

School Facilities Bond Programs in San Diego County

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April 2011

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Acknowledgments

We would like to thank the following parties for their general support regarding this report: AECOM, C.W. Driver, Erickson-Hall Construction, Gafcon Inc., Lusardi Construction, RNT Architects, Jon Walz, Andrew Berg, and George Hawkins.

Executive Summary

Introduction

Since the approval of Proposition 39 by California voters in 2000, which reduced the majority voting threshold for the passage of school bonds from two-thirds to 55 percent, the number of voter-approved school facilities bonds in San Diego County has increased by 80 percent. Given the prevalence and fiscal significance of school bond programs in San Diego County, it is more important than ever to ensure that school district policies and practices promote successful implementation of bond programs.

The San Diego County Taxpayers Association (SDCTA) has historically been at the forefront of school bond policy. The Association's efforts have included publishing several policy documents which have provided a blueprint for successful execution of school bond programs. These documents include: independent citizens oversight committee best practices; detailed bond support criteria; and a study, published in 2007, which comprehensively reviewed active school bond programs in San Diego County. This study expands upon the efforts of the 2007 study by analyzing the performance of all active school bond programs in San Diego County, as well as examining two specific areas that are especially important to the effective implementation of school bond programs: procurement practices and transparency. To this end, this report develops objective metric systems that are used to evaluate multiple aspects of school bond program performance and, pursuant to these evaluations, provides several recommendations as to how school districts can improve bond program implementation.

Background

Our analysis incorporates review of the traditional project delivery method, design-bid-build, as well as alternatives that have been utilized by school districts more frequently in recent years. These methods are outlined below:

Project Delivery Method	Process	Primary Advantage	Primary Disadvantage
Design-bid-build	District first awards bid for design plans, then awards bid for construction	Method has established procedures and clearly-defined legal parameters	Lengthy procedural requirements, with potential for bid protests and litigation
Design-build	District awards bid for design plans and construction simultaneously to one firm	Use of single firm for design and construction eliminates possibility of conflict between different firms used for different phases	Available only for projects over \$10 million, with potential for lack of transparency and favoritism in selection process
Construction Manager-at-Risk	District hires construction manager to consult during design and planning phase	Construction manager can provide guidance to district throughout all phases of design and construction	Higher fees for construction manager; uncertainty of total project cost until all subcontractor contracts are received

Multi-Prime	Construction manager consults district and serves as general contractor; district manages subcontractors	Advantages of CM-at-Risk, and contract generally includes guaranteed maximum price	Districts must manage subcontractor agreements
Lease-Leaseback	District and developer enter into dual leases; one leases land to developer, the other leases facilities back to district; 40-year lease limit	Absence of formal bidding procedures gives district flexibility in selecting firms for design and construction	Lack of defined legal parameters and limited district experience in utilizing

Methodology

Our analysis of bond program performance is broken down into three elements:

1. Overall bond program performance – Has the program delivered the projects as promised to voters in a timely and cost effective manner?
2. Procurement policies and practices – Is procurement of construction and professional services related to the bond program conducted in a fair, objective, and transparent manner?
3. Transparency – Does the district, ICOC, and bond program management provide for open communication and information to the public regarding the progress and development of the bond program?

Findings

Our primary findings are the following:

- Overall, bond programs in San Diego County have effectively delivered projects originally promised to voters, with 93.4% of original projects being completed, on average.
- No districts are found to have average change order rates at or exceeding 10%, with the highest reported rates being 5.7% and the lowest 1.9%.
- The use of non-traditional project delivery methods, which provide an alternative to design-bid-build, is found to be as prevalent within school districts as traditional design-bid-build. Review of individual projects completed using various project delivery methods reveals that these alternative methods have produced promising results for school districts and can be advantageous when used in the appropriate circumstances.
- Several school bond programs are found to have been adversely affected by reliance on state-matching funds, of which the payment of \$2.5 billion in funds has been delayed due to the State's current fiscal crisis.
- Of six criteria used to evaluate the procurement practices of school districts, we find that three

are common practices: use of predetermined evaluation criteria, publicly available bid protest policies, and publication of bid results online. However, we find that implementation of our remaining three criteria (publication of a donor list, established post-award debriefing procedures, and written policies governing the rejection of all bids) is rare or non-existent.

