



2022 CSFC Annual Summit

Embassy Suites Sacramento Riverfront Promenade
October 27-28, 2022

**Legal Update: Alternative Procurement and Purchasing
Options, Piggybacks and More**

Shawn VanWagenen

Legal Counsel

Office of the Fresno County Superintendent of Schools

Speaker Biography

Shawn VanWagenen
Legal Counsel
Office of the Fresno County Superintendent of Schools

Shawn VanWagenen is legal counsel at the Office of the Fresno County Superintendent of Schools. He has represented school districts and county superintendents regarding education law matters since 2015. His expertise includes business matters, facilities, and general governance.

Shawn has conducted many workshops for school districts on education law topics, including public works projects, contracting, and real property transactions.

He received his J.D. from the University of the Pacific, McGeorge School of Law.

ALTERNATIVE PROCUREMENT AND PURCHASING OPTIONS, PIGGYBACKS, AND MORE

Shawn VanWagenen
Legal Counsel
Fresno County Superintendent of Schools



2022 CSFC Annual Summit
October 27-28, 2022

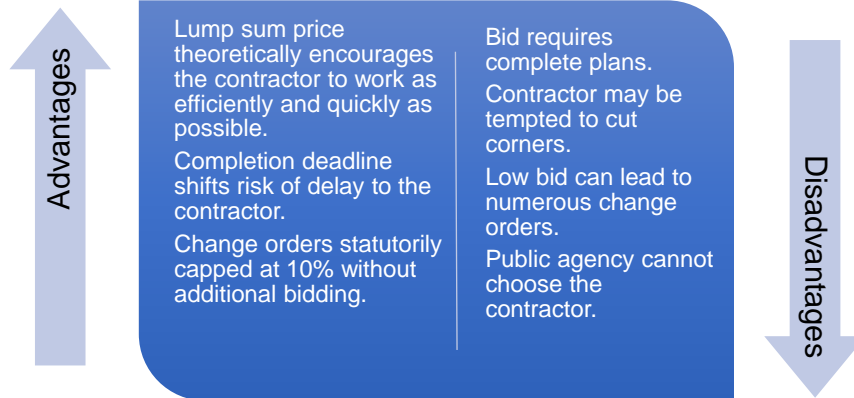


OVERVIEW

- Competitive Bid Overview
- Common Bid Exceptions
- Legal Background of Modulares and Piggybacks
- Summary of SAB Current Position
- Options for Purchasing Modulares Going Forward



COMPETITIVE BIDDING SUMMARY




COMMON BID EXCEPTIONS

| EXCEPTION | LEGAL AUTHORITY |
|--|---|
| Professional and special services | PCC 20111(c); Gov. 53060 |
| Piggybacking on other public agency contracts. | PCC 20118 |
| Surplus property from the Federal government. | Ed. 17602 |
| California Multiple Award Schedules (CMAS.) | PCC 10298 & 10299 |
| Supplementary textbooks, library books, educational films, audiovisual materials, test materials, workbooks, instructional computer software packages, or periodicals. | PCC 20118.3 |
| Perishable foodstuffs and seasonal commodities needed in the operation of cafeterias. | Ed. 38083 |
| Where public bidding does not produce any advantage, or where it is practically impossible to obtain what is required through public bidding | Graydon (1980) 104 Cal.App.3d 631; see PCC 3400 |

COMMON BID EXCEPTIONS (CONT.)

| EXCEPTION | LEGAL AUTHORITY |
|---|---|
| Procurement or maintenance of electronic data processing systems and supporting software (may contract with one of 3 lowest bidders) | PCC 20118.1 |
| Computers, software, telecommunications equipment, microwave equipment, and other related electronic equipment and apparatus (may use “competitive negotiations”) | PCC 20118.2 |
| Emergency situations when a sudden occurrence takes place, and is either a threat to public safety or to continuation of existing classes | PCC 22035; PCC 1102; Marshall (2004) 119 Cal.App.4th 1241 |
| Lease-leaseback delivery method | Ed. 17400, <i>et seq.</i> |
| Design-build delivery method | Ed. 17250.10, <i>et seq.</i> |



...s, 2022

TO: ALL SCHOOL DISTRICTS AND COUNTY SUPERINTENDENTS OF SCHOOLS

School districts that use piggyback contracts for modular facilities are ineligible for state funding from State Allocation Board administered programs.

In 2006, Office of Public School Construction (OPSC) staff presented the Attorney General's (AG) Opinion 05-405 dated January 24, 2006, to the State Allocation Board (SAB), which concluded that school districts must competitively bid contracts to acquire modular school facilities for installation on a permanent foundation. At the direction of the SAB at the January and February 2006 meetings, staff provided numerous notices to ensure that school districts were aware that all contracts related to acquisition and installation of permanent modular facilities signed after January 25, 2006, must be competitively bid to receive funding consideration by the SAB.

As a result of recent communications between staff and stakeholders, staff has learned that alternate interpretations of the AG opinion to acquire and install modular school facilities exist. On February 23, 2022, staff presented the current SAB members with a copy of the original Board reports and the AG's opinion, to remind all stakeholders of the Public Contract Code (PCC) requirements.

At the June 22, 2022, SAB meeting, staff presented a follow up item regarding piggyback contracts and PCC compliance relative to modular school facilities. After staff's presentation, discussion from the SAB members, and public comment, the SAB took the following action:

Provide a grace period for SAB-administered programs for projects with construction contracts signed on or within sixty calendar days (through August 21, 2022) of this Board action. Create a new process to begin after this grace period where Staff evaluates the contracts during the time of application processing and prior to fund release to ensure no piggyback contracts have been used for modular facilities.

