

School Construction and Professional Services Procurement Best Practices

(Adopted July 15, 2011)

In April 2011, the San Diego Taxpayers Educational Foundation published a study (“School Facilities Bond Programs in San Diego County”) reviewing the performance of school facilities bond programs throughout San Diego County. This report analyzed the procurement policies and practices of all school districts in San Diego County with active school bond programs and determined that several steps could be taken by school districts to improve the transparency and objectivity of their procurement processes. This best practices document was developed in response to the findings of this report, which can be accessed at www.sdcta.org.

District Policies

Competitive Bidding

Board policies should explicitly define all district guidelines, regulations, and procedures related to procurement of contracts through competitive bidding. Any common practices or unspoken rules should also be included in written Board Policies. Clearly defined procurement policies increase a school district's transparency and provide a standard to which the public and potential contractors may hold the district accountable. Provisions that should be defined in Board Policies include:

- The conditions a contract must meet in order for competitive bidding to be required;
- How, when, and to whom contracting opportunities will be advertised;
- Procedures and relevant deadlines for acceptance and opening of bids;
- A description of prequalification procedures and the conditions under which contractor prequalification will or may be required;
- Under what conditions the district will award the contract to the lowest bidder and under what conditions non-price factors will be considered;
- A notice that all proposal submittals are public record;
- Procedures for post-award activities such as debriefing, bid protests, publishing of bid results.

Professional Services

Government Code §4525 et seq. governs the procurement of professional services (private architectural, landscape architectural, engineering, environmental, land surveying, or construction project management firms). Under its provisions, school district are afforded the freedom to develop individual procurement procedures for professional services provided that they “assure that these services are engaged on the basis of demonstrated competence and qualifications for the types of services to be performed and at fair and reasonable prices” and “prohibit practices which might result in unlawful activity including, but not limited to, rebates, kickbacks, or other unlawful consideration, and shall specifically prohibit government agency employees from participating in the

selection process when those employees have a relationship with a person or business entity seeking a contract.” School districts should ensure that these requirements are always met by clearly defining professional services procurement procedures in formal Board Policies.

Rejection of All Bids

School districts should avoid issuing a request for proposal/qualifications if it is not the ultimate intention of the district to award a contract. Should the district wish to reject all bids received, the district should notify all bidders of its specific rationale. Such a policy will provide several benefits including increased district transparency, reduced likelihood of future litigation, and a potential incentive for increased participation by contractors in future competitive bidding.

Lease-leaseback

Procurement of LLB services is more susceptible to questionable practices than procurement of other construction or professional services as no legal requirements currently exist for advertisement of potential contracting opportunities or evaluation of potential contractors via a standardized process. For this reason, we recommend that school districts institute several provisions to ensure fair and open procurement of lease-leaseback services:

- Districts should not look to LLB as a perfect project delivery method which produces optimal results in all circumstances. Rather districts should develop Board Policies for evaluating projects on a case-by-case basis;
- Districts should establish Board Policies regarding procedures for procurement and execution of LLB agreements;
- Districts should fully evaluate the knowledge and experience of current staff to ensure that proper capacity exists to effectively carryout a LLB agreement;
- LLB agreements should be procured through a best value competitive process
- Potential contractors should be evaluated using predetermined and publicly-available criteria;
- Potential contractors should be evaluated by a selection panel consisting of both district staff and outside parties knowledgeable in public works contracting and/or construction.

Solicitation Procedures/Documents

Pre-Solicitation Preparation

Prior to solicitation of any private construction or professional services for a school facilities project a school district should fully develop its intended scope of work, determine which project delivery method it will use and decide how the project will be managed. All of these factors are important for a district to consider in order to select an appropriate firm(s) to meet the district's needs. In addition, by establishing these parameters in the early stages of procurement, a district can avoid issues that may result in the delay of a project, such as the need to alter or terminate contracts and contracting for additional services after the project has already begun. Factors to be considered by a school district prior to procurement should include:

- District staff capabilities;
- Time considerations;
- Project complexity;
- Degree of district control and oversight desired;
- Type of contractors the district wants to attract;
- Budget;

- Predominant trade practices in region;
- Appropriate community and business participation;
- Level of acceptable district legal and financial risk.