- Even among the highest-scoring school districts in the procurement practices category, we find several opportunities for potential improvement including: use of an objective weighting or scoring system in evaluation of potential contractors; extension of bid protest procedures to all competitively bid contracts; and codification of procurement practices related to alternative project delivery methods, such as procurement of lease-leaseback services.
- School districts performed very well in both of our transparency evaluation categories: website information provision and annual report/performance audit information provision. The most commonly-noted deficiency was lack of updated information on the status and performance of individual projects.

Conclusions/Recommendations

As a result of these findings we have developed several recommendations as to how school districts can improve bond program execution going forward. To improve overall bond performance, we provide two primary recommendations: (1) school districts should establish a formal procedure for evaluating the appropriate project delivery method to be used for each given project on a case-by-case basis, and (2) school districts should actively monitor the State's fiscal condition and the status of delayed matching funds, hiring outside professional consultants or program managers with specific expertise in state financing issues as necessary.

Introduction

In 2000, California voters approved Proposition 39, which reduced the majority voting threshold required to pass a school bond measure from two-thirds to 55 percent. Proposition 39 also allowed property taxes to exceed one percent of assessed valuation for the purpose of repayment of school bonds. For a bond to qualify for a reduced voter threshold under Proposition 39 it must include (1) a requirement that bond funds be used only for construction, rehabilitation, equipping of school facilities, or acquisition or lease of real property; (2) a specific list of school projects to be funded and certification that the school board has evaluated safety, class-size reduction, and information technology needs in developing the list; and (3) a requirement that the school board conduct an annual, independent performance audit to ensure that the funds have been expended only on the specific projects listed.

During the eight-year period (1992-1999) preceding the passage of Proposition 39, voters in San Diego County approved 15 school facilities bonds. During the eight-year period (2001-2008) following Proposition 39, County voters approved 27 school facilities bonds, an increase of 80 percent.

History of School Facilities Bonds in San Diego County (1992-2010)

Year	Number of School Facilities Bonds	Amount Authorized
1992	1	\$6,200,000
1994	1	\$23,000,000
1995	2	\$11,500,000
1996	3	\$94,326,000
1997	2	\$37,500,000
1998	6	\$1,638,912,000
2000	5	\$487,354,000
2002	7	\$1,352,300,000
2004	3	\$303,800,000
2006	6	\$2,713,000,000
2008	11	\$3,735,450,000
2010	4	\$338,800,000
Total	47	\$10,742,142,000

The importance and increased prevalence of school facilities bonds since the passage of Proposition 39 makes it ever more imperative to ensure that school district policies and practices provide for successful execution of school facilities bond programs. The State Legislature affirmed this with the passage of Assembly Bill (AB) 1908 in June of 2000. AB 1908 was enacted following voter approval of Proposition 39 and placed additional restrictions on school bonds passed at the 55 percent threshold. AB 1908 capped the tax rate levied for repayment of bonded indebtedness at \$60 (unified school district), \$30 (school district), or \$25 (community college district) per \$100,000 of assessed valuation. In addition, AB 1908 included an additional transparency and information provision in school bond

programs by requiring the establishment of an independent citizens' oversight committee (ICOC) “to inform the public concerning the expenditure of bond revenues.”

The San Diego County Taxpayers Association (SDCTA) has also been on the forefront of school facilities bond policy. The Association has created an ICOC best practices document intended to encourage school districts and independent oversight committees to attain the highest standards in the preparation, execution, and supervision of school facilities bond projects. In 2007, SDCTA published a report titled “Bond-Financed Facilities Projects and Independent Citizens' Oversight Committees in San Diego County,” which reviewed the success of school bond programs in San Diego County and analyzed various practices that contribute to successful execution of school bonds.

This report carries on and expands the pursuits of SDCTA's 2007 report. In doing so, this report reviews all active school facilities bonds in San Diego County¹, assesses their overall performance and progress, and examines in detail two important aspects of school bond programs that contribute to their successful execution: procurement practices and transparency. Based on the results of our bond program evaluations, we also provide several recommendations for changes in school district policies and procedures that will improve the execution of bond programs going forward.

Every effort has been made to provide an objective and fair representation of all school bond programs through the use of observable metrics and application of a predetermined scoring system. However, we acknowledge that our results must reflect the varying degrees of information provided across school districts, as well as the overall complexity of school bond programs.