With this action,

- Staff will continue to process and present applications that signed piggyback contracts prior to the conclusion of the grace period.
- Via this email, OPSC is notifying all District Superintendents and District Representatives on file with OPSC, as well as all stakeholders on OPSC's master email subscription list, that consistent with the PCC and the AG Opinion, modular school facilities must be competitively bid.
- OPSC has created a webpage to advise school districts of the Public Contract Code requirements and its applicability to state funding.
- OPSC has established a specific process during application processing and/or in advance of fund release for thoroughly reviewing contracts to ensure that funds are not released for projects that use piggyback contracts for modular school facilities.
- For any contracts entered into after fund release (after OPSC's review), staff will work with the State Controller's Office to amend the K-12 Audit Guide for Appendices B and C, to ensure that as part of the project audit, and the K-12 local auditor would review the contracts for compliance.

PUBLIC CONTRACT CODE 20118

Notwithstanding Sections 20111 and 20112, 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...

7

LEGAL BACKGROUND

The Attorney General found in 2005 that “building structures to be permanently affixed to land do not have the characteristics of the listed ‘personal property’”



Concluded that “a school district may not, without advertising for bids, contract with another public agency to acquire factory-built modular building components for installation on a permanent foundation.”

8

LEGAL BACKGROUND



The 2006 Attorney General Opinion does not address “portable” or “relocatable” classroom buildings

Education Code section 17070.15(j) defines “portable classroom” to include a building “of one or more stories that is designed and constructed to be relocatable and transportable over public streets, and with respect to a single story portable classroom, is designed and constructed for relocation without separation of the roof and floor from the building and when measured at the most exterior walls, has a floor area not in excess of 2,000 square feet.”



9

OPSC POSITION

- After 16 years, OPSC decided to prohibit use of piggybacks to purchase modular school facilities after August 21, 2022.
- OPSC will establish a process during application processing and/or in advance of fund release for thoroughly reviewing contracts to ensure that funds are not released for projects that use piggyback contracts for modular school facilities.
- OPSC will amend the K-12 Audit Guide to ensure that as part of the project audit, and the K-12 local auditor would review the contracts for compliance.



10

Purchasing Modulars Going Forward



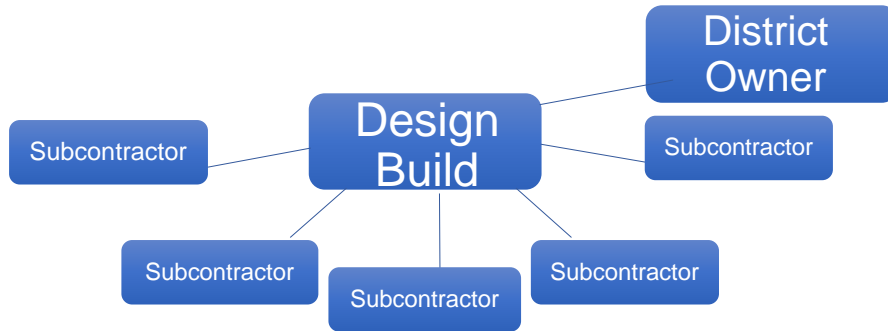
Bid “Performance Specs”

Education Code 17298 authorizes school districts to enter into contracts for “a relocatable school building of a type previously approved by [DSA]” so long as work is not performed until DSA approval is received.



Use of Design Build

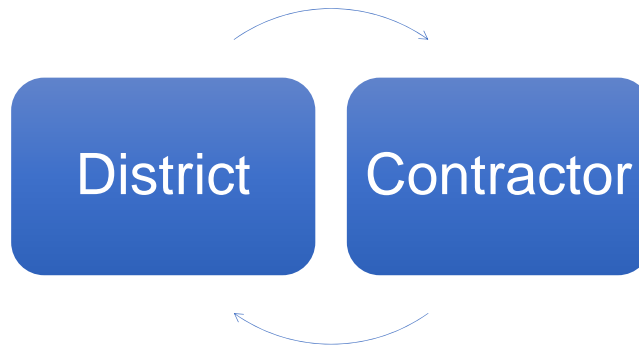
- Design-build allows the award of a contract prior to DSA approval to the extent the project will cost over \$1,000,000 (EC §§17250.10 et seq.).
- The procurement process requires an extensive RFP process with multiple steps.
 - Note - AB 185 now authorizes the use of a “progressive” design-build process for projects over \$3,000,000, eliminating several steps to allow a design-builder to be selected based on a fee proposal.



13

Use of Lease-Leaseback

- Lease-leaseback also allows the award of a contract prior to DSA approval for “preconstruction services” (EC §§17400 et seq.).
- The “best value” selection process for lease-leaseback is not as flexible as design-build.
- SAB auditors have not expressly endorsed the use of lease-leaseback for modular buildings and have instructed districts to consult with legal counsel.



14

QUESTIONS?



Shawn A. VanWagenen
Legal Counsel
Office of Fresno County Superintendent of Schools
1111 Van Ness Avenue
Fresno, CA 93721-2000
Phone: (559) 265-3003
Fax: (559) 265-3054
Email: svanwagenen@fcoe.org

2022 CSFC Annual Summit
October 27-28, 2022