Document Language

Solicitation documents should be clearly written with all necessary terms outlined definitively. Clear and understandable solicitation documents provide the potential benefits of increased contractor participation, reduced confusion among potential contractors, more uniform and comparable proposal submittals and reduced likelihood of future litigation or challenges to district award determinations. Items that should be included in all solicitation documents are:

- Scope of work : The size, type, and desired design characteristics of the buildings and site, performance specifications covering the quality of materials, equipment, and workmanship, preliminary plans or building layouts, and any other information deemed necessary to describe adequately the school district’s needs;
- Specific submittal requirements: Format and content requirements for proposal submittals;
- Information about all critical dates and deadlines;
- Description of how bidders will be evaluated and how the final contract award determination will be made;
- Description of any district contracting preferences or requirements, such as prevailing wage requirements, preference for small, local, or minority owned businesses, and bonding requirements.

Prequalification

Public Contract Code §20111.5 gives school districts the authority to conduct prequalification of contractors. Any school district which elects to conduct prequalification must “adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine the size of the contracts upon which each bidder shall be deemed qualified to bid.” Prequalification ensures school districts adequate time to evaluate the responsibility of contractors for various projects and provides contractors with additional time to provide rebuttals in the event of a district determination of non-responsibility. In 1992, the San Diego County Office of Education, (SDCOE) in cooperation with the Associated General Contractors and a collection of local school districts developed a standardized prequalification package to be used by school districts in San Diego County. We recommend school districts implement the following suggestions made by the SDCOE prequalification package:

- Prequalification evaluation should be carried about by a review panel. Panel members should be knowledgeable in public construction and may be drawn from district staff, private program management staff, SDCOE facilities planning staff, and other district representatives;
- The district's legal counsel should be informed of the district's desire to prequalify contractors and offered an opportunity to comment on the process and review documents to be used;
- All elements of a prequalification questionnaire that require factual verification should be reviewed and verified by district staff prior to consideration by the review panel.

Evaluation Criteria

All competitively bid contracts should be evaluated based on predetermined and publicly available evaluation criteria. Evaluation criteria should be identified and described in all solicitation documents. For contracts let according to traditional competitive bidding (Public Contract Code §20111), solicitation documents should clearly state that the contract will be awarded to the lowest

responsive bid made by a responsible bidder and include a description of the district's process in establishing the responsiveness and responsibility of a bid. For contracts let through best value competitive bidding, which considers non-price factors, school districts should identify and describe all significant factors and sub-factors which will be considered in evaluating proposals, including specifically identifying how much relative significance will be given to price and non-price factors.

Standardizing Scoring System

For any evaluation of potential contractors according to non-price criteria a standardized scoring system should be used in conjunction with predetermined evaluation criteria. A standardized scoring system will eliminate the potential for subjective or bias interpretation of evaluation criteria by various district staff or officials throughout the procurement process. The scoring system should identify how each evaluation criteria will be measured and the relative significance or weight that will be assigned to each criterion. A description of the scoring system should be made publicly available and included in all solicitation documents.

Selection Panel

A committee or panel comprised of district staff and a member(s) of another school district or other outside expert(s) in public works contracting should be used in all circumstances in which a potential contractor is evaluated according to non-price criteria, including best value procurement, contractor prequalification, and professional services procurement. Use of a selection committee introduces an objective outside opinion into the selection process and assures that contractors will be evaluated fairly.

Accountability/Transparency

Notice of Intent to Award

After a district has made a final contract award determination but prior to the actual awarding of the contract, the district should send a notice of intent to award to all bidders informing them which contractor(s) the district has selected. This notice serves as an indication to unsuccessful bidders that they may apply for post-award debriefing and/or file a bid protest with the district.

Bid Protest/Contract Award Appeals Procedure

Any unsuccessful bidder should be given the opportunity to challenge a district's contract award if he/she believes that the award is inconsistent with Board Policies, the bid's specifications, or local, state, or federal law. The opportunity to challenge a district's award should not be limited to contracts awarded through traditional competitive bidding, but also applicable to professional services contracts, design-build contracts, and lease-leaseback contracts. However, for contracts awarded based on non-price evaluation criteria such as professional services contracts, design-build contracts, and lease-leaseback contracts, unsuccessful bidders should not be allowed to appeal specific district interpretation or application of evaluation criteria but should be limited to a challenge based on non-compliance with Board Policies and local, state, or federal laws. If award challenges are reviewed by district staff, a procedure should be established which allows a contractor to appeal the determination of a staff member to the Board. Districts should establish a deadline for receipt of bid protests. However they should also develop a provision allowing for the extension of the deadline if an outstanding public record request has been submitted to the district by the protesting bidder. Bid protest procedures should be described in both written Board Policies and all solicitation documents.

