Shedding Light on School Energy Projects & Procurement

September 8, 2021

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Overview & Objectives

- Energy Projects Primer
- Solar Projects & GC 4217
- California Energy Efficiency Programs
- Federal Funding
- Emergency Exceptions

Objectives → Share lessons learned, stories from the field & what we see on the horizon

Information in this presentation, included but not limited to PowerPoint handouts and the presenters’ comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.
Reasons to Celebrate

- CA Solar Stats in Schools
- 1/3 of solar schools in nation
- 45% of entire solar capacity
- Cost-Savings from Energy Efficiency
- Increasing State and Federal Funding Opportunities
Continued Need for Energy Efficiency & Resiliency
Energy Projects Primer
## Energy Projects – Then & Now

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Solar Projects & GC 4217
Solar Energy Projects

- 10+ Years In
- PPAs & District Owned
- Lessons Learned
- Issues of Concern
Issues of Concern

- Location of solar arrays
- Maintenance and operation
- Security
- Guarantees
- Assignments
- Bonds
Pitfalls to Avoid

Contract language problems

K-12 District - Power Purchase Agreement

- Failed to include language requiring solar vendor to connect system to utility
- Failed to include language requiring solar vendor’s contractor to follow Education Code requirements (fingerprinting, drug/alcohol free workplace)
- Failed to include language requiring solar vendor to reimburse district for legal costs when refinancing
Pitfalls to Avoid

Roof mounts

- Large K-12 District - Power Purchase Agreement
  - DSA approval for rooftop difficult to obtain
  - Insurance companies don’t cover roof penetrations
  - Roof replacement challenges
  - Drainage and plumbing issues
  - Problems increased costs and caused solar vendor to withdraw from contract
Past Decade - Lessons Learned

- Relocation of Arrays
- Sale of Sites
- Bankruptcies
- COVID Delays
- Angry Neighbors
- CEQA
- Procurement Requirements & Recs
Other 4217 Energy Projects

- RFP or some type of comparative process recommended
- Know your funding source(s)
- Still need cost-savings findings
- Examples that can work:
  - HVAC
  - Lighting
GC 4127 Implementation

Prepare Request for Proposals ("RFP")

- Not necessary to use RFP process but we recommend it
- Gov’t Code sections 4217.10 et seq.
- Include information specific to District’s needs
- Can request proposals for different configurations
- Suggest limited distribution of RFP
- RFP responses will provide info for District’s decision on options
- Improves bargaining position
Selection of Company - 4217

- Board makes decision in regular, open session
  - Hear staff and consultants’ reports on proposals and recommendations
  - Make required Gov. Code 4217.10 et seq. findings
  - Public comment
  - Public notice two weeks prior to Board meeting
Best Practices – 10 + Years In

Research
- Energy assessment, evaluation of systems, companies and financing
- Independent third-party technical analysis of vendor’s numbers
- Legal analysis of contract terms

Communication
- Recommend early communication with stakeholders

Design and Contract Issues
- Aesthetics, location of panels, security (panels can’t block security cameras)
- Language specific to school districts (mandated by law)

Evolving Laws & Funding Sources
- Net metering
- Tax credits
California Energy Efficiency Programs
AB 841 – New Funding Source

- California Schools Healthy Air, Plumbing & Efficiency Program (CalSHAPE)
- Majority of Funding for Ventilation
- 25% Funding—Priority for Underserved Communities
- Implementation Requirements
- California Energy Commission
  - Program Guidelines
AB 841 – Practical Considerations

- Caution on multiple funding sources
  - Tip → follow the $ to identify procurement standards
- Assessment Report
- Verification Report
- Retroactive Funding
- Board Action & Grant Agreements
Prop 39 Update

- What are we seeing?
- Final projects and reports
- Audits
  - *Sole Source Findings*
  - Contract Flaws
  - Misuse of funds
- Potential return of millions of Prop 39 monies
Legal Standard – Prop 39 Process

- Public Resources Code§26235(c)
  - “LEA shall *not* use a *sole source process* to award funds pursuant to this chapter”
  - Legislature did not define “sole source process”
  - “LEA *may* use the best value criteria as defined in paragraph (1) of subdivision (c) of Section 20133 of the Public Contract Code…”

(Senate Bill 73, 2013)

- “We have interpreted the requirement to ‘not use a sole source process to award funds,’ as the need to use a competitive process.”

- District “did not submit documentation to support that it had considered other vendors when it awarded the contract.”
Substantial Compliance

- Education Code section 41344.1
  - “A minor or inadvertent error causing non-compliance may be grounds for the EAAP to find substantial compliance, so long as the Appellant can also demonstrate it acted in good faith to comply with the conditions established in law or regulation that are necessary for apportionment of the funding.”
Federal Funding
Federal Funding for Energy

- Current Landscape
- Potential Future Opportunities
CARES Act Funds

- Cares Act (March 2020)
  - CR Fund (expenditure timeline ended December 2020)
  - ESSER I/GEER I (March 13, 2020 – September 30, 2022)
- CRRSA Act (December 2020)
  - ESSER II/GEER II (March 13, 2020 – September 30, 2023)
Requirements for Purchases with Federal Funds

- EDGAR: federal regulations that govern expenditures of all federal grants awarded by the U.S. Department of Education
- Requirements to also apply documented procedures that reflect applicable state and local laws
Other EDGAR Requirements

- Full and Open Competition, Noncompetitive Awards
- Contract Costs
- Contract Provisions and Certifications
- Contract Administration
- Tracking, Use and Disposition
- Records Retention
- Internal Controls/Written Policies
Layers of Law

The non-federal entity (district) must use its own documented procedures which reflect applicable State, local and tribal laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this part [of EDGAR].

Take away: Follow the most restrictive/most conservative rule that applies.
Emergency Exceptions

- State Order: In California, Governor Newsom's March 4, 2020, State of Emergency Declaration is ongoing.
  - PCC 20113

- Federal Emergency Declarations:
  - Secretary of Health and Human Services has renewed the State of Emergency as of January 7, 2021.
Justification Elements

1. Identify the public exigency or emergency
2. Provide a brief description of the purchase
3. Illustrate why competitive bidding would cause unacceptable delay; describe the specific steps taken to determine that full and open competition could not have been used
4. State how long the noncompetitively procured contract will be used
5. Describe any known conflicts of interest and any efforts that were made to identify possible conflicts of interest
Key Takeaways

Know your funding source(s)

Some competition is always good even if not always required

Think current and future needs

Legacy Projects
THIS IS A SUMMARY ONLY AND NOT LEGAL ADVICE. WE ADVISE YOU TO CONSULT WITH LEGAL COUNSEL TO DETERMINE HOW THIS INFORMATION MAY APPLY TO YOUR SPECIFIC FACTS AND CIRCUMSTANCES.
Thank You!

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*This session qualifies for one (1) continuing education unit so long as you attend the live webinar in its entirety. To receive your CEU, please contact Michelle Neto at mneto@casbo.org one week after the webinar concludes.