MEMORANDUM

To: John Carroll, Superintendent
From: Erin E. Stagg, Associate General Counsel
Date: September 8, 2020
Re: Emergency Temporary Structures or Buildings

You recently contacted our office for guidance regarding the substantive and procedural requirements to construct temporary structures or buildings for student occupancy under an Emergency Declaration adopted by the Board.

Typically, the construction, reconstruction, or alteration of school buildings or an addition to school buildings involves compliance with statutory requirements in the Education Code, Public Contract Code, Labor Code, Public Resource Code and Government Code as well as related implementing regulations. Due to the COVID-19 pandemic, certain statutory requirements have either been expressly modified by the enforcing state agency or subject to an emergency exemption if certain factors are established.

The following memorandum summarizes the requirements that typically apply when a school district constructs new structures or buildings and provides an analysis regarding requirements that have been modified or may be subject to an emergency exemption. In brief:

- A project that would otherwise require compliance with the Field Act and/or DSA approval will arguably still require Field Act compliance and DSA approval under expedited DSA pandemic emergency procedures.
- A school district board may pass an emergency declaration to enter into contracts without competitive bidding, by unanimous vote and with the approval of the county superintendent, if “a sudden, unexpected occurrence” 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.”
- An emergency declaration excusing competitive bidding does not excuse other statutory requirements relating to public contracts and public works projects.
• There is limited authority or guidance regarding the reach of an emergency declaration as it pertains to construction projects that implicate drainage, road conditions or grading or that are subject to state regulation under CEQA or the Coastal Act.

DSA and the Field Act

Education Code section 17280 expressly delegates supervision of the design and construction of any school building or the reconstruction or alteration of or addition to any school building to the Department of General Services which includes the Division of the State Architect (“DSA”). DSA’s responsibilities include carrying out and enforcing the Field Act, a set of standards and minimum requirements for the structural integrity of public school buildings. Education Code sections 17280 et seq.

As such, “[n]o contract for the construction or alteration of any school building, made or executed by the governing board of any school district or other public board, body, or officer otherwise vested with authority to make or execute a contract, is valid, and no public money shall be paid for any work done under a contract or for any labor or materials furnished in constructing or altering any building,” unless DSA approval in writing has been “had and obtained”. Educ. Code § 17307.

Recognizing the unprecedented challenges to reopening for in-person instruction, DSA issued Bulletin 20-01 (the “Bulletin”) to help school districts prepare for and meet federal, state and local reopening guidance for in-person instruction. The Bulletin “is to provide guidance to school districts in need of rapid placement of new buildings or structures or alterations to existing school buildings or structures, and temporary sanitation-related amenities such as hand washing stations due to emergency program needs in response to the COVID-19 pandemic.” Under the terms of the bulletin, DSA is expediting plan reviews for school districts in need of rapid placement of new relocatable buildings or tent structures or alterations to existing school buildings or structures, installation of permanent buildings or structures using DSA-approved pre check plans, or installation of temporary sanitation-related amenities such as hand washing stations.

Based on DSA’s express acknowledgment of the need for expedited plan review and issuance of the Bulletin, it is unlikely that an emergency declaration extends to excusing compliance with the Field Act and/or DSA approval.

Competitive Bidding

California’s strong public policy in favor of competitive bidding leads courts to strictly construe the definition of an “emergency” permitting a school district to enter into contracts without complying with competitive procurement policies. Specifically, Public Contract Code section 1102 defines an “emergency” as “a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services.”
In an emergency, section 20113 of the Public Contract Code expressly permits school districts to enter into contracts without advertising for or inviting bids “when any repairs, alterations, work, or improvement is necessary to any facility of public schools to permit the continuance of existing school classes, or to avoid danger to life or property.” In *Marshall v. Pasadena Unified School District*, 119 Cal. App. 4th 1241, 1255 (2004), the Court confirmed that the definition of emergency in section 1102 must be read into section 20113. Section 20113 imposes additional requirements on a school district proceeding under this section. Namely, in the event of an emergency, as defined by section 1102, the District may, *by unanimous vote and with the approval of the county superintendent of schools* enter into contracts without advertising for or inviting bids.

