

LOMPOC UNIFIED SCHOOL DISTRICT



PURCHASING MANUAL Public Contracts

Revision January 2025

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INDEPENDENT CONTRACTOR AGREEMENTS, PUBLIC CONTRACTS AND BIDDING PROCEDURES

I. AUTHORITY TO ENTER INTO CONTRACTS

The only entity with the authority to bind a California school district contractually is the District's Board of Education. (Ed. Code, § 35010 ["Every school district shall be under the control of a board of school trustees or a board of education."].) This "control" includes the power to "carry on any . . . activity . . . which is not in conflict with or inconsistent with . . . any law and which is not in conflict with the purposes for which school districts are established." (Ed. Code, § 35160.) Entering into a contract is an activity that the District's Board may perform.

A. The Board Approval Process

1. **The Board must approve or ratify all contracts via Board Action.**
2. **Agenda items and backup must be submitted by the District's scheduled deadline. The backup includes the contract unless the Assistant Superintendent - Business Services approves an alternative.**
3. **If findings are needed, a form of resolution must be provided to the Board. Noncontroversial items can be on the consent calendar.**
4. **Board Policies and Administrative Regulations 3311AR, 3311BP, 3312BP, 3314AR, 3314BP, 3600BP**

B. Delegable Authority

The Board's authority to contract may, "by a majority vote of the board be delegated to its district superintendent, or to any persons that he or she may designate The delegation of power may be limited as to time, money or subject matter or may be a blanket authorization in advance of its exercise, all as the governing board may direct." (Ed. Code, § 17604.)

1. Approval or Ratification Required

"No contract made pursuant to the delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board, the approval or ratification to be evidenced by a motion of the board duly passed and adopted." (Ed. Code, § 17604, emphasis added.)

2. Delegable Authority for Purchase of Supplies, Equipment, and Services Under the Bid Limit

If the authority that the Board delegates to District staff is under the bid limit of Public Contract Code section 20111, currently **\$114,800** for non-construction services and materials the Board need not approve or ratify the contract. Since the District has adopted CUPCCAA, the bid threshold for informal bidding is **\$75,000** for construction contracts. Education Code section 17605 instead requires that, "All transactions entered into by the officer or employee shall be reviewed by the governing board every 60 days." (Ed. Code, § 17605, emphasis added.)

Change Orders for materials and supplies can be entered without competitive bidding if the cost agreed up in writing between the District and the contractor does not exceed the

greater of the following: (a) the applicable bid threshold, or (b) ten percent of the original contract price. (Public Contract Code, § 20118.4)

3. Malfeasance

Both sections 17604 and 17605 state that, in the event of malfeasance in these transactions, the officer or employee with the authority to contract shall be personally liable for any and all moneys of the district paid out as a result of the malfeasance.

II. DISTRICT'S FORMS FOR NON-BID CONTRACTOR AND/OR SERVICE AGREEMENTS

The District has an Agreement for Professional Services template to be used for independent contractors and a Contract for Construction Services Under is **\$75,000** template that the District requires all of its schools and departments to use when contracting with any consultant or other services vendor. Use of these forms will avoid contracts that fail to contain the required terms.

A. Contract Terms

The following items are important for every contract. Most need to be reviewed and added for each specific contract.

1. Coversheet

The Cover Sheet provides a summary of contract information, including contractor identification, the school or department source requesting the contract, the price, and process to revise the contract.

2. Legal Authority

The agreement needs to identify whether it is for special services or non-construction services under the bid limit of **\$114,800** Other contracts require public bidding.

3. Scope of Services

Define the scope of the products or performance for which the parties are contracting. One sentence is rarely enough. A paragraph may be enough. Generally, the more detail, the better.

4. Term

Without a clear term of the contract (e.g., one year), a contract could be void or not enforceable. Alternatively, it could extend longer than the parties intend. A clearly defined contract term should be in all contracts.

Education Code section 17596 limits the term for contracts for services, apparatus and equipment to five years and for materials or supplies to three years. (Ed. Code, § 17596.)

5. Document Submittal

a. Workers' Compensation Certification is required if the contractor has any employees, whether or not they will be working at the District or on the contract. It is not required if the contract is with an individual or partnership that has no employees. See Tab 3, Agreement section 14.1.2.

b. Fingerprinting Certification. See Tab 3, Agreement section 21.

c. Insurance Certificates and Endorsements. See Tab 3, Agreement section 14.

d. W-9 Form.

6. Compensation/Payment

Payment provisions are usually pretty straightforward, but they must be verified. Any arrangement other than installment payment after performance should be stated.

7. Expenses

Any expenses that District will pay should be itemized.

8. Independent Contractor

This section clarifies that Contractor is not a District employee.

9. Materials

Any materials District will provide should be listed, i.e., use of laptop computer, projector, telephone, copier, paper, books, etc.

10. Performance of Services

This section sets District standards for contractor performance and should be reviewed, and revised if necessary, by the party initiating the Contract.

11. Originality of Services and Copyright/Trademark/Patent

Highlight copyright/trademark/patent provision unless you have a good reason not to. Contractor request is not a sufficient reason to omit this section.

12. Audit

This section requires the Contractor to maintain documents concerning the services performed for a set period of time so that the District, or other authorized party, can review them if necessary.

13. Termination

Termination provisions should allow the District to immediately terminate for cause. Contractors may argue that they will not have time to cure a breach before termination. That is not true. The District can, at its discretion, give the other party time to cure a breach notwithstanding a termination provision; providing a mandatory cure period is not required.

District termination for convenience is useful for all contracts in case funding issues, changes in District priorities or contractor performance make termination advisable. District termination for non-appropriation of funds is required for financing leases. See section below regarding financing of lease-purchase transactions or lease-leaseback agreements.

14. Indemnification

Indemnification clauses can be complex and confusing. The District should not indemnify anyone else. A good indemnification clause will require the other party to indemnify, defend and hold harmless the District for any damages related to the performance of the contract, except those damages caused by the sole negligence or willful misconduct of the District.

15. Insurance

The other party should carry, at a minimum, commercial general liability ("CGL"), any auto automobile liability ("Auto"), and workers' compensation insurance for its employees. The contract should state, and the District's risk manager or insurance adviser should confirm, the types and levels of coverage. The CGL and Auto policies should name the District as an additional insured by an endorsement. There should be a term requiring that the policies will not be cancelled or revised on less than 30-day's written notice to the District. If the other party is providing professional services, it should also carry a professional liability policy. The District may require a waiver of subrogation and a certain rating for the insurers. Employer's liability insurance is also advisable.

