contract Code Section 20111(c) [20651(c)] expressly provides that contracts for professional services or advice, insurance services, other purchases or services exempt from Section 20111[20651], and work done by day labor or force account (i.e., the district's own forces) in accordance with Section 20114 [20655] are not subject to the bidding requirements outlined above. The following are some examples of other types of projects/contracts not subject to the usual competitive bidding requirements:

- **Force Account/Day Labor.** K-12 districts having an average daily attendance under 35,000 can authorize the use of force account/day labor without competitive bidding so long as the job does not require more than 350 hours. Larger districts can authorize force account or day labor for up to 750 hours per job, or when the cost of material does not exceed \$21,000. The rule is the same for community college districts, except that the threshold is 15,000 full-time equivalent students. (Public Contract Code Section 20114 [20655].)
- **Emergencies.** Public Contract Code Section 20113 [20654] provides that competitive bidding may be avoided when repairs, alterations, work, or improvements are necessary to avoid danger to life or property in an emergency. An emergency 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. In those cases, the governing board must approve the contract by unanimous vote and obtain the approval of the county superintendent of schools for the contract. The procedural rules for declaring an emergency are different for districts adopting the Uniform Construction Cost Accounting Procedures (see Public Contract Code Sections 22035, 22050).
- **The State List.** Competitive bidding may be avoided when purchasing materials, equipment, or supplies through the Department of General Services or utilizing its California Multiple Award Schedule ("CMAS"). (Public Contract Code Section 20118 [20653]) (See also, Education Code Section 17595 and Public Contract Code Section 10298 and following.)
- **Surplus Federal Property.** Competitive bidding may be avoided when purchasing certain surplus property from the federal government, however, the situations in which this exception may apply have been substantially reduced in recent years. (Education Code Section 17602 [81653].)
- **Piggyback Bids.** Competitive bidding may be avoided by proper arrangement with another public agency to purchase or lease materials, supplies, equipment, vehicles, and other personal property where the purchasing agency has complied with its own applicable statutes. This is also known as "piggybacking." A piggyback contract generally cannot include any "public work." (Public Contract Code Section 20118 [20652].) The law was recently changed to specifically permit districts to make payment directly to the piggyback vendor rather than to the school district initiating the contract. In certain circumstances districts can also contract directly with a vendor having a contract

in place with a public agency. We recommend you have piggyback arrangements reviewed by legal counsel.

- Data Processing Equipment. After soliciting bids in accordance with the statutory bidding requirements, a district may contract with any one of the three lowest competitive bidders for the procurement and/or maintenance of electronic data processing systems and supporting software in any manner the board deems appropriate. (Public Contract Code Section 20118.1 [Education Code Section 81645].)
- Technology and Telecommunications, Related Equipment, Software and Services. Under a recent statute K-12 districts may consider factors other than price in the award of contracts for technology, telecommunications, related equipment, software, and services. Factors such as financing, reliability, life-cycle, delivery timetables, support, fitness for purpose and warranties may comprise part of the justification for an award. The authority does not extend to construction, the process to be used is similar to bidding, and the school district must make findings justifying any award made to someone other than the low bidder. (Public Contract Code Section 20118.2.)
- Transportation Services. When contracting for transportation services, the district must solicit bids if it is contemplated that the contract will exceed \$10,000 and be with an entity other than a common carrier or a municipal transit system. However, the district may award the contract to other than the lowest responsible bidder. (Education Code Section 39802; the former statute for community colleges, Education Code Section 82302, was repealed.)
- Instructional Materials. Districts may purchase specified instructional materials and software without taking estimates or advertising for bids. (Public Contract Code Section 20118.3 [Education Code Section 81651].)
- Energy Conservation and Energy Management Contracts. The Government Code permits districts to enter into specified energy conservation agreements without formal bidding, provided the governing board can make findings after a public hearing that the cost of the project will be paid for out of the energy savings. K-12 districts may use a "request for proposal" process rather than formal bidding when considering "energy service contracts" and "facility financing contracts" and "facility ground leases" related to energy conservation facilities. (Government Code Sections 4217.10 and following.) Districts are strongly urged to consult legal counsel before proceeding with an energy conservation agreement without competitive bidding. K-12 applicants to the School Facilities Program for partial funding of energy services and energy management contracts should strongly consider using a competitive process to select their contractor.