Post-Award Debriefing

Following the award of all competitively bid contracts, school districts should offer post-award debriefing for all unsuccessful bidders. A post-award debriefing session should provide a:

- Description of the district's evaluation of the bidder's proposal and outlining of significant weaknesses;
- Review of bidder's scoring according to district rationale (if applicable);
- Rationale for the district's decision to award the contract;
- Responses to questions regarding district's adherence to district policies and state regulations;
- Response to questions regarding district's policies and state regulations in general.

Post-award debriefing procedures and notice of the right of all unsuccessful bidders to a post-award debriefing session should be included in written Board Policies as well as all solicitation documents. School districts should refer to Federal Acquisitions Regulation §15.506 as a model for developing formal Board Policies (Attachment 1).

Published Bid Results

Following the award of all competitively bid contracts, schools districts should publish bid results on a website available to the general public, such as the district's website. Bid results should include the names and basic information of all bidders, amount of bids, and original solicitation documents. Bid results may include additional information if it is available or applies to the contract in question, such as proposed contract documents, original district cost estimates, and bid walk attendee information.

Published Donor List

School districts should annually publish on their website a list of all parties who have donated to: (1) the district directly, (2) district elected officials, (3) related educational foundations, and/or (4) any recent bond campaign. The donor list should include the name of the contributor and the dollar amount of the donation.

Conflict of Interest

School district staff and officials should excuse themselves from participation in a particular procurement process and/or decision to award a contract if he/she: (1) knows or has reason to know he/she has a financial interest and/or (2) has a relationship with the person or business entity seeking a contract which would reasonably influence his/her decision. Districts should refer to Government Code §87100 et seq. to determine if a financial interest exists (Attachment 2).

Attachment 1

Federal Acquisition Regulation 15.506

(a) (1) An offeror, upon its written request received by the agency within 3 days after the date on which that offeror has received notification of contract award in accordance with 15.503(b), shall be debriefed and furnished the basis for the selection decision and contract award.

(2) To the maximum extent practicable, the debriefing should occur within 5 days after receipt of the written request. Offerors that requested a post award debriefing in lieu of a pre-award debriefing, or whose debriefing was delayed for compelling reasons beyond contract award, also should be debriefed within this time period.

(3) An offeror that was notified of exclusion from the competition (see 15.505(a)), but failed to submit a timely request, is not entitled to a debriefing.

(4)(i) Untimely debriefing requests may be accommodated.

(ii) Government accommodation of a request for delayed debriefing pursuant to 15.505(a)(2), or any untimely debriefing request, does not automatically extend the deadlines for filing protests. Debriefings delayed pursuant to 15.505(a)(2) could affect the timeliness of any protest filed subsequent to the debriefing.

(b) Debriefings of successful and unsuccessful offerors may be done orally, in writing, or by any other method acceptable to the contracting officer.

(c) The contracting officer should normally chair any debriefing session held. Individuals who conducted the evaluations shall provide support.

(d) At a minimum, the debriefing information shall include—

(1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;

(2) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;

(3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;

(4) A summary of the rationale for award;

(5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and

(6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

(e) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing shall not reveal any information prohibited from disclosure by 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C 552) including—

(1) Trade secrets;

(2) Privileged or confidential manufacturing processes and techniques;

(3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and

(4) The names of individuals providing reference information about an offeror's past performance.

Attachment 2

87100. No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

87100.1. (a) A registered professional engineer or licensed land surveyor who renders professional services as a consultant to a state or local government, either directly or through a firm in which he or she is employed or is a principal, does not have a financial interest in a governmental decision pursuant to Section 87100 where the consultant renders professional engineering or land surveying services independently of the control and direction of the public agency and does not exercise public agency decision making authority as a contract city or county engineer or surveyor.

(b) For purposes of this section, the consultant renders professional engineering or land surveying services independently of the control and direction of the public agency when the consultant is in responsible charge of the work pursuant to Section 6703 or 8703 of the Business and Professions Code.

(c) Subdivision (a) does not apply to that portion of the work that constitutes the recommendation of the actual formula to spread the costs of an assessment district's improvements if both of the following apply:

(1) The engineer has received income of two hundred fifty dollars (\$250) or more for professional services in connection with any parcel included in the benefit assessment district within 12 months prior to the creation of the district.

(2) The district includes other parcels in addition to those parcels for which the engineer received the income. The recommendation of the actual formula does not include preliminary site studies, preliminary engineering, plans, specifications, estimates, compliance with environmental laws and regulations, or the collection of data and information, utilized in applying the formula.

87101. Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made. The fact that an official's vote is needed to break a tie does not make his participation legally required for purposes of this section.

