Software, Desks, and Hand Sanitizer: Adapt During the 20-21 School Year with Alternate Procurement

Presented to: CASBO
Monday, July 20, 2020
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Today’s Webinar

- Today’s session is best viewed in Full Screen.
- **Questions** during the webinar can be submitted in one of two ways:
  - Use the **Chat Box** to send your question during the presentation
  - Send questions via **email** to emcpeters@dwkesq.com
- Get ready! **Interactive polls** will be conducted throughout the webinar.
- The PowerPoint and the webinar recording link will be sent to all registrants the following day.
Today’s Goals

- In this workshop you will be provided with the tools to successfully identify the best option for your district’s procurement needs.
- You will feel better equipped to recognize potential alternatives to competitive bidding.
Adaptation in Action

- CDE Guidance: [https://www.cde.ca.gov/ls/he/hn/strongertogethehealth.asp](https://www.cde.ca.gov/ls/he/hn/strongertogethehealth.asp)
- CA State: [https://covid19.ca.gov/request-ppe/](https://covid19.ca.gov/request-ppe/)

Governor Gavin Newsom Lays Out Pandemic Plan for Learning and Safe Schools

Plan centers on rigorous instruction for students even when schools are physically closed.

Decisions to open in-person will be determined by local data that the public can track on a daily basis.

Schools open for in-person instruction will implement precautions, including a requirement that students in 3rd grade and above wear masks.

Newsom: "In California, health data will determine when a school can be physically open – and when it must close – but learning should never stop."

SACRAMENTO – Governor Gavin Newsom today announced his plan for learning and safe schools ahead of the 2020-2021 school year, as the California Department of Public Health issued a framework for when and how schools should reopen for in-person instruction.

“Learning is non-negotiable,” said Governor Newsom. “The virus will be with us for a year or more, and school districts must provide meaningful instruction in the midst of this pandemic. In California, health data will determine when a school can be physically open – and when it must close – but learning should never stop. Students, staff, and parents all prefer in-classroom instruction, but only if it can be done safely.”

The Governor’s plan centers on five key areas:

1) Safe in-person school based on local health data

The California Department of Public Health today issued updated schools guidance that includes using existing epidemiological metrics to determine if school districts can start in-person instruction. CDPH currently uses six indicators to track the level of COVID-19 infection in each...
COVID-19 Impacts on Procurement

- Emergency Declarations
  - State
  - County
  - District

- Exception to local bidding requirements?
  - “state agencies”
Presentation Roadmap

I. Procurement Basics
   - Bid Thresholds
   - CUPCCAA
   - Bid vs. RFP

II. Exceptions to Bidding:
   - True “Piggyback”
   - CMAS
   - JPA/Cooperative Purchasing Agreements
   - Emergencies

III. Other Types of Contracts:
   - Technology Contracts
   - Supplemental Instruction Materials
I. Procurement Basics
Procurement Basics

- Start from the following assumption that everything needs to be formally bid.

- If bidding is not practical or desired, then look for an exception that allows the district to procure the product or service without competitive bidding.
Bid Thresholds

- Formal bid process is required by statute:
  - Selection through a public, competitive, formal bidding process for contracts exceeding the bid threshold. (Pub. Contract Code, § 20111, et seq.)

- Bid Thresholds:
  - For public works projects (i.e., construction services) of $15,000 or more. (Pub. Contract Code, § 20111(b).)
  - For equipment, materials, or non-construction services over current bid limit (i.e., $95,200 in 2020). (Pub. Contract Code, § 20111(a)(1).)
Construction Services: What is it?

- Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility. (Pub. Contract Code, §22002(c).)*
  - “Construction” includes painting and repainting.
  - “Construction” excludes maintenance.

- If you need to repave your school’s parking lot, is that construction or maintenance?

*Not to be confused with definition of “Public Works” under Labor Code, §1720, et seq., which determines whether prevailing wage applies (and which includes maintenance).
Equipment, Materials, Supplies, and Non-Construction Services

- Competitive bidding is **required** when contracting for equipment, materials, supplies or non-construction services in excess of the bid limit. (Pub. Contract Code, §20111(a)(1).)
  - Bid Threshold is $95,200 in 2020.
Equipment, Materials, Supplies, and Non-Construction Services

- This category includes:
  - Purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district.
  - Non-construction services.
    - Other procedures for **Professional Services**: Architects, Engineering, Land Surveying, Construction Project Management, and Environmental Services (Govt. Code, § 4525).
    - Other procedures for **Special Services**: Financial, Economic, Accounting, Legal or Administrative Services (Govt. Code, § 53060).
  - Non-public works repairs, including maintenance.
Bid Splitting

“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 this article requiring contracting after competitive bidding.” (Pub. Contract Code, § 20116.)