Background

This section provides an overview of terminology and concepts that are necessary to understand in order to properly analyze school bond programs.

Project Delivery Methods

A project delivery method determines how a school district selects and interacts with construction and architectural firms, and which party will be liable for problems with program implementation. Five primary project delivery methods exist:

1. Design-bid-build
2. Construction manager at-risk
3. Multi-prime
4. Design-build
5. Lease-leaseback

Design-bid-build

The design-bid-build (DBB) project delivery method, authorized by California Public Contract Code (PCC) §20110 et seq., has been the traditional project delivery method used by school districts and public agencies during the majority of the past century. The DBB project delivery method awards a separate contract to an architectural and construction firm. In the initial phase of a project, the school district contracts with an architectural firm to develop designs and plans for a project. These plans are then used to create bid documents on which private contractors are invited to submit competitive bids.

The district then awards the construction contract to the lowest responsive and responsible bid. During construction, the school district retains responsibility of managing and overseeing construction.

Construction Manager at-risk

Under construction manager at-riskⁱⁱ (CM at-risk) a construction manager is hired in the early (design and bidding) stages of the bond program as a consultant or construction manager. During this phase, the construction manager provides assistance in design activities and manages the contracting of subcontractors. Prior to construction, the construction manager then takes the role of general contractor and assumes responsibility for the completion of the project. Unlike in DBB, the project's general contractor is engaged in the early phase of project development, which potentially provides the general contractor with more detailed knowledge of the project.

Multi-prime

Similar to CM at-risk, under the multi-prime (MP) project delivery a construction manager is hired in the early phases of project implementation. The construction manager functions as both consultant to the district and a general contractor. Selection and management of subcontractors are the responsibility of the district, but are directed by the construction manager. Unlike with CM at-risk, the responsibility of managing subcontractors and the risk of project completion remain with the district.

Design-build

Design-build (DB), authorized by California Education Code (EC) §17250 et seq., is similar to DBB but differs in that the district contracts with a single entity for both architectural (design) and construction (build) services. Varying levels of control and project management can be retained by the district based on the terms of the agreement. The team approach employed by DB encourages cooperation and communication between the architect and general contractor.

Lease-leaseback

Authorized by EC §17406 et seq., lease-leaseback (LLB) involves hiring of a project developer. The project developer may take several forms: an architect/construction team, similar to DB; separate firms, similar to DBB; or any other combination of professional and construction services the district desires. However, the relationship and contract terms between the district and developer are considerably different than with other project delivery methods. After selecting a developer, the school district negotiates two concurrent leases: a site lease (an agreement in which the school district leases a parcel of property which it owns so that the firm can construct, renovate, or modernize school facilities on the premises), and a facilities lease (an agreement in which the firm leases the newly constructed facilities back to the school district). The lease term can be no longer than 40 years, at which time the school district assumes ownership of the parcel and school facilities.

Agreements pursuant to non-traditional delivery methods (CM at-risk, DB, and LLB) typically include a Guaranteed Maximum Price (GMP) provision. GMP limits the total sum of payments that a school district is obligated to make to a general contractor for the completion of a project. The general contractor is liable for all project costs incurred beyond this price limit.

Procurement

A school district's procurement policies impact several aspects of the execution of a bond program. Procurement policies determine which construction, architecture, and consulting firms a school district will contract with, the structure of the contract, the financing of the projects, and the overall project costs. In general, procurement related to school bond programs can be placed into two groups: construction services procurement and professional services procurement. While the procurement methodology used to contract with construction firms is generally dictated by the project delivery method selected by the district, contracting with professional services firms, defined in state law as private architectural, landscape architectural, engineering, environmental, land surveying, or construction project management firms, is governed by Government Code (GC) §4525 et seq.

Construction Services

Under DBB, the awarding of contracts for construction services must follow a formal competitive bidding process. For school districts, the threshold for competitive bidding is \$15,000 for construction services and \$78,500 for all other services, equipment purchases, and facility repairs.ⁱⁱⁱ The purpose of establishing formal competitive bidding processes is to “[protect] the public from the misuse of public funds” as well as “to eliminate favoritism, fraud, and corruption in awarding public contracts.”^{iv} The PCC establishes the general rules for the competitive bidding of public contracts in the State of California; the provisions of the PCC related to school districts are broad and leave development of specific procedures and policies up to individual districts. However, all school districts must adhere to two primary PCC provisions.