87102. The requirements of Section 87100 are in addition to the requirements of Articles 2 (commencing with Section 87200) and 3 (commencing with Section 87300) and any Conflict of Interest Code adopted there under. Except as provided in Section 87102.5, the remedies provided in Chapters 3 (commencing with Section 83100) and 11 (commencing with Section 91000) shall not be applicable to elected state officers for violations or threatened violations of this article.

87102.5. (a) The remedies provided in Chapter 3 (commencing with Section 83100) shall apply to any Member of the Legislature who makes, participates in making, or in any way attempts to use his or her official position to influence any of the following governmental decisions in which he or she knows or has reason to know that he or she has a financial interest:

(1) Any state governmental decision, other than any action or decision before the Legislature, made in the course of his or her duties as a member.

(2) Approval, modification, or cancellation of any contract to which either house or a committee of the Legislature is a party.

(3) Introduction as a lead author of any legislation that the member knows or has reason to know is non-general legislation.

(4) Any vote in a legislative committee or subcommittee on what the member knows or has reason to know is non-general legislation.

(5) Any roll call vote on the Senate or Assembly floor on an item which the member knows is non-general legislation.

(6) Any action or decision before the Legislature in which all of the following occur:

(A) The member has received any salary, wages, commissions, or similar earned income within the preceding 12 months from a lobbyist employer.

(B) The member knows or has reason to know the action or decision will have a direct and significant

financial impact on the lobbyist employer.

(C) The action or decision will not have an impact on the public generally or a significant segment of the public in a similar manner.

(7) Any action or decision before the Legislature on legislation that the member knows or has reason to know will have a direct and significant financial impact on any person, distinguishable from its impact on the public generally or a significant segment of the public, from whom the member has received any compensation within the preceding 12 months for the purpose of appearing, agreeing to appear, or taking any other action on behalf of that person, before any local board or agency.

(b) For purposes of this section, all of the following apply:

(1) "Any action or decision before the Legislature" means any vote in a committee or subcommittee, or any roll call vote on the floor of the Senate or Assembly.

(2) "Financial interest" means an interest as defined in Section 87103.

(3) "Legislation" means a bill, resolution, or constitutional amendment.

(4) "Non-general legislation" means legislation that is described in Section 87102.6 and is not of a general nature pursuant to Section 16 of Article IV of the Constitution.

(5) A Member of the Legislature has reason to know that an action or decision will have a direct and significant financial impact on a person with respect to which disqualification may be required pursuant to subdivision (a) if either of the following apply:

(A) With the knowledge of the member, the person has attempted to influence the vote of the member with respect to the action or decision.

(B) Facts have been brought to the member's personal attention indicating that the action or decision will have a direct and significant impact on the person.

(6) The prohibitions specified in subdivision (a) do not apply to a vote on the Budget Bill as a whole, or to a vote on a consent calendar, a motion for reconsideration, a waiver of any legislative rule, or any purely procedural matter.

(7) A Member of the Legislature has reason to know that legislation is non-general legislation if facts have been brought to his or her personal attention indicating that it is non-general legislation.

(8) Written advice given to a Member of the Legislature regarding his or her duties under this section by the Legislative Counsel shall have the same effect as advice given by the commission pursuant to subdivision (b) of Section 83114 if both of the following apply:

(A) The member has made the same written request based on the same material facts to the commission for advice pursuant to Section 83114 as to his or her duties under this section, as the written request and facts presented to the Legislative Counsel.

(B) The commission has not provided written advice pursuant to the member's request prior to the time the member acts in good faith reliance on the advice of the Legislative Counsel.

87102.6. (a) "Non-general legislation" means legislation as to which both of the following apply:

(1) It is reasonably foreseeable that the legislation will have direct and significant financial impact on one or more identifiable persons, or one or more identifiable pieces of real property.

(2) It is not reasonably foreseeable that the legislation will have a similar impact on the public generally or on a significant segment of the public.

(b) For purposes of this section and Section 87102.5, all of the following apply:

(1) "Legislation" means a bill, resolution, or constitutional amendment.

(2) "Public generally" includes an industry, trade, or profession.

(3) Any recognized subgroup or specialty of the industry, trade, or profession constitutes a significant segment of the public.

(4) A legislative district, county, city, or special district constitutes a significant segment of the public.

(5) More than a small number of persons or pieces of real property is a significant segment of the public.

(6) Legislation, administrative action, or other governmental action impacts in a similar manner all members of the public, or all members of a significant segment of the public, on which it has a direct financial effect, whether or not the financial effect on individual members of the public or the significant segment of the public is the same as the impact on the other members of the public or the significant segment of the public.