- Bid splitting is **NOT**:  
  - Different scopes, timelines, products/brands.

- Bid splitting **IS**:  
  - Intentionally dividing up a scope to fall under the bid limit.
What is the California Uniform Public Construction Cost Accounting Act?

- **CUPCCAA**: Legislation to help promote uniform cost accounting practices for construction services on *public works projects*.
  
  • District uses specified accounting procedures to:
    - estimate project costs to assess bidding, and
    - record actual costs if a public project is performed by the District’s own work force.
  
  • Procedures follow normal accounting in the industry and in many cases are not much different from those already in place at the agency.
  
  • District may use the Standard Accounting Code Structure to comply with the tracking requirements.
How to be subject to CUPCCAA

1. **Adopt Resolution re CUPCCAA**
   - Resolution Of The Governing Board Of The School District To Become Subject To Uniform Public Construction Cost Accounting Procedures.

2. **Notice to State Controller**
   - Pursuant to Public Contract Code section 22030, the District must notify the State Controller of its election to be subject to CUPCCAA.
   - The notice must include copy of approved Board Resolution adopting CUPCCAA.

3. **Update BP and AR (3311)**
   - District’s Board Policies and Administrative Regulations should reflect adoption of CUPCCAA, informal bidding procedures and other requirements.

4. **Create and Maintain List of Registered Contractors**
   - Used for notice for informal bidding. (Pub. Contract Code, § 22034(a).)
   - In November of each year, District mails written notice to designated trade journals.
   - New list may be created starting January 1.
   - Commission recommends including contractors who submitted one or more valid bids during the previous year. Contractors may be added to the list by providing the information at any time.
Context for CUPCCAA: Public Works Projects and Contracts

- **Public Works Project** (Pub. Contract Code, § 22002(c)):
  - Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.

  - Agreement for erection, construction, alteration, repair, improvement of any public structure, building, road, or public improvement of any kind.

- Public Works do not include maintenance.
CUPCCAA: No Bidding/Direct Negotiation (≤$60,000)

- Allows no bidding (i.e., direct negotiation) for construction services contracts up to $60,000.
  - (Pub. Contract Code, §§ 22032, 22034, 22036.)

- Examples:
  - $55,000 relocation of underground cables
  - $60,000 lead abatement during construction
  - How about a total contract for $40,000 for installation labor and $10,000 for materials?
CUPCCAA: Informal Bidding ($60,000.01 - $200,000*)

- Applies to projects > $60,000 and ≤ $200,000*.

- Informal Bidding Procedure:
  - Provide notice to list of contractors/specified trade journals inviting informal bids:
    - At least 10 days before bids are due,
    - Notice must contain general description of project, instructions for how to obtain additional information, and time and place for submission of bids.
  - No formal advertising required, and
  - Award to lowest responsible bidder, unless all bids exceed $200,000.
    - *If all bids received exceed $200,000, Governing Board may pass 4/5ths resolution awarding contract at $212,500 or less to lowest responsible bidder if it determines District’s cost estimate was reasonable.

- If no bids received, may use force account or negotiate contract.

(Pub. Cont. Code, §§ 22032, 22034, 22036.)
CUPCCAA: Informal Bidding (Continued)

- Informal Bid Packet
  - What is included in the informal bid packet?
  - How is it different from formal bidding for projects over $200,000?

- Examples:
  - $75,000 Roof Repair (includes labor and materials)
  - $65,000 Athletic sound system installation
  - $139,000 HVAC Replacement
CUPCCAA: Formal Bidding (> $200,000)

- Applies to projects greater than $200,000.
- Advertise for bids:
  - Published in newspaper at least **14 days** before bid opening;
  - Published in trade journals (electronically if available) at least **15 days** before bid opening;
  - All advertisements must include:
    - Time and place for opening;
    - Description of project and work to be done;
  - Bid bond required.

(Pub. Cont. Code, § 22037.)
CUPCCAA: Formal Bidding (>\$200,000) (Continued)

- Awarding contract:
  - May accept and award to lowest, responsive, responsible bidder.
  - May reject bid(s) and perform with District employees *IF*:
    1. District declares project can be performed cheaper by own forces before rejecting bids;
    2. Proper notice is provided;
       - Notice must be written and mailed at least 2 business days before rejection hearing;
    3. District has hearing to reject bid(s);
    4. All bids rejected;
    5. District reevaluates project cost estimates; and
    6. Board resolution by 4/5ths vote declaring project can be performed more economically by District forces.