The first of these provisions mandates that all competitively bid contracts be awarded to the lowest responsive bid made by a responsible bidder.^v A responsive bid provides all of the information in the form requested within the agency's proposal. A responsible bidder is “a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract.”^{vi} If a school district finds a bidder to be non-responsive, then the bidder has failed to fundamentally agree to perform all terms of the contract and the school district may reject the bidder's offer and award the contract to the next-lowest responsive bidder. However, if a bidder is found to be non-responsible, it is entitled to a formal hearing in which it may provide evidence of responsibility prior to rejection by the school district.

The responsibility or responsiveness of the lowest bidder may be challenged by the next-lowest bidder through a bid protest. As bids are subject to the California Public Record Act, the next-lowest bidder may obtain copies of the lowest bidder's proposal and outline specific defects which it feels makes the lowest bidder non-responsive or non-responsible. The lowest bidder is provided an opportunity to rebut the arguments of the protesting party. If the school district concurs with the findings of the bid protest, the lowest bidder is rejected and the contract is awarded to the next-lowest bidder.

As an exception to awarding contracts to the lowest responsive bid made by a responsible bidder, school districts may additionally require bidders to make a good-faith effort to meet district requirements relating to participation in contracts by minority or disadvantaged enterprises.^{vii} An additional alternative is for the school district to reject all bidders, in which case the school district may choose not to pursue the contract or rebid the contract to receive new proposals.^{viii}

Under DBB, PCC also provides school districts with the authority to conduct prequalification of

contractors. In order to be prequalified, contractors may be required to submit a standardized questionnaire and financial statements. Any school district that elects to conduct prequalification must “adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine the size of the contracts upon which each bidder shall be deemed qualified to bid.”^{xix} Prequalification provides school districts adequate time to evaluate the responsibility of contractors for various projects and gives contractors additional time to provide rebuttals in the event of a district determination of non-responsibility.

Procurement of general contractors under CM at-risk and MP is carried out through a non-competitive professional services agreement, pursuant to GC §4525 as described in the professional services section below. Under these delivery methods, procurement of subcontractors follows the same formal competitive bidding process as is required with DBB.

DB project delivery^x involves procurement of architecture and construction services through a variant of strict competitive bidding mandated under DBB. Under DB, a contract is negotiated between a school district and a single entity (firm, partnership, or general contractor with sub-contractors) which provides architectural design and construction services. A prequalification process is conducted to establish a narrow list of design/construction entities from which the school district will select a final party to carry out a school facility project. The school district may select among the list of finalists using the standard competitive bidding procedures used in DBB, or may establish its own list of evaluation criteria. If the school district elects to establish its own list of evaluation criteria, it must either publish these criteria in all solicitation documents or disclose if all evaluation factors other than cost are significantly more important, equally important, or less important than cost.^{xi}

The selection of a project developer under LLB need not follow a competitive bidding process or even be publicly advertised.^{xii} School districts are provided significant flexibility in the selection of the developer, as no specific requirements exist in state law regarding how procurement must be conducted.

Professional Services

Procurement of professional services (private architectural, landscape architectural, engineering, environmental, land surveying, or construction project management firms) need not follow a formal (lowest bidder) competitive bidding process; however, state law does set forth several requirements that must be followed. Primary among these is that procurement of professional services must be conducted using “procedures that assure that these services are engaged on the basis of demonstrated competence and qualifications for the types of services to be performed and at fair and reasonable prices.” In addition, “these procedures shall specifically prohibit practices which might result in unlawful activity including, but not limited to, rebates, kickbacks, or other unlawful consideration, and shall specifically prohibit government agency employees from participating in the selection process when those employees have a relationship with a person or business entity seeking a contract.” In general, school districts may develop individual procurement procedures given that they meet these simple requirements.

Methodology and Performance Metric Development

To properly assess the performance of school facilities bond programs in San Diego County, it is important to first establish a well-developed set of best practices or metrics that can be used to gauge the performance of bond programs. Our analysis of bond program performance is broken down into three elements:

4. Overall bond program performance – Has the program delivered the projects as promised to voters in a timely and cost effective manner?
5. Procurement policies and practices – Is procurement of construction and professional services related to the bond program conducted in a fair, objective, and transparent manner?
6. Transparency – Does the district, ICOC, and bond program management provide for open communication and information to the public regarding the progress and development of the bond program?