16. Other Provisions

Ensure that the contract is governed by the laws of the State of California, and the County of Santa Barbara.

Ensure that disputes concerning the contract are resolved pursuant to Chapter 1 (commencing with section 900) and Chapter 2 (commencing with section 910) of Part 3 of Division 3.6 of Title 1 of Government Code (the "Government Claims Act").

Ensure that the contract contains language that the contract is the entire agreement between the District and the Contractor and supersedes all prior discussions, negotiations, and agreements, whether oral or written.

17. Provisions Not In Contract

Review any Guarantees or Warranties furnished by the Contractor.

B. When You Can Use A Purchase Order Without A Contract.

1. When it does not require any terms not on the purchase order.
2. When it is a small, risk-free contract.
3. When it is for multiple orders under an existing contract.
4. When the Assistant Superintendent - Business Services approves the purchase order without a separate contract.

C. When in Doubt, Ask the Purchasing Manager.

III. PROCUREMENT PROCESS FOR CONTRACTS

A. District Procurement is Controlled by Applicable Law

Start from the following assumption: Everything needs to be formally bid. There are exceptions and some products and services do not need to be bid. But the starting point should be a bidding requirement, and then look for an exception or exclusion that allows the District to procure the product or service without bidding.

1. California State law

The District must comply with the California Constitution and all applicable statutes when procuring products or services. Generally, the applicable statutory code sections are the Public Contract Code, the Education Code, the Government Code, and the Public Resources Code. All California Codes are located on-line.
(<http://www.leginfo.ca.gov/calaw.html>.)

2. California Code of Regulations

State agencies draft regulations that interpret statutes. These can be relied upon to give direction on how to interpret statutes. All of the California Code of Regulations is located on-line. (<http://www.calregs.com>)

3. District Board Policies and Administrative Regulations

The District is also bound by the policies its Board adopts. Many relate to contracting and contracting requirements.

4. That's not all

- (a) Case law, also known as common law, includes published appellate court decisions that have the same authority as statutes and may change or invalidate statutes. Attorney general opinions are not binding, but are persuasive.
- (b) Federal law is a parallel scheme of constitution, statutes, regulations, and case law that can impact school districts.

B. Services Except Construction Services

For the purpose of procurement, "services," including repairs and maintenance, are distinguished from "construction services." (Pub. Contract Code, § 20111(a).) Maintenance is defined as "routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility . . . , defined as a "plant, building, structure, ground facility, utility system, or real property." Maintenance includes "carpentry, electrical, plumbing, glazing, and other craftwork." (Pub. Contract Code, §§ 20111(a)(3) & 20115.) Since the Board has adopted CUPCAA, maintenance 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; and (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." (Pub. Contract Code, § 22002.) Contracts for services may not exceed a term of five years. (Ed. Code, § 17596.)

1. Determination of Independent Contractor Status

Prior to entering into any contract with an independent contractor, the District must make a determination that the work to be performed is not work that should be performed by a District employee.

(a) IRS Factors

The IRS may penalize and fine the District if the District classifies an individual as an independent contractor when the individual is doing work that should be done by an employee. The IRS makes this determination after a detailed analysis of factors related to the District's right to direct or control how the worker does the work, the District's right to direct or control the business part of the work, and how the District and the worker perceive their relationship. The District's Determination of Worker Status Questionnaire, Tab 4, evaluates these criteria.

(b) **“Contracting Out” Issues**

Although the Education Code generally allows the “contracting out” of work, collective bargaining obligations may affect the District’s ability to contract out.

2. Formal Bidding Required

Competitive bidding is required when the District is contracting for non-construction services in an amount in excess of the bid limit. (Pub. Contract Code, § 20111(a)(2).) The bid limit is revised in January of each year and is currently **\$114,800** for non-construction services.

3. No Formal Bidding Required

(a) **Services costing less than the bid limit.** (Pub. Contract Code, §§ 20111(a) and 22032.) The bid limit is currently **\$114,800** for non-construction services.

(b) **Energy Efficiency/Energy Services Contracts** [See section below under “Construction Services.”]

(c) **Special Services Contracts**

These are defined as contracts for financial, economic, accounting, legal, administrative, or insurance services.

School districts may contract without bidding for, “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.” (Gov. Code § 53060.) Also, Public Contract Code section 20111(c) exempts from the public bidding requirement “professional services or advice, insurance services, or any other purchase or service otherwise exempt from this section.”

(d) **Waste / Recycling Services Contract**

The District can contract with a “solid waste enterprise” for waste handling services pursuant to the California Integrated Waste Management Act of 1989. (Pub. Resources Code, § 40050, et seq., the “Act”.) Section 40058 of the Act states that a solid waste enterprise is an entity, “which is regularly engaged in the business of providing solid waste handling services.” Section 40059(a)(2) of the Act states that the District can determine “[w]hether the services are to be provided by means of nonexclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding.”

4. Services Cannot Be Leased

The Education Code does not authorize the lease of services. The subject matter of a lease, by definition, must be tangible real or personal property, and services do not constitute property. Some leases may include some services (i.e. janitorial services in a commercial lease), but these types of services are not the focus of the lease and are limited, incidental services necessary to maintain the property. Some types of financing leases include incidental services as part of the lease, e.g. installation and delivery of copy machines. However, yearly maintenance contracts for copiers are not properly included in a lease.

C. Construction Services

“Public projects” are defined as “construction, reconstruction, erection, alteration, renovation, improvement, demolition, [painting or repainting,] and repair work involving any publicly owned, leased, or operated facility.” (Pub. Contract Code, § 22002(c).)

1. Bidding Requirements

Public projects of **seventy-five thousand (\$75,000)** or less may be performed by the employees of a public agency by force account, by negotiated contract, or by purchase order. Public projects of **two hundred twenty thousand dollars (\$220,000)** or less may be let to contract by informal procedures. Public projects of more than **two hundred twenty thousand dollars (\$220,000)** shall, except as otherwise provided in this article, be let to contract by formal bidding procedure. (Pub. Contract Code, § 22032.)