- If no bids received, may use force account or negotiate contract.

(Pub. Cont. Code, § 22038.)
Bid vs. RFP

• “Bid” (a.k.a., “hard bid,” “formal bid,” “competitive bid”) is a legal term of art and, among other things, requires the District to select the LOWEST, RESPONSIBLE, and RESPONSIVE bid.
  – If I get 3 quotes, does that meet a “bid” requirement?

• “RFP” (request for proposals) permits District to seek proposals from prospective vendors and District is not required to select the vendor with the lowest price – but, based on other criteria.
II. Exceptions to Bidding
“Piggyback” Categories: True Piggyback

- Piggyback on Other Public Agencies’ Contracts. (Pub. Contract Code, § 20118.)
  - Why is this ok?

- Can districts piggyback on a contract that wasn’t from a school district or LEA?

- Piggybacking to lease data-processing equipment and/or to purchase materials, supplies, equipment, and other personal property.

- Piggyback can be used for goods, but cannot be used for services.
  - Unless the services are “incidental” (we’ll cover this).
Conditions for “True Piggyback”

- Board findings (resolution) that it is in best interest to the District to use piggyback contract.
- Must perform **due diligence** that underlying purchase by other public agency was procured as authorized by law:
  - Must be **same terms** as original piggyback contract.
- Must be for purchase of personal property, and services “incidental” to purchase of personal property.
  - “Incidental” means 10% or less of the total contract price.
  - On a case-by-case basis, “incidental” may be up to 50% of the total contract price.
  - “Incidental” can **never** exceed 50% of the total contract price.
“Piggyback” Categories: True Piggyback (Continued)

- **Best Practices:**
  - Obtain copy of original procurement docs and resolution approving the original contract, as well as any term extensions, if applicable.
  - Due Diligence Review – ensure the following:
    - proof the vendor had the original contract awarded to it;
    - item being acquired is the same item as approved by original-award entity;
    - same terms and conditions apply as in the original contract;
    - same pricing applies as in the original contract;
    - original contract is still valid (it hasn’t expired or been terminated); and
    - original contract includes a provision authorizing piggybacks.
“Piggyback” Categories: CMAS

- California Multiple Award Schedule (“CMAS”) and other State-leveraged procurement agreements (“LPA”) for goods, information technology, and services. (Pub. Contract Code, §§ 10298, 10299, 12101.5.)

- 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.

- Can you use CMAS for artificial turf + turf installation by a licensed contractor?
Conditions for CMAS

- Must perform due diligence that underlying purchase by DGS was procured as authorized by law.
- Contract must be valid (not expired or terminated)
- Make sure to check all supplements!
- Required products and services must be included in the CMAS contract.
  - For construction:
    - Total dollar value of all public works services in purchase order must not exceed the dollar value of the products;
    - Cannot use CMAS contract for services only.
- Prices offered are equal *or lower* than the prices in the awarded CMAS contract.
- Incorporate CMAS terms and conditions (e.g., purchase limits).
“Piggyback” Categories: JPA aka Cooperative Purchasing Agreements

- School districts are authorized to enter into joint powers agreements (“JPA”) with contracting agencies outside of California to purchase goods and services without competitive bidding. (Gov. Code, § 6502.)
  - Think of this as cooperative purchasing; members leverage their buying power to get good products and pricing.

- JPA Purchasing Programs include:
  - The Cooperative Purchasing Network
  - National Cooperative Purchasing Alliance
  - Omnia Partners (fka NIPA and US Communities)
  - Sourcewell (fka NJPA)
Conditions for JPA

- Board approval to become member of the JPA.
  - Often requires approval of the JPA’s Membership Agreement/authorization to execute Membership Agreement.
- Contract must be procured under other public agency’s legal requirements.
  - Legal opinion letter or analysis.
- Proof the vendor had the JPA contract awarded to it.
- JPA contract is still valid.
- Item(s)/Service(s) being acquired are included within the JPA contract.
- Same terms and conditions of JPA contract, including pricing.
- No limitation on services.
Emergencies

- Definition: “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 [emphasis added].)


- Urgent vs. Emergency vs. ASAP
Steps to Enter an Emergency Contract

- **IF NOT** covered by CUPCCAA:
  - Unanimous Board vote;
  - Approval of the county superintendent of schools. (Pub. Contract Code, § 20113.)