For community college districts, while bidding is still required in purchasing energy management systems, the "lowest" bid can be based on the net cost or savings after projecting the benefits of the system to be acquired. (Education Code Section 81661.)

- Insurance. Districts may purchase insurance policies (including liability, property loss, and group and life coverage) without going to bid. (Government Code Sections 990 and 5322, Education Code Sections 35208 [72506] and 39601 [81601].)
- Professional Experts. Without going to bid, districts may contract with a person who will furnish "special services and advice" to the district in financial, economic, accounting, engineering, legal, or administrative matters. Any person so employed must be specially trained and experienced and competent to perform those special services. (Government Code Section 53060.) However, all "architectural and engineering services" as defined in Government Code Section 4529.10 must be procured pursuant to a fair, competitive selection process. (See discussion on selection of construction experts below.) (Government Code Section 4529.12.) (See also, Education Code Section 45103.1[88003.1] for personal service contracts for services currently or customarily performed by the classified service.)
- Other Special Services and Advice. As discussed above, Government Code Section 53060 applies to professional experts such as attorneys and accountants. That section has also been interpreted to permit acquisition of services outside those typically considered "professional," such as services for security alarm monitoring, operation of a campus bookstore for a community college, or sewage disposal. The services that fall within this exclusion from competitive bidding depend of the nature of the services, the necessary qualifications required of persons to perform the services, and the availability of the services from public sources.

If the services may be obtained from district employees, this section does not provide authority to contract outside for those services. Whether or not a service is "special" may depend upon the circumstances, and it is recommended that districts consult with legal counsel if this is an issue. Contracting out for services which are or could be provided by the classified service may have collective bargaining implications. In addition, the Education Code may restrict the ability of the District to contract out. (See, for example, Education Code Section 45103.1 [88003.1].)

■ Futile and Unavailing. Competitive bidding may be avoided when unique circumstances establish that compliance with the competitive bidding statutes would be "futile and unavailing." Of course, this situation will occur only rarely and this exception to competitive bidding should be invoked only after consulting with legal counsel. Common situations where the concept of futile and unavailing may apply include the following:

- Repeated failure to receive bids while engaged in competitive bidding;
- Where there is but a "sole source" for a product properly specified (note that this does not include the typical "exclusive regional sales representative" situation);
- Where, under the circumstances, there is no advantage to the public to be gained by engaging in competitive bidding.

- Perishable Foodstuffs/Seasonal Commodities. School and community college districts are permitted to acquire perishable foodstuffs and seasonal commodities necessary for cafeteria operation or food services without competitive bidding. Districts must adopt rules and regulations for such acquisitions, and such rules preempt any conflicting provisions of the Public Contract Code. (Education Code Section 38083 [Public Contract Code Section 20660].)
- Documentation for County Office of Education. As part of their responsibility in connection with processing K-12 district warrants, county offices of education may require districts to provide justification for the use of the above exemptions from competitive bidding. In general, use of the exemptions contemplates a knowing decision to award contracts under specific situations, and not an after-the-fact justification. Preferably the circumstances surrounding the authorization will be described in board minutes approving the transaction.

As indicated above, the courts closely scrutinize the letting of public contracts, and contracts awarded without strict compliance with legal requirements will be set aside (i.e., voided). As the California Court of Appeal observed in *Konica Business Machines U.S.A., Inc., v. Regents of University of California* (1988) 206 Cal.App.3d 449, "this preventative approach is applied even where it is certain that there was in fact no corruption or adverse effect on the bidding process, and the deviations would save money." Courts will closely scrutinize the reliance on exceptions to bidding requirements, so districts should take care to be sure the exception properly applies and that any legal requirements are observed.

6. What Is Bid Splitting?

Public Contract Code Section 20116 [20657] continues to make it unlawful to split or separate a project into smaller work orders or projects for the purpose of evading competitive bidding requirements. Depending upon the facts, it may be permissible for districts to separate a work, project, service, or purchase into smaller work orders or projects for other purposes, including for example:

- To utilize construction management.
- To act as its own prime contractor.
- To permit the use of smaller and/or specialized contractors, vendors, or service providers.
- To purchase equipment, materials, or supplies needed for a project directly from suppliers instead of through the contractor.
- To take advantage of existing district resources, donated goods or services, or other unique opportunities.

Because of the serious consequences if a district does not comply with bidding requirements (including possible criminal prosecution of district officers and employees), it is recommended that districts consult with legal counsel before taking any action that may be considered bid splitting.

7. How Can My District Screen Bidders?

Public Contract Code Section 20111.5 [20651.5] allows districts to require potential bidders to submit a prequalification questionnaire and financial statement, including a statement of the bidder's financial ability and experience in performing public works. To take advantage of this procedure, the district must adopt and apply a uniform system of rating bidders to determine the size of the contracts they are qualified to handle. The documents submitted must be verified under oath. They are not public records.

A bid may not be accepted from any bidder who has failed to submit the required prequalification documents at least five days before the bid opening. A bidder must have met the prequalification requirements (as to financial ability or other criteria) for at least one day prior to bid opening. In other words, it is not sufficient for a bidder to promise to meet the requirements once awarded the bid.

Model documents prepared by the California Department of Industrial Relations, in collaboration with industry and interested agencies, are mandated for use with most public entities except school districts. It is believed that school districts may elect to adopt and use these model forms for district prequalification purposes.

8. What Are The Rules Concerning Bid Alternates?

Districts may ask bidders to provide alternative bids for different variations of a proposed public works contract. The usual practice is to call for a price for the basic bid and for other prices which are expected to be either higher, if additional alternatives are also awarded, or lower if some alternatives are deleted. It is imperative that the notice to bidders and bid form clearly indicate whether the bidder must bid on all items. Public Contract Code Section 20103.8 requires K-12 districts to state the method that will be used to determine the lowest bid. While there is no similar statute for community college districts, it is recommended that they follow the same practice.

If the bid notice does not specify the method, the base bid without alternates will be used to determine the low bidder. Other acceptable methods include:

- The lowest bid will be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.
- The lowest bid will be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

- The lowest bid will be the lowest total of the bid prices on the base contract and those additive or deductive items which, when taken in order from a specifically identified list of those items and added to or subtracted from the base bid, are less than or equal to a funding amount publicly disclosed prior to bid opening.
- The lowest bid shall be determined in a manner that prevents 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.

The method stated in the bid notice is only used to determine the low bidder; once that has been determined through the designated method, a district is free to award whichever alternates it wishes.

9. How Much Contracting Authority Can The Board Delegate?

The governing board of any school or community college district may delegate to an officer or employee of the district any of the powers held by the board. Ultimate responsibility remains with the board. (Education Code Section 35161 [70902(d)].)

■ Blanket Designation of Authority Subject to Ratification. By majority vote of the board, the contracting power of the governing board of a district may be delegated to its superintendent or the superintendent's designee, or if there is no superintendent, to any other officer or employee. The delegation of power may be limited as to time, money, or subject matter, or may be a blanket authorization. However, no contract made pursuant to any delegation of authority is valid or constitutes an enforceable obligation against the district unless the contract has been approved or ratified by the governing board. (Education Code Section 17604 [81655].)

■ Delegation Under Bid Threshold Subject to Board Review. A district governing board may also adopt a rule delegating to any district officer or employee the authority to purchase supplies, materials, apparatus, equipment, and services. The rule cannot authorize any officer or employee to make any purchases in excess of the amounts specified by Section 20111/20651 of the Public Contract Code. The rule must prescribe the limits of the delegation as to time, money, and subject matter. All transactions entered into by the officer or employee must be "reviewed" by the governing board every 60 days. (Education Code Section 17605 [81656].)

WARNING: In the event of misconduct under either type of delegation rule, the district officer or employee given the power shall be personally liable for any and all moneys of the district paid as a result of the malfeasance.

We hope this information is useful to you. If you have any questions concerning the competitive bidding process, do not hesitate to contact the members of the Business Practice Group, Christopher Burger, Bill Hornback, and Alan Harris.