Many public agencies, including school districts, adopted resolutions during the initial shelter-in-place orders expressly declaring an emergency pursuant to section 1102 and authorizing administrative staff to enter into contracts without complying with competitive bidding requirements. Courts will construe “emergency” narrowly and evaluate whether the need for additional facilities is “a sudden, unexpected occurrence that poses a clear and imminent danger.” A contract for the construction of temporary structures and buildings – that, as discussed above, arguably requires compliance with the Field Act and receipt of DSA approval – would likely be construed differently than, for example, contracts for additional technology supplies to support distance learning, PPE for employees providing meal service or maintenance and construction services necessary to secure empty school-sites.

**CEQA**

Many school projects are eligible for categorical exemptions under CEQA. Thus, depending on the scope of the project, it may not be necessary to invoke an emergency exemption. However, the California Environmental Quality Act, which applies to projects that will either have a direct or reasonably foreseeable indirect impact on the environment, exempts “specific actions necessary to prevent or mitigate an emergency.” Pub. Res. Code § 21080(b)(4). For purposes of CEQA, “[e]mergency means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. Emergency includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage.” *CalBeach Advocates v. City of Solana Beach*, 103 Cal. App. 4th 529, 536 (2002)(internal quotations and citations omitted).

**Additional Statutory Requirements for New Construction**

Public Contract Code section 20113 expressly states that proceeding under the emergency exception to competitive bidding will not “eliminate the need for any bonds or security otherwise required by law”. Thus, contracts in excess of $25,000 require a contractor to provide a payment bond pursuant to Civil Code section 9550. Similarly, Labor Code sections 1720 *et seq.* will require the payment of prevailing wage for any public works project over $1000.00 and a contractor will be required to register with the Department of Industrial Relations for any new construction work over $25,000.00.
Local Regulations

Because of the involvement of DSA, local zoning, planning and building departments are not typically involved with the inspection and oversight of school construction. In recognition of the fact that the State has “occupied the field” with respect to the inspection and oversight of school construction, the Legislature adopted Government Code section 53094 authorizing a school district to exempt itself from local zoning and building regulations.

However, this exemption does not extend to local city or county ordinances (1) regulating drainage improvements and conditions, (2) regulating road improvements and conditions, or (3) requiring the review and approval of grading plans as these ordinance provisions relate to the design and construction of onsite improvements which affect drainage, road conditions, or grading. Gov. Code § 53097.

As noted above, given DSA’s acknowledgment of the need for expedited plan review and issuance of the Bulletin, it is unlikely that a school district’s emergency declaration will be construed as excusing Field Act compliance and/or DSA approval. By extension, a court could find that an emergency declaration does not excuse compliance with local city or county ordinances if drainage improvement and conditions will be impacted by the new structures. Further, because a section 53094 exemption only applies to city and county ordinances, as opposed to state requirements such as CEQA or the Coastal Act, it may be necessary to secure a coastal development permit absent express authority from the Legislature exempting emergency school building projects.

In sum, and with the now customary note of caution relating to legal requirements during the pandemic, namely, that statutes, regulations and guidance are frequently changing:

- Issuance of the Bulletin suggests that DSA will take the position that an emergency declaration does not excuse compliance with the Field Act or receipt of DSA approval for projects that would otherwise require such.
- Compliance with competitive bidding requirements may be excused, by unanimous vote and with the approval of the county superintendent, if a school district is able to demonstrate that “a sudden, unexpected occurrence” 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.”
- Other statutory requirements relating to public contracts and public works projects will still apply to contracts entered under an emergency declaration.
- Absent legislative clarification, it is unclear whether DSA’s expedited process will extend to construction projects that implicate drainage, road conditions or grading or that are subject to state regulation under CEQA or the Coastal Act.