(7) The Budget Bill as a whole is not non-general legislation.

(8) Legislation that contains at least one provision that constitutes non-general legislation is non-general legislation, even if the legislation also contains other provisions that are general and do not constitute non-

general legislation.

87102.8. (a) No elected state officer, as defined in subdivision (f) of Section 14 of Article V of the California Constitution, shall make or participate in the making of, or use his or her official position to influence, any governmental decision before the agency in which the elected state officer serves, where he or she knows or has reason to know that he or she has a financial interest.

(b) An elected state officer knows or has reason to know that he or she has a financial interest in any action by, or a decision before the agency in which he or she serves where either of the following occur:

(1) The action or decision will have a direct and significant financial impact on a lobbyist employer from which the officer has received any salary, wages, commissions, or similar earned income within the preceding 12 months and the action or decision will not have an impact on the public generally or a significant segment of the public in a similar manner.

(2) The action or decision will have a direct and significant financial impact on any person, distinguishable from its impact on the public generally or a significant segment of the public, from whom the officer has received any compensation within the preceding 12 months for the purpose of appearing, agreeing to appear, or taking any other action on behalf of that person, before any local board or agency.

(c) The definitions of "public generally" and "significant segment of the public" contained in Section 87102.6 shall apply to this section.

(d) Notwithstanding Section 87102, the remedies provided in Chapter 3 (commencing with Section 83100) shall apply to violations of this section.

87103. A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following:

(a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.

(c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. The amount of the value of gifts specified by this subdivision shall be adjusted biennially by the commission to equal the same amount determined by the commission pursuant to subdivision (f) of Section 89503. For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

87103.5. (a) Notwithstanding subdivision (c) of Section 87103, a retail customer of a business entity engaged in retail sales of goods or services to the public generally is not a source of income to an official who owns a 10-percent or greater interest in the entity if the retail customers of the business entity constitute a significant segment of the public generally, and the amount of income received by the business entity from the customer is not distinguishable from the amount of income received from its other retail customers.

(b) Notwithstanding subdivision (c) of Section 87103, in a jurisdiction with a population of 10,000 or less which is located in a county with 350 or fewer retail businesses, a retail customer of a business entity engaged in retail sales of goods or services to the public generally is not a source of income to an official of that jurisdiction who owns a 10-percent or greater interest in the entity, if the retail customers of the business entity constitute a significant segment of the public generally, and the amount of income received by the business entity from the customer does not exceed one percent of the gross sales revenues that the business entity earned during the 12 months prior to the time the decision is made.

(c) For the purposes of subdivision (b):

(1) Population in a jurisdiction shall be established by the United States Census.

(2) The number of retail businesses in a county shall be established by the previous quarter's Covered Employment and Wages Report (ES-202) of the Labor Market Information Division of the California Employment Development Department.

87103.6. Notwithstanding subdivision (c) of Section 87103, any person who makes a payment to a state agency or local government agency to defray the estimated reasonable costs to process any application, approval, or any other action, including but not limited to, holding public hearings and evaluating or preparing any report or document, shall not by reason of the payments be a source of income to a person who is retained or employed by the agency.

87104. (a) No public official of a state agency shall, for compensation, act as an agent or attorney for, or otherwise represent, any other person by making any formal or informal appearance before, or any oral or written communication to, his or her state agency or any officer or employee thereof, if the appearance or communication is for the purpose of influencing a decision on a contract, grant, loan, license, permit, or other entitlement for use.

(b) For purposes of this section, "public official" includes a member, officer, employee, or consultant of an advisory body to a state agency, whether the advisory body is created by statute or otherwise, except when the public official is representing his or her employing state, local, or federal agency in an appearance before, or communication to, the advisory body.

87105. (a) A public official who holds an office specified in Section 87200 who has a financial interest in a decision within the meaning of Section 87100 shall, upon identifying a conflict of interest or a potential conflict of interest and immediately prior to the consideration of the matter, do all of the following:

(1) Publicly identify the financial interest that gives rise to the conflict of interest or potential conflict of interest in detail sufficient to be understood by the public, except that disclosure of the exact street address of a residence is not required.

(2) Recuse himself or herself from discussing and voting on the matter, or otherwise acting in violation of Section 87100.

(3) Leave the room until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter has been placed on the portion of the agenda reserved for uncontested matters.

(4) Notwithstanding paragraph (3), a public official described in subdivision (a) may speak on the issue during the time that the general public speaks on the issue.

(b) This section does not apply to Members of the Legislature.