

Date: November 12, 2024
To: The MDUSD Community
From: Dr. Adam Clark, Superintendent

Subject: Citizen's Bond Oversight Committee's (CBOC) Concerns: Issues and Answers

For over a year, some members of the CBOC have raised concerns about the District's contracts with Schneider Electric. District staff have attended every CBOC meeting and explained the District's research and position on each issue. In order to avoid any misunderstandings, the District provides an overview of the project and outlines the several concerns the CBOC has raised with respect to this contract and provides responses below.

Project Description

The project consists of two scopes. The first included HVAC equipment replacement and the installation of cost-efficient LED lighting. The second scope includes other Heating, Ventilation and Air Conditioning (HVAC) replacement work and the installation of automated controls to reduce energy costs. The work is being performed at multiple District sites. The contract prices for the respective scopes are \$24,354,012 and \$25,074,659. Each scope consists of a design phase and a construction phase.

Procurement of The Project

The District elected to procure the project as an energy conservation contract under Government Code § 4217.10, *et seq.* The District, while not required under that statute to engage in a competitive selection process, still elected to use one, issuing a Request For Qualifications ("RFQ") on August 20, 2021. The RFQ requested statements of qualification from energy services companies that met certain minimum requirements and required them to otherwise demonstrate that they were qualified to perform the work. The respondents were required to provide a statement of qualifications, which included information regarding firm background, financial capacity, management structure, energy project references, project approach, and their approach to ensuring project savings.

Three proposals were received and scored, and the project was awarded to the proposer that best aligned with the District's needs, which was Schneider Electric. On February 2, 2022, Schneider was awarded the project. To be clear, Schneider was awarded both phases. However, because the construction cost and energy savings

could not be determined before the design phase and we anticipated that an energy audit would be completed in the future, the initial contract price included only the design fee for the first scope of work.

The only significant contractor selection requirement for energy services agreements is that prior to entering into an energy savings agreement, it must be established that the anticipated cost to the District for energy generated by the improvements “will be less than the anticipated marginal cost to the public agency of thermal, electrical, or other energy that would have been consumed by the public agency in the absence of those purchases.” (Government Code § 4217.12(a)(1)) Put in simpler terms, this means that the energy savings generated by the project must pay for the project. Therefore, once the agreement was signed, Schneider proceeded to perform an energy audit.

After performing the energy audit, Schneider concluded that the District would obtain the required level of energy savings. On May 11, 2022, the District held the required hearing, with the Board finding that the District would obtain the savings and that entering into the agreement was in the best interests of the District. However, the only information provided by Schneider to support the energy savings was a matrix which stated the estimated energy savings per year over the life of the improvements. Notably absent was any of the data which supported their conclusions. It should be noted that there is nothing in the Government Code which requires that the supporting data be presented to the Board. At the meeting, the Board approved an amendment to the contract to add the construction phase for that scope of work. Then, in March 2023, the design work was completed on the second phase of the project and the agreement was amended to include the construction portion for that scope of work.

CBOC Issue # 1: 1) Was a formal bid process or consideration of another contractor required by law?

Response # 1: For energy service contracts, a district may negotiate directly with the contractor without formal bidding or may use a request for proposal process under the conditions of Government Code §§ 4217.10 et seq. Even though the District was not required to do so, the District utilized a competitive selection process, using “best value” criteria for the award. In August 2021, the District issued a Request for Qualifications (RFQ) # 1896 for District-Wide Building Automation Heating Ventilation Air Conditioning Systems and Lighting. In October 2021, the Board approved a pool of two qualified firms—SitelogIQ and Schneider. In February 2022, the Board conducted a Public Hearing and authorized District staff to enter into a design-build agreement with Schneider Electric for the Project. In April 2022, the Board approved a Design-Build Contract with Schneider for design services for \$385,000. The Board approved 1) in

May 2022 an Amendment for the first phase of construction for \$24,354,012; and 2) in March 2023 a Second Amendment for the second phase of construction for \$25,074,659.

CBOC Issue # 2: Was there was a conflict of interest which prohibited Schneider from being awarded the second phase of the work without going through a separate competitive selection process, since California Government Code §1090 prohibits any officer or employee of a state or local government agency from being financially interested in any contract made in his or her official capacity or made by any board of which he or she is a member?

Response # 2: In April 2024, Glenn Gould, Esq., with Orbach Huff & Henderson LLP, attended a CBOC meeting, and explained that the RFQ made it clear that the project consisted of both scopes of work. The only reason the second phase of the construction was added later was because the preliminary design work had to be completed before the construction cost for that scope could be added to the contract. Put another way, at the time Schneider was selected, it was understood that they would perform both scopes of work. Therefore, there was no conflict of interest with respect to the second scope of work.