2. RFP/RFQ Process

Some services related to construction work require a “fair, competitive selection process” even though they are exempt from public bidding. (Gov. Code, §§ 4525 et seq., 4529.12.) School districts generally comply with these requirements by using a request for proposal (“RFP”) process. The scope of services provided is determined by the RFP and can include more than one project. A request for qualifications (“RFQ”) may be used to screen potential applicants. Respondents that meet the District’s minimum qualifications are then sent an RFP. An RFQ/RFP can be done in one step in which the District requests both the respondent’s qualifications and its proposal.

An RFQ/RFP is recommended for the following services: architecture, landscape architecture, engineering, environmental services, land surveying, and construction management. (Gov. Code, § 4529.10.)

For agreements with architects for services over \$10,000, the RFP must set out in bold type, a “disclosure of any contract provision that would require the contracting architect to indemnify and hold harmless the local agency against any and all liability, whether or not caused by the activity of the contracting architect.” (Pub. Contract Code, § 20103.6.) Otherwise, the District will be limited in the indemnification it can require from the architect.

Since January 1, 2018, an architect’s indemnification is limited to claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional. Further, in no event shall the cost to defend charged to the architect exceed architect’s proportionate percentage of fault. (Civ. Code, § 2782.8.)

3. No Bidding Required

(a) Construction Services Costing **\$75,000** or Less

“The governing board shall let any contract for a public project, as defined in subdivision (c) of Section 22002, involving an expenditure of **seventy-five thousand dollars (\$75,000)** or less may be performed by the employees of a public agency by force account, by negotiated contract, or by purchase order.” (Pub. Contract Code, § 22032.)

(b) Energy Efficiency/Energy Services Contracts

Government Code section 4217.10, et seq., provides a narrow exception to public bidding for contracts defined in the statute: “Prior to awarding or entering

into an energy service contract, the public agency may request proposals from qualified persons. After evaluating the proposals, the public agency may award the contract on the basis of the experience of the contractor, the type of technology employed by the contractor, the cost to the local agency, and any other relevant considerations.” (Gov. Code, § 4217.16, emphasis added.) The District need not formally or informally bid an energy service contract, although it may. The District’s Board must make specified findings prior to approving an energy efficiency contract. (Gov. Code, §§ 4217.12, 4217.13.)

The scope of an energy efficiency/energy services contract can be the purchase of power, the installation of a new lighting and/or HVAC system, the installation of a CNG (compressed natural gas fueling) facility, or other energy saving products or services.

(c) **Emergency**

Emergency Defined. An emergency is “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.” (Pub. Contract Code, § 1102.) Those public services include, “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.” (Pub. Contract Code, § 20113.) A California appellate case has narrowly defined when a school district can declare an emergency. (*Marshall v. Pasadena Unified School District* (2004) 119 Cal.App.4th 1241.)

Emergency Process. “In cases of emergency when repair or replacements are necessary, the governing body may proceed at once to replace or repair any public facility without adopting plans, specifications, strain sheets, or working details, or giving notice for bids to let contracts. The work may be done by day labor under the direction of the governing body, by contractor, or by a combination of the two.

In case of an emergency, a public agency, pursuant to a four-fifths vote of its governing body, may repair or replace a public facility, take any directly related and immediate action required by that emergency, and procure the necessary equipment, services, and supplies for those purposes, without giving notice for bids to let contracts. Before a governing body takes any action, it shall make a finding, based on substantial evidence set forth in the minutes of its meeting, that the emergency will not permit a delay resulting from a competitive solicitation for bids, and that the action is necessary to respond to the emergency.

The governing body shall review the emergency action at its next regularly scheduled meeting and, except as specified below, at every regularly scheduled meeting thereafter until the action is terminated, to determine, by a four-fifths vote, that there is a need to continue the action. If the governing body meets weekly, it may review the emergency action in accordance with this paragraph every 14 days. If a person with authority delegated orders any action, the governing body shall initially review the emergency action not later than seven days after the action, or at its next regularly scheduled meeting if that meeting will occur not later than 14 days after the action, and at least at every regularly scheduled meeting thereafter until the action is terminated, to determine, by a four-fifths vote, that there is a need to continue the action, unless a person with authority delegated has terminated that action prior to the governing body reviewing the emergency action and making a determination pursuant to this subdivision. If the governing body meets weekly, it may, after the initial review, review the emergency action in accordance with this paragraph every 14 days.

The governing body shall terminate the action at the earliest possible date that conditions warrant so that the remainder of the emergency action may be completed by giving notice for bids to let contracts.
(Pub. Contract Code, §§ 22035 and 22050.)

(d) **Certain Construction and Maintenance Work Not Exceeding 350 Hours of Work**

For districts that are not subject to the CUPCCAA, “[the district] 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 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.” (Pub. Contract Code, §20114(a).)

(e) **Volunteer Work**

The District can accept work performed on a volunteer basis. If no District money is being spent, the work generally need not be bid. Although the District is not paying for volunteer work, that work is subject to all other applicable statutory and regulatory requirements. For example, in the construction setting, volunteer contractor(s)/worker(s) must still have an appropriate contractor’s license, payment bond, insurance, and criminal/fingerprinting clearances. They must usually pay prevailing wage. There would need to be DSA approval, if applicable, of the project, and the District should require a performance bond.

D. Alternative Delivery Methods

In design-bid-build projects, the District accepts competitive bids from contractors based on a completed design of the project and awards the contract to the lowest responsive and responsible bidder. While design-bid-build is the most common method of public works construction, other delivery methods are available that may better meet the District’s needs for a particular project.

1. Design-Build Contract for School Facility Exceeding \$1,000,000.

The District is authorized to use a design-build method as an optional, alternative procedure for construction delivery. (Ed. Code § 17250.10 -17250.55) Design-build means a process in which both the design and construction of a project are procured from a single entity.

In order to authorize the use of a design-build contract, the governing board must develop guidelines for a standard organizational conflict-of-interest policy, consistent with applicable law, regarding the ability of a person or entity that performs services for the school district relating to the solicitation of a design-build project, to submit a proposal as a design-build entity, or to join a design-build team. (Ed. Code §17250.20(b).)

The District must prepare documents setting forth the scope and estimated price of the project, which may include additional elements as desired, such as the size of the project, performance specifications, and plans. Performance specifications and plans shall be prepared by a design professional who is duly licensed and registered in California. (Ed. Code § 17250.25(a)(1).)

The District must prepare a request for qualifications (“RFQ”) in order to prequalify, or develop a short-list of, the design-build entities whose proposal shall be evaluated for final selection. (Ed. Code § 17250.25(b).) To qualify, the entity must provide an enforceable commitment that the prime contractor and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades. After this RFQ, the District then issues a request for proposals (“RFP”) to evaluate the prequalified/short-listed entities submitting proposals. (Ed. Code §

17250.25(d).) Both the RFQ and RFP must contain the elements set forth in the design-build statutes such as language relating to skilled and trained workforce commitments. (Ed. Code §§17250.25(b)-(d).) The contract may ultimately be awarded on either a low bid or best value basis, as identified in the RFP.

2. Lease-Leaseback Contracts

The District may use the lease-leaseback construction delivery method to construct a building or buildings on property owned by the District pursuant to a lease of the land to the contractor for a set term to allow for project construction provided that title to the building(s) shall vest in the District at the expiration of the term. (Ed. Code § 17406 et. seq.)

Under the lease-leaseback statutes, the District can enter into an agreement before plan approval by the Division of the State Architect (“DSA”), thereby allowing preconstruction services to be built into the lease-leaseback agreement itself. (Ed. Code §17406.)

The lease-leaseback statutory provisions require the District to prequalify potential prime contractors and first tier mechanical, electrical and plumbing subcontractors per Public Contract Code section 20111.6.

The District must adopt and publish its internal procedures to select contractors based on a request for proposal (“RFP”) process that uses best value criteria. This allows for consideration of factors in addition to price, such as experience, safety record, and performance.

The RFP shall be published in a newspaper of general circulation at least once a week for two weeks and a trade paper of general circulation, and must identify all criteria for evaluating proposals, including any pass/fail criteria and request either lump sum or fee-for-service price proposals. Additionally, the District must obtain an enforceable commitment that the prime contractor and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades. (Ed. Code §17407.5.)

E. Equipment, Materials, Supplies

For procurement, contracts for “equipment, materials, or supplies to be furnished, sold, or leased to the district” must be bid. (Pub. Contract Code, § 20111(a)(1).) Equipment contracts may not exceed five years; materials and supplies contracts may not exceed three years. (Ed. Code, § 17596.)

1. Formal Bidding Required

Competitive bidding is required when the District is contracting for equipment, materials, or supplies in excess of the bid limit. (Pub. Contract Code, § 20111(a)(1).) The bid limit is currently **\$114,800** for equipment, materials, or supplies. 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 requiring contracting after competitive bidding.

2. Technology

(a) Electronic Data Processing Systems and Supporting Software

Formal bidding is required for these contracts, but the District can contract with one of the three lowest responsive, responsible bidders and then may enter into a contract “in any manner the board deems appropriate,” if the Notice to Bidders informs bidders that the District is using this process. (Pub. Contract Code, § 20118.1.)

(b) Computers, software, telecommunications equipment, microwave equipment, and other related electronic equipment and apparatus

After making a finding that it is in the best interest of the district, school districts may procure these items through an RFP process and should consider, in addition to price, the following in the award of those contracts: vendor financing, performance reliability, standardization, life-cycle costs, delivery timetables, support logistics, competing products and materials available, fitness of purchase, manufacturer's warranties and similar factors. (Pub. Contract Code, § 20118.2.)

3. No Formal Bidding Required

(a) Equipment, materials, supplies costing less than the bid limit.

The District must still comply with Board policies regarding procurement under the bid limit.

(b) Educational Materials

“Any school district may purchase supplementary textbooks, library books, educational films, audiovisual materials, test materials, workbooks, instructional computer software packages, or periodicals . . . without taking estimates or advertising for bids.” (Pub. Contract Code, § 20118.3.)

(c) Piggybacking to lease data-processing equipment and/or to purchase materials, supplies, equipment, automotive vehicles, tractors, and other personal property.

“The governing board of any school district, without advertising for bids, if the board has determined it to be in the best interests of the district, may authorize by contract, lease, requisition, or purchase order, any public corporation or agency, including any county, city, town, or district, to lease data-processing equipment, purchase materials, supplies, equipment, automotive vehicles, tractors, and other personal property for the district in the manner in which the public corporation or agency is authorized by law to make the leases or purchases from a vendor. . . .” (Pub. Contract Code, § 20118, emphasis added.) The District cannot piggyback for services.

NOTE: The Office of Public School Construction issued a notice that any contracts for modular construction on a permanent foundation signed after January 25, 2006 must be competitively bid. School Facility Program Funding for such piggyback projects with contracts signed after January 25, 2006 will be jeopardized. Modular construction refers to a facility comprised of multiple pre-manufactured building components, such as separate wall and floor systems, that are transported to a site where all components are installed on a permanent foundation. This does not apply to portable or relocatable classrooms as defined by Education Code section 17070.15(m), which typically are factory-built as two complete building modules that are simply connected on-site and placed on temporary foundations.

If the District is utilizing a piggyback bid, the District should ensure the following:

- (i) that the item being acquired is the same item indicated in the original bid;
- (ii) that the same terms and conditions apply as set forth in the original bid;
- (iii) that the original bid is still valid; and
- (iv) that the original bid includes a provision allowing piggybacking.

The District should obtain a complete set of the original bid documents and a copy of the Board resolution approving the original contract, as well as any term extensions if applicable.

If the piggyback bid is for relocatable buildings, the original bid documents probably require the vendor to post performance and payment bonds and to obtain insurance.

The District and vendor should either execute a copy of the agreement included in the original bid documents or include language on a purchase order which incorporates the original bid documents.

If the item will be lease financed, all these documents must be forwarded to legal counsel so that legal counsel can review them prior to giving an opinion of counsel. See section below regarding lease financing.

(d) **Multiple Award Contracts / State-Based Contracts / Contracts Based on a Joint Powers Authority**

(i) **California Multiple Award Schedule (“CMAS”) for goods, information technology, and services.**

The Department of General Services (“DGS”) has made certain “multiple award” contracts available to other public agencies, including school districts, for the acquisition of goods, information technology, or services. DGS competitively bid these contracts and has made them available to school districts through Public Contract Code sections 10298, 10299, and 12109. CMAS contracts must adhere to the most up-to-date specific form of CMAS contract with the vendor of the product or service. The District should independently verify that the price is competitive. The District may negotiate a lower price than the CMAS price. Further information is available on the CMAS website: www.dgs.ca.gov/PD

(ii) **California Network and Telecommunications (CALNET) Program**

(iii) **OMNIA Partners**

(iv) **Western State Contracting Alliance**

(v) **Public School Services**

F. Contracts Related to Food and Kitchens

1. Perishables/Food & Food Services Contracts

- (a) “Perishable foodstuffs and seasonal commodities . . . may be purchased . . . in accordance with rules and regulations for such purchase adopted by the governing board of [a school district] notwithstanding any provisions of [the Education Code] in conflict with such rules and regulations.” (Ed. Code, § 38083.)
- (b) For districts that participate in the National School Lunch Program and/or the Commodity Supplemental Food Program, federal regulations generally provide that school districts may use their own procurement procedures that reflect applicable state and local laws and regulations. (7 C.F.R. §§ 210.21, 247.14.)

- (c) The federal grant standards note that the “competitive proposals” procurement method (e.g., RFP) is generally used when conditions are not appropriate for the use of sealed bids. (36 C.F.R. § 3016.36.)
- (d) Also, recipients of federal grants must perform a cost or price analysis in connection with every procurement action. The method and degree of analysis is dependent on the facts surrounding the particular situation, but as a starting point, grantees must make independent estimates before receiving proposals. (36 C.F.R. § 3016.36.)

IV. FORMAL BIDDING PROCESS

Formal public bidding requires compliance with statutory and common law requirements. The District must advertise for bids, provide bid documents to potential bidders, and award the contract to the lowest responsive, responsible bidder.

A. Advertising for Bids

1. Statutory Requirements

- (a) Published at least 14 days before bid opening in a newspaper of general circulation and also be sent electronically and mailed to all construction trade journals specified in Section 22036 at least 15 calendar days before the date of opening the bids. (Pub. Contract Code, § 22037.)
- (b) Description of work to be done. (Pub. Contract Code, § 22037.)
- (c) Time and place of bid opening. (Pub. Contract Code, § 22037.)
- (d) Bid security. (Pub. Contract Code, § 20111.)
- (e) Application of alternates in selection of the low bidder. (Pub. Contract Code, § 20103.8.)
- (f) Mandatory job walk, if any. (Pub. Contract Code, § 6610.)
- (g) Substitution of securities. (Pub. Contract Code, § 22300.)
- (h) Required contractor’s license to perform the work. (Pub. Contract Code, § 3300.)
- (i) Required registration as public works contractor with Department of Industrial Relations. (Labor Code, §§ 1725.5 and 1771.1.)
- (j) Prevailing wage requirements. (Labor Code, § 1773.2.)
- (k) State Labor Compliance. (Labor Code, § 1771.4.)
- (l) Sole sourced products, if any. (Pub. Contract Code, § 3400.)
- (m) Worker’ Compensation coverage (Labor Code, § 3700)
- (n) Payment Bond for contracts over \$25,000 (Civ. Code, § 9550.)

2. May require prequalification, employers’ liability coverage, performance bond, DVBE (Disabled Veteran Business Enterprise) compliance.

B. Provide the Bid Documents

The District must provide all potential bidders with a full set of bid documents, including the contract documents describing the services and/or items the District is seeking. These should include:

1. Instructions to Bidders

Describes rules which apply to bids and bid opening such as: bid security, bid evaluation, bid withdrawal, addenda, alternates, bonds, rejection of non-conforming bids, evidence of financial responsibility, price and quantity breakdown on unit price bids, applicable laws, contractor licensing requirements, and bid protest deadline and procedure, District right to reject all bids.

2. Documents Due with Bid Proposal Form

The District must provide all potential bidders the documents that the bidder must turn in with its bid. The District then evaluates these documents for responsiveness and responsibility and determines which bidder submitted the lowest bid.

(a) Bid Proposal Form

- (i) Bid price and price for alternates.
- (ii) Signature of authorized representative of bidder.
- (iii) List of subcontractors performing work in excess of one half of one percent (1/2 of 1%) of work of contract.
- (iv) Acknowledgement of any addenda.

(b) Bid Bond on the District's form or other security.

- (i) Required by Public Contract Code section 20111. A bid bond is not statutorily required for non-construction contracts, but may be required at the Board's discretion.
- (ii) Usually a bond equal to ten percent (10%) of the contract price. Must have notarial acknowledgement, power of attorney, and certificate of authority of signer.
- (iii) Other acceptable forms of security are cash, a cashier's check payable to the District, or a certified check payable to the District.
- (iv) District must verify surety is an admitted surety. Section 995.311 of the Code of Civil Procedure requires that "any bond required on a public works contract . . . shall be executed by an admitted surety insurer," and that the public agency can verify this by either "[p]rinting out information from the website of the Department of Insurance" or "[o]btaining a certificate from the county clerk."
([http://interactive.web.insurance.ca.gov/webuser/idb_co_list\\$.startup](http://interactive.web.insurance.ca.gov/webuser/idb_co_list$.startup))

(c) **Designated Subcontractors List**, required by Public Contract Code section 4104 for construction contracts.

(d) **Noncollusion Declaration**, required by Public Contract Code section 7106 for construction contracts.

(e) **Site-Visit Certification**, if required by District, for construction contracts.

(f) **Iran Contracting Act Certification**, if contract is \$1 million or more as required by Public Contract Code section 2204.

3. Documents Generally Due after Award

The District must provide the bidders some of the documents that the successful bidder must turn in after award of the contract by the board. The District should not let any successful bidder perform any work or supply any items until it has submitted all applicable documents.

(a) **Executed Agreement**

Binds the bidder to perform for the price, sets the time of performance, identifies the liquidated damages, incorporates the contract documents, reaffirms Labor Code requirements, stipulates to the substitution of securities.

(b) **Insurance Certificates and Endorsements**

It is important that the District receive the required endorsements as well as the certificates. These ensure that the amounts, limits, and notification requirements are part of the insurance policy. The District's risk manager can provide information related to required limits and scopes of coverage.

(c) **Worker's Compensation Certification**

(d) **Criminal Background Investigation/Fingerprinting Certification**

(e) **Performance Bond in Form in Bid Documents**

(i) Value is usually one hundred percent (100%) of the contract price.

(c) **Payment Bond (Contractor's Labor and Material Bond)**

(i) Value is one hundred percent (100%) of the contract price.

(ii) Civil Code section 9550(a) states, "Every original contractor to whom is awarded a contract by a public entity . . . involving an expenditure in excess of twenty-five thousand dollars (\$25,000) for any public work shall, before entering upon the performance of the work, file a payment bond with and approved by the officer or public entity by whom the contract was awarded."

(iii) District must verify surety is an admitted surety. Section 995.311 of the Code of Civil Procedure requires that "any bond required on a public works contract . . . shall be executed by an admitted surety insurer," and that the public agency can verify this by either "[p]rinting out information from the website of the Department of Insurance" or "[o]btaining a certificate from the county clerk." (<http://interactive.web.insurance.ca.gov/companyprofile/companyprofile>)

(c) **Prevailing Wage and Related Labor Requirements Certification.**

(d) **Disabled Veterans' Business Enterprise Participation Certification** (as required).

(e) **Drug-Free Workplace Certification.**

(f) **Tobacco-Free Environment Certification**

(g) **Site Visit Certification**

(h) **Hazardous Materials Certification** (as required).

(i) **Lead-Based Paint Certification** (as required).

- (j) **Imported Materials Certification** (as required).
- (k) **Contractor's Safety Plan** specifically adapted for the Project.
- (l) **Buy American Certification** (as required).
- (m) **Off-Road Diesel-Fueled Fleet Certification** (as required).
- (n) **Workplace Violence Prevention Plan** (as required).
- (o) **Roofing Project Certification** (as required).
 - (i) Public Contract Code section 3006 requires that an architect, engineer, or roofing consultant registered by RCI (formerly Roof Consultants Institute) who provides professional services related to a roof project must disclose any financial relationships by completing and signing a disclosure certificate prior to the time professional services are engaged.
 - (ii) Public Contract Code section 3006 also requires materials manufacturers, contractors, or vendors involved in a bid or proposal for a roof project to disclose any financial relationships by completing and signing a disclosure certificate when the award is made.
 - (iii) A "roof project" is defined as (1) the replacement of a roof of a public facility or (2) the repair of a roof that is greater than 25 percent of the roof or costs greater than \$21,000.
 - (iv) There are civil penalties up to \$1,000 for any false information provided in addition to any other remedies, and the District is entitled to any costs incurred as a result of any undisclosed financial relationships.

4. Technical Specifications

The "how to" guide for the contractor, prepared by the architect. Watch for sole sourcing and "or equal" requirements. (Pub. Contract Code, § 3400.)

5. Prequalification

(a) Statutory Authority

Public Contract Code section 20111.5 authorizes school districts to require prospective bidders to submit a standardized questionnaire and financial statement prior to bidding on specific construction projects. Section 20111.5 (e) authorizes school districts to establish a process for prequalifying bidders on a quarterly basis. Any prequalification may be considered valid for up to one calendar year following the date of initial prequalification.

Public Contract Code section 20111.6 requires school districts to require prospective bidders and first tier MEP subcontractors, if any, to submit a standardized questionnaire and financial statement prior to bidding or being listed on for lease-leaseback projects and/or projects using funds received pursuant to the Leroy F. Greene School Facilities Act of 1998 or any funds received, including funds reimbursed, from any future state school bond, or uses general funds, for a public project that involves a projected expenditure of one million dollars (\$1,000,000) or more. Section 20111.6 (g) authorizes school districts to establish a process for prequalifying bidders on a quarterly or an annual basis. Any

prequalification may be considered valid for up to one calendar year following the date of initial prequalification.

(b) **Process**

Advertisement

The District advertises prequalification in the same manner as it advertises for bidding on a specific project (once a week for two weeks). (Pub. Contract Code, § 20112.)

Prequalification Form

Instead of providing bidding documents to respondents, the District provides a standard prequalification form to each respondent.

District Evaluation of Submitted Forms

The District must evaluate all submitted forms based on a pre-determined and uniform rating system. Based on this evaluation, the District finds each contractor either qualified or not qualified to bid on District projects. The District can also qualify contractors up to a specific dollar amount based on a uniform rating system.

Respondents' Appeal Rights

The District should establish a process for potential bidders to appeal a determination that the bidder is not qualified or any limitation that is part of a determination that the bidder is qualified.

(c) **Prequalification Issues**

Can be a controversial process. Because it is statutorily prescribed, all steps of the prequalification process must be carefully structured to be as objective as possible and to limit potential protests and challenges to a finding that a bidder is not qualified. A finding that a bidder is not qualified may be interpreted as a finding of nonresponsibility. (See discussion below on responsibility.)

V. EVALUATING BIDS

A. Bid Withdrawal: When A Bidder Wants Out

A bidder may withdraw its bid due to mistake if it notifies the District in writing within five (5) days of the bid opening of its mistake and provides detail as to how the mistake occurred.

1. The District may relieve the bidder of its bid if the District finds and documents the following:

- (a) A mistake was made in filling out the bid and not due to error in judgment or carelessness inspecting the site or reading the plans or specs. This is sometimes characterized as a "clerical error."
- (b) The mistake made the bid materially different from what the bidder intended. (Pub. Contract Code, § 5103.)
- (c) The bidder may not bid again on the same project. (Pub. Contract Code, § 5105.)

2. A district cannot recover on a bid bond after it knowingly misleads the contractor.

In *Emma Corporation v. Inglewood Unified School District* (2004) 114 Cal. App. 4th 1018, a district represented to a contractor that the information and notification to the district related to the contractor's withdrawal was sufficient. The district then sued to recover on the contractor's bid bond. The court held that the district deliberately misled the contractor so the district could not recover on the contractor's bid bond.

3. Substitution of Subcontractor

A bidder may substitute out a listed subcontractor because of an inadvertent clerical error on the subcontractor list if it notifies the District in writing within two (2) working days of the bid opening. (Pub. Contract Code, § 4107.5.)

B. The Lowest Responsive, Responsible Bidder

The District must award the contract to the bidder that submits the lowest responsive monetary bid and that is also responsible, or reject all bids.

1. Use of Alternates to Select the Lowest Bidder

Public Contract Code section 20103.8 allows consideration of bid alternates in the selection of the low responsible bidder.

- (a) If the District does not select a method of utilizing alternates in the bid evaluation process, it must select the low bidder on the basis of the base bid price only.
- (b) The notice to bidders must specify the method of selection.
- (c) Options:
 - (i) Lowest base bid price only.
 - (ii) Lowest price using the base bid and identified alternates.
 - (iii) Lowest price using the base bid and alternates needed in a specified order to reach a stated dollar amount.
 - (iv) Lowest price determined in a way that would prevent the District from knowing the identity of bidders until bidders have been ranked.

2. Responsibility

- (a) Determining if a bidder is "responsible" involves judgments as to whether the bidder has "demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform" the work of the contract. (Pub. Contract Code, § 1103.) It "is a complex matter dependent, often, on information received outside the bidding process requiring, in many cases, the application of subtle judgment." (*Taylor Bus Service, Inc. v. San Diego Board of Education* (1987) 195 Cal. App. 3d 1331, 1340.)
- (b) Before finding a bidder non-responsible, the District must provide the rejected bidder due process. "Before a contract may be awarded to one other than the lowest (or highest) bidder, the public body must (1) notify that bidder of any evidence reflecting upon the bidder's responsibility received from others or adduced as a result of independent investigation, (2) afford the bidder an opportunity to rebut such adverse evidence, and (3) permit the bidder to present evidence of qualification." (*City of Inglewood- L.A. County Civic Center Auth. v. Superior Court* (1972) 7 Cal.3d 861, 871.)

- (c) A bid investigation that goes outside the four corners of the bid is frequently an issue of non-responsibility rather than nonresponsiveness, and that a determination of non-responsibility would entitle the contractor to due process. The court in *Great West* identifies five factors enumerated in the prior case of *D. H. Williams Construction, Inc., v. Clovis Unified School District* (2007) 146 Cal. App. 4th 757. Those factors are to be considered in determining whether a bid is non-responsible or nonresponsive. Those factors are:
 - (i) The complexity of the problem and the ensuing need for subtle administrative judgment.
 - (ii) The need for “information received outside the bidding process.”
 - (iii) Whether the problem is the sort that is susceptible to categorical hard and fast lines, or whether it is better handled on a “case-by-case” basis.
 - (iv) The potential for “adverse impact on the professional or business reputation of the bidder.”
 - (v) The potential that “innocent bidders” are subject to “arbitrary or erroneous disqualification from public works contracting.” (*Great West Contractors, Inc. v. Irvine Unified School District* (2010) 187 Cal.App.4th 1425.)

3. Responsiveness

- (a) This can be determined from the face of the bid. Examples include failure to provide licensing information, dollar amounts, or other information plainly called for by the bid documents. The bidder must be given notice of the defect in its bid.
- (b) The District need not provide a contractor due process prior to making a finding that the bid is non-responsive.
- (c) These matters can sometimes be waived if the omission or “irregularity” is not significant. For example, a bidder who neglects to sign the bid may still be awarded the contract if the signature appears in other places on the bid. The determination as to whether an error in a bid can be waived is governed by two sometimes inconsistent tests:
 - (i) A defect in a bid cannot be waived if the defect would have given the bidder the right to withdraw its bid due to mistake. (*Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal. App. 4th 1432.)
 - (ii) A defect in a bid cannot be waived if the defect affects the amount of the bid by giving the bidder an advantage not enjoyed by other bidders. (*Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal. App. 4th 897.)
 - (iii) Waiver of a minor defect in a bid is up to the District’s discretion. (*MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal. App 4th 359.) The District should be consistent in the exercise of this discretion.
- (d) A public agency cannot declare a bid nonresponsive merely because the bidder listed an unlicensed subcontractor. A subcontractor is not required to be licensed at the time it submits its sub-bid (Business & Professions Code section 7026), but it must be licensed when it signs its subcontract with the prime contractor. If the subcontractor is not properly licensed by the time it must perform its work, the contractor has a cure within the law—substitution of subcontractor under Public Contract Code section 4107. Therefore, the contractor’s bid cannot be

found nonresponsive based on a subcontractor's lack of a license. (*D.H. Williams Construction, Inc. v. Clovis Unified School District* (2007) 146 Cal.App.4th 757.)

4. Bid Protests

When a bidder believes that the District has made an incorrect determination as to the "lowest responsive, responsible bidder," it may file a bid protest.

- (a) Bid protests should be investigated before award of the contract.
 - (i) The Instructions to Bidders should limit the time for filing protests.
 - (ii) The protest should be sent to the low bidder for a response, and that response should be provided to the protesting bidder for a response.
- (b) A protesting bidder's damages are limited to:
 - (i) Bid preparation expenses.
 - (ii) Bid protest expenses.
 - (iii) Unabsorbed overhead.
 - (iv) Prejudgment interest.
- (c) A protesting bidder cannot recover for lost profits. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal. 4th 305.)

VI. TYPES OF CONTRACTS – FOR SERVICES, EQUIPMENT, MATERIALS, SUPPLIES, ETC.

A. Requirements Contract – For Equipment Only

A contract covering long-term (up to five years) district requirements for an item may be used when the total quantity required cannot be definitely fixed, but can be stated as an estimate or within maximum and minimum limits, with deliveries on demand.

B. Task Order Contract

A task order contract, formerly job order contract ("JOC") is a competitively bid, indefinite quantity contract for the performance of construction services based on specific charges or unit prices. JOCs generally list specific tasks with descriptions and the price to perform each task either as a percentage of a stated amount or as the bidder's stated amount. JOCs generally have a term of at least a year. (Pub. Contract Code, §§ 20118.5—20118.9.)

C. "Sole Source" Contract

The purchase of an item or service that is exempt from competitive bidding because it is available from only one source. Generally, public entities in California can only require a "sole source" for items or services on public projects in limited circumstances and after approved by the Board.

1. In Non-Public Works Contracts, Districts May "Sole Source," With Some Risk

- (a) There is a risk in listing only one product even in a non-public works contract. Although there is no specific statute that requires the District to allow bidders to offer an "equal" item, a potential bidder could argue that doing so violates the

spirit of public bidding by not allowing all manufacturers to have their equal products be part of a publicly bid contract.

- (b) At a minimum, any sole source bid should be based on Board-approved District standards.

2. In public works, “sole sourcing” is controlled by Public Contract Code Section 3400:

“No . . . district, nor any public officer or person charged with the letting of contracts for the construction, alteration, or repair of public works shall draft or cause to be drafted specifications for bids, in connection with the construction, alteration, or repair of public works, (1) in a manner that limits the bidding, directly or indirectly, to any one specific concern, or (2) calling for a designated material, product, thing, or service by specific brand or trade name unless the specification is followed by the words ‘or equal’ so that bidders may furnish any equal material, product, thing, or service.” (Pub. Contract Code § 3400 (c).)