- **IF** covered by CUPCCAA:
  - 4/5ths Board vote and finding that emergency will not permit a delay and action is necessary to respond to emergency;
  - If no notice for bids given, then Board shall review emergency action at next regularly scheduled meeting, and each meeting until emergency terminated, to determine by 4/5ths vote that need continues to exist. (Pub. Contract Code, §§ 22035, 22050.)
Unique “Emergency” Options

- Purchase PPE from the State of California for “essential” workers:
  - [https://covid19.ca.gov/request-ppe/](https://covid19.ca.gov/request-ppe/)
  - Face masks, fields, gloves, sanitizer, wipes, gowns, plexiglass partitions

- **Essential** is defined in Gov. Newsom’s Order N-33-20.
  - Includes, but is not limited to: school lunch programs; school transportation; workers supporting pre-K, K-12, colleges, and universities for distance learning, school meals, or care/supervision of minors to support essential workforce; workers ensuring continued building function, maintenance, security; workers supporting government digital infrastructures.
III. Other Procurement Options
Technology Purchase Section 20118.2

- Competitive Request for Proposals process may be used to contract for computers, software, telecommunications equipment, microwave equipment, other related electronic equipment and apparatus.
  - (Pub. Contract Code, § 20118.2.)
- How about cat 5 (Ethernet) cabling?
- May trigger Ed. Code, § 49073.1 (pupil data privacy requirements).
Technology Purchase Section 20118.2

- Statute authorizes **competitive, regulated** RFP process.
- Permits District to consider, in addition to price, other factors such as:
  - vendor financing
  - performance reliability
  - standardization
  - life-cycle costs
  - delivery timetables
  - support logistics
  - the broadest possible range of competing products and materials available
  - fitness of purchase
  - manufacturer’s warranties
Technology Purchase Section 20118.2

- Regulated, competitive RFP Process:
  - Board resolution with findings (technology falls within statute limits), and procurement will be competitive;
  - RFP identifying all significant evaluation factors and import;
  - RFP includes detail regarding District’s evaluation of:
    - technical and quality issues
    - selection and award
  - RFP submitted to adequate number of qualified sources for reasonable competition;
  - RFP must be published in a newspaper at least twice and for at least 10 days before deadline for submitting proposals.
Technology Purchase Section 20118.2

- Single proposal received?
  - District Board must make a finding (via a resolution) regarding District’s efforts to maximize number of feasible proposals from qualified sources.

- Selection and Award:
  - District rejects all proposals and requests new ones, or
  - Awards contract to qualified proposer who met the evaluation standards.

- Award made to proposer who did not have the lowest price?
  - District Board must make finding (via a resolution) identifying basis for the award (e.g., why was it most advantageous to the District).
Supplementary Education Materials

- Pub. Contract Code, § 20118.3
  - “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.”

- What about “electronic” textbooks?

- How to document basis of award?
  - Use your contract recitals!
IV. Other Considerations
Not All Forms of Agreement Are Created Equal

- **Hard bid contracts:**
  - Use a form of agreement/bid package prepared/reviewed by the District (or your consultant, e.g. Architect, Construction Manager, Legal Counsel)

- **Negotiated contracts:**
  - Use a form of agreement prepared by the District (or your legal team)
  - Common issues with using a vendor agreement:
    - Contract term doesn’t match what is authorized under the Education Code;
    - Mandatory provisions not included (e.g., insurance requirements, pupil data privacy requirements, bonds if the contract is for construction);
    - Terms and Conditions may be vague, ambiguous, or unfairly drafted;
    - Payment provisions are not compliant with California Constitution;
    - Document procurement authorization is not recorded in recitals.
Authority to Enter into Contracts

- Who Has Authority to Enter into Contracts?
  - Only the Board of Education can approve or ratify District contracts. (Ed. Code, § 35010.)
    - Approve: To give formal sanction to; to confirm authoritatively.
    - Ratification: Confirmation and acceptance of a previous act, thereby making the act valid from the moment it was done.

- Can Your School Site Contract?
  - No, only the District.
Authority to Enter into Contracts

- Can the Board Delegate the Authority to Contract?
  - The Board may delegate the authority to contract to the superintendent or the superintendent’s designees.

- What Is the Scope of Delegation?
  - Limited as to time, money, or subject matter; or
  - Unlimited.
  - The Board must approve or ratify every District contract for it to be binding after delegation. (Ed. Code, § 17604.)
Authority to Enter into Contracts

- What If a Contract is Not Approved or Ratified by the Board?
  - Contract may be void
  - Contractor may not get paid
    - Payments made to Contractor may have to be returned to District
Questions?