This issue was litigated in the courts and was recently codified in Government Code § 1097.6, which provides that this type of procurement is not a conflict of interest, as noted by Mr. Gould on June 14, 2024, when he attended the CBOC meeting. He explained that the RFQ included two phases—Phase 1 (Design) & II (Build—Construction Phase), and accordingly, approving the subsequent construction work did not violate § 1090. In fact, in *CA Taxpayers Action Network v. Taber Constr., Inc.*, 42 Cal. App. 5th 824 (2019), plaintiffs brought an action against Taber Construction and the District alleging a violation of Government Code § 1090 due a construction company providing preconstruction services and subsequent construction of a project. The case’s holding that there was no conflict because the intent of the process was “one fluid transaction,” was codified in [Government Code § 1097.6](#) (Subsequent contract with independent contractor for later phase of same project; good faith reliance). The award to Schneider mirrors the process followed in the 2019 case. Specifically, in September 2021, the District issued an RFQ 1896 “Combined Phase I (Design) & II (Build): Districtwide Building Automation HVAC & Lighting.” In this respect, similarly to the Taber case, when the District issued RFQ 1896, the District anticipated the subsequent contracts following the design phase.

CBOC Issue # 3: Does the first contract with Schneider Electric include additive items that are “service contracts” as opposed to construction contracts that are typically for a construction bond program?

Response # 3: The plain text of the [Bond Measure](#) provides for incidental costs, including professional services: “Each of the bond projects described in this Bond Project List include the costs of furnishing and equipping such facilities, and all costs which are incidental but directly related to the types of projects described above. Examples of incidental costs include, but are not limited to: ... other professional services ...”

CBOC Issue # 4: Is the District allowed to use bond funds for operational or administrative costs, specifically, for bond program audit costs?

Response # 4: The plain text of the Bond Measure provides that bond funds may be used for audits. “Each of the bond projects described in this Bond Project List include the costs of furnishing and equipping such facilities, and all costs which are incidental but directly related to the types of projects described above. Examples of incidental costs include, but are not limited to: ... independent annual financial and performance audit...”

CBOC Issue # 5: The Chair of the CBOC requested a legal opinion with respect to a fellow CBOC member voting on matters related to the Schneider contracts.

Response # 5: The CBOC’s Ethics Policy Statement provides that a CBOC member should not influence contracts funded by the bond process or benefit from such a contract. This member did not vote to approve or disapprove the Schneider Contract or subsequent Amendments. Further, there was no evidence that the member personally benefited from any contract between Schneider and the District. Based on known facts, the CBOC member did not appear to have a conflict under the Ethics Policy Statement requiring recusal.

CBOC Issue # 6: Is the district’s decision to decline to approve the CBOC’s proposed contract for independent legal counsel a direct violation of the district’s obligation under prop 39 to provide the CBOC with necessary administrative support?

Response # 6: Education Code § 15278 provides that if a bond measure authorized by Proposition 39 is approved, then a district must establish CBOC. The District, without expending bond funds, must provide the CBOC with any necessary technical assistance and “administrative assistance in furtherance of its purpose ...” Educ. Code § 15280. The CBOC’s authorized activities in Education Code §§ 15278(c) & 15280 do not include hiring legal counsel. The CBOC’s [Bylaws](#) provide: “The Committee shall have

no jurisdiction over the following types of activities: ... handling of legal matters.” Thus, the request for independent counsel is outside of its jurisdiction.

The District offered to fund eight hours of legal counsel to the CBOC. In response to that offer, the CBOC requested additional hours, the District authorized up to 15 hours. The CBOC requested 30 hours. The District removed the offer due to widening scope of focus.

CBOC Issue # 7: Is the energy savings analysis performed by Schneider accurate?

Response #7: Schneider will publicly address this during the November 14, 2024 CBOC meeting.

CBOC Issue #8: Why did the District not require an energy savings guarantee in its contract?

Response #8: Many school districts opt not to require a guarantee of cost savings because the monitoring required to provide that verification is very costly. Like many other school districts, MDUSD instead decided to put the money that would have been spent on savings verification toward more HVAC units.

CBOC Issue 9: Questions regarding Schneider’s profit, Schneider’s subcontractors, and what subcontractors are being paid.

Response #9: Schneider will publicly address this during the November 14, 2024 CBOC meeting.