For purposes of roof projects, a material, product, thing, or service will be considered equal if it meets all of the following requirements: (1) the item is at least equal in quality, durability, durability, design, and, appearance but not necessarily of an identical color; (2) the item will perform the intended function at least equally well; and (3) the item conforms substantially, even with deviations, to the detailed requirements contained in the specifications. (Pub. Contract Code § 3002.)

- (a) Sole sourcing is allowed if the District “makes a finding that is described in the invitation for bids or request for proposals that a particular material, product, thing, or service is designated by specific brand or trade name for any of the following purposes”:
 - (i) “In order that a field test or experiment may be made to determine the product’s suitability for future use.” (Pub. Contract Code § 3400 (b)(1), emphasis added.)
 - (ii) “In order to match other products in use on a particular public improvement either completed or in the course of completion.” (Pub. Contract Code, § 3400 (b)(2), emphasis added.)
 - (iii) “In order to obtain a necessary item that is only available from one source.” (Pub. Contract Code, § 3400 (b)(3), emphasis added.)
 - (iv) “In order to respond to an emergency declared by a local agency, but only if the declaration is approved by a four-fifths vote of the governing board of the local agency issuing the invitation for bid or request for proposals.” (Pub. Contract Code, § 3400 (b)(4)(A), emphasis added.)
 - (v) “In order to respond to an emergency declared by the state, a state agency, or political subdivision of the state, but only if the facts setting forth the reasons for the finding of the emergency are contained in the public records of the authority issuing the invitation for bid or request for proposals” (Pub. Contract Code, § 3400 (b)(4)(B), emphasis added.)

D. E-Rate Contract

1. **E-Rate (The Schools and Libraries Program of the Universal Service Fund administered by the Universal Service Administrative Company) is a federal program that provides discounts to assist schools in obtaining affordable telecommunications and Internet access.**
(<http://www.universalservice.org/e-rate>)
2. **E-Rate supports connectivity - the conduit or pipeline for communications using telecommunications services and the Internet. School districts can request funding under four categories of service:**
 - (a) Telecommunications services,
 - (b) Internet access,
 - (c) Internal connections, and
 - (d) Basic maintenance of internal connections.
3. **School districts must provide additional resources including:**
 - (a) End-user equipment (e.g., computers, telephones, etc.),
 - (b) Software,
 - (c) Professional development, and
 - (d) The other elements that are necessary to utilize the connectivity funded by E-Rate.
4. **The primary measure for determining Schools and Libraries support discounts is the percentage of students eligible for free and reduced lunches under the National School Lunch Program, calculated by individual school. Discounts range from 20% to 90% of the costs of eligible services.**
5. **School districts must comply with specific advertising and bidding requirements.**

E. Lease/Purchase Contract for Equipment and Relocatable Buildings

1. Statutory Authority

(a) Equipment

Education Code section 17450 states that school districts may lease or lease-purchase the following: (1) school buses, (2) other motor vehicles, (3) test materials, educational films, and audiovisual materials, and (4) all other items defined as equipment or service systems in the California School Accounting Manual. An equipment lease-purchase may not exceed the useful life of the item, and in no event may the term exceed ten years.

(b) Relocatable Buildings

Relocatable buildings are not considered "equipment" and therefore do not follow the same Education Code provisions. Both Education Code sections 17400 and 17597 appear to contemplate lease/purchase arrangements involving relocatable buildings.

2. Elements of the Lease/Purchase Transaction

A lease/purchase transaction for equipment, materials, supplies and relocatable buildings generally involves the simultaneous occurrence of distinct transactions, as follows:

(a) **Purchase of Item(s)**

The District must enter into an agreement to purchase the item from a vendor. This typically occurs after a competitive bidding process or use of another school district's bid through "piggybacking." This agreement should set forth the vendor's responsibilities for the equipment, delivery, condition, warranties, and like. If the District piggybacks on another agency's contract, the District must ensure that the vendor signs a contract with the District and is bound by a contract with the District that includes the terms and conditions of the original contract on which the District is piggybacking

(b) **Financing the Transaction**

The Lease/Purchase Agreement is a separate contract between the District and the entity that will be providing the financing for the District's acquisition of the items. Sometimes financing is provided by the vendor, or a financing arm of the vendor, and sometimes financing is provided through totally independent third-party financing companies. The financing agreement normally requires the financing company to pay the vendor for the equipment on the District's behalf. Financing leases should provide for title to transfer to the District only after the lease payments are fully paid. The lease/purchase agreement sets forth the terms associated with the leasing of the asset. Most lease/purchase agreements are extremely difficult to terminate, and often are terminable only if the District lacks sufficient funds to make the yearly payments. Financing leases must have either a non-appropriation clause or an abatement clause to comply with applicable case law. (*City of Los Angeles v. Offner (1942) 19 Cal.2d 483; Dean v. Kuchel (1950) 35 Cal.2d 444.*)

(c) **Maintenance and Other Services**

- (i) Maintenance services for equipment acquired through lease/purchase are not appropriately included in the financing agreement. Services such as maintenance should either be part of the District's agreement with the vendor or through a separate maintenance contract.
- (ii) Services that are incidental to the purchase of a piece of equipment, however, such as delivery and installation charges, may be included in the lease financing agreement.

(d) **Legal Review/Opinion of Counsel**

- (i) The statutes that provide for the lease and lease/purchase of the foregoing items are complex. In certain cases, the board must take specific kinds of actions and make specified findings before entering into a financing agreement. Legal counsel should be consulted about applicable requirements and resolutions before the board takes any action regarding the transaction.
- (ii) Financing companies usually require the District's legal counsel to provide an opinion of counsel to the financing company, opining that the transaction was completed in compliance with all applicable laws, including procurement and bidding requirements. Legal counsel need to review all lease/purchase documents and to approve the bidding or other procurement process. The District should forward all documents, particularly all applicable bidding or piggyback documents, to legal counsel at the beginning of any lease/purchase process. Before legal counsel can give an opinion on a transaction, counsel needs to be sure

that all legal prerequisites have been met. Early consultation is therefore vital to timely compliance with this requirement.

F. Lease of Equipment and Relocatables (No Purchase)

School districts may lease equipment and relocatable buildings. The District enters into a lease agreement with the vendor for a specified term and a specified rental, but title does not transfer to the District. At the conclusion of the lease term, the District returns the equipment to the vendor. (Ed. Code, § 17450 et seq.)