The performance metrics used in this report were developed pursuant to review of current practices in San Diego County and other jurisdictions, state and federal regulations, and relevant case law. Interviews were also conducted with industry experts to vet rating procedures and receive suggestions. Metrics are only considered if they can be easily observed and measured objectively.

After establishing a set of performance metrics, this report collected and systematically reviewed information on all active school bonds in the County with total authorized bond issuance greater than \$50 million and measured the performance of these bond programs based on the predetermined performance metrics. Scoring is based upon evidence and information that were made readily available to us by school districts, either through the districts' websites or a Public Records Act request.

Overall Bond Performance

In evaluating overall bond program performance, three primary areas were considered: change of scope, cost effectiveness, and timeliness. Although these general areas were reviewed for each bond program, the metrics used and specific supporting materials may vary by district, as varying levels of information provision are observed. In evaluating change of scope, we compared the bond program's original voter-approved project list to the list of projects that have actually been completed or are still scheduled to be completed. We highlight areas of divergence in which the district has removed projects from the list, added new projects, or adjusted prioritization of projects from initial plans. To evaluate program cost effectiveness, we compared the district's current program budget to its initial program budget in order to highlight areas where cost escalation has occurred. We also evaluated project construction change orders and highlight irregularities. To evaluate timeliness, we considered the current progress of the bond program since onset and also compare actual project timelines to originally proposed timelines.

The metrics used to measure overall bond performance are listed below (note: not all measures are calculated for each district due to varying levels of information provided).

Overall Bond Performance Metrics
<p><i>Change of Scope</i> Percentage of original projects completed or to be completed Percentage of identified facilities needs fulfilled Change orders as a percent of project costs</p>
<p><i>Cost Effectiveness</i> Percentage savings on completed projects Percentage increase in bond program contingency fund Percentage of projects completed within budget Percentage of anticipated state matching funds <i>not</i> received Change orders as a percent of project costs</p>
<p><i>Timeliness</i> Percentage of projects completed within initial construction timeline District or ICOC reported construction delays</p>

Procurement

In general, procurement related to school bond programs can be categorized into two groups: construction services procurement and professional services procurement. Although the legal requirements for these two types of procurement are considerably different, several general practices should be followed by all school districts to ensure fair and open procurement.

Procurement Performance Metrics
<p><i>Clearly defined evaluation criteria and methodology provided in solicitation documents</i> The district includes contractor evaluation criteria and methodology in all of its solicitation documents.</p>
<p><i>Clearly defined bid protest or contract award appeals procedures</i> The district can provide, upon request, written policies for appealing a district's final contract award.</p>
<p><i>Clearly defined policies for rejection of all bids</i> The district can provide, upon request, written policies describing the circumstances under which it is appropriate for the district to reject all bids/submittals received and request new bids.</p>
<p><i>Published bid results</i> The district publishes its recent bid results, firm name and bid amount on its website.</p>
<p><i>Published list of donors</i> The district publishes on its website a list of donors, name and amount, to the school district or a specific bond campaign.</p>
<p><i>Post-award debriefing process</i> The district conducts a debriefing process following the awarding of a contract to inform unsuccessful potential contractors about the district's decision process and how applicant's proposals could have been improved.</p>

Bid Evaluation Criteria

Although districts are legally bound to award many competitively bid contracts to the lowest responsive, responsible bidder, a significant and growing portion of procurement does not follow a formal competitive bidding process. Under Government Code §4525 et seq., procurement of professional services such as private architectural, landscape architectural, engineering, environmental, land surveying, or construction project management firms need not follow a formal competitive bidding process, nor must the district award the contract to the lowest bidder. Additionally, in procuring construction services pursuant to alternative project delivery methods, such as DB and LLB, districts are not required to award contracts to the lowest bidder. In the case of LLB, districts are not even required to advertise bids or conduct any form of formal contractor solicitation. Exclusion from formal, sometimes cumbersome competitive bidding requirements may provide added flexibility for school districts in contract awarding and reduce the burden on district resources and staff. However, it is also clear that increased subjectivity in contract awarding can introduce the possibility of questionable procurement practices and favoritism, which formal competitive bidding was designed to limit. For this reason, it is important to develop practices which ensure that procurement of services not done through traditional (lowest bidder) competitive bidding is conducted as objectively as possible.

The importance of established evaluation criteria is supported by both state law and state agencies responsible for overseeing public school districts, such as the State Allocation Board (SAB) and State Office of Public School Construction (OPSC). State law governing the procurement of professional services requires the creation of practices which ensure the selection of firms “on the basis of demonstrated competence and qualifications for the types of services to be performed”.^{xiii} Although it is not expressly required within this language, use of predetermined and publicly-available evaluation criteria would sufficiently ensure adherence to this requirement. AB 1402, which authorized the use of DB by school districts, expressly requires districts to include evaluation criteria in all requests for proposals for design-build services; the bill reads^{xiv}:

“Each request for proposal shall do all of the following...

...(C) Include a section identifying and describing the following:

- (i) All significant factors and subfactors that the school district reasonably expects to consider in evaluating proposals, including cost or price and all nonprice related factors and subfactors.
- (ii) The methodology and rating or weighting scheme that will be used by the school district governing board in evaluating competitive proposals and specifically whether proposals will be rated according to numeric or qualitative values.
- (iii) The relative importance or weight assigned to each of the factors identified in the request for proposal.”

The SAB and OPSC have also expressed concern regarding the significant flexibility in procurement practices allowed under LLB, stating that it may lead to questionable practices and favoritism.^{xv} In addition, the OPSC and SAB have warned that lease-leaseback contracts awarded by districts without use of formal selection criteria or a bidding process may be illegal pursuant to PCC.

Given that districts are beginning to consider alternative project delivery methods more so than ever, and that procurement of qualified and suitable professional services firms is vital to bond program success, it is essential for school districts to safeguard objective procurement by including evaluation criteria and methodology in all solicitation documents. In scoring districts based on this criterion, we

were unable to review *all* district solicitation documents, as we were limited to what could be made available to us through the district websites or by requests to district staff.

Note: If evaluation criteria existed in available solicitation documents, then the district is reported as meeting this criterion.

Bid Protest Procedures

Bid protests are a mechanism for contractors to hold districts accountable to the requirements of state law and district policies in contract awarding. However, in order for bid protests to serve this purpose, the district's bid protest procedure must be clearly defined, understandable, and available to all contractors. California public contracting case law provides several examples of instances in which lack of adherence to clearly defined protest procedures resulted in significant issues for both school districts and contractors. Two such cases are described below.

D.H. Williams Construction Inc. v. Clovis Unified School District

In *D.H. Williams Construction Inc. v. Clovis Unified School District*^{xvi}, the firm D.H. Williams Construction challenged the determination by Clovis Unified School District (USD) that its bid was non-responsive. Clovis USD found D.H. Williams to be non-responsive on the grounds that one of its subcontractors lacked adequate state licensing and subsequently rejected D.H. Williams's bid without a formal hearing. However, D.H. Williams argued that licensing is a determinant of fitness and capacity and thus should be considered as a factor of responsibility, not responsiveness. By using lack of licensing as rationale for finding D.H. Williams non-responsive as opposed to non-responsible, Clovis USD failed to afford D.H. Williams a formal hearing to protest its findings. The California Court of Appeals ruled that the school district had improperly evaluated D.H. Williams bid and failed to provide them with due process prior to rejection.

Great West Contractors Inc. v. Irvine Unified School District

In *Great West Contractors Inc. v. Irvine Unified School District*^{xvii}, the firm Great West Contractors charged Irvine Unified School District (USD) with failure to provide due process in rejecting their bid and alleged favoritism in awarding the bid to another bidder. In May 2008, Irvine USD received bids for construction services related to two school facilities projects. On May 8, the bids were opened revealing Great West as the lowest bidder on both projects. However, on May 9, a competing bidder obtained a copy of Great West's bid and filed a bid protest arguing that Great West was non-responsive due to licensing issues. On May 16, Great West received a notice from Irvine USD that their bid had been found non-responsive and that district staff would advise their Board to reject Great West's bid. On May 20, Irvine USD awarded the contracts to two other firms. Finally, on May 23, Great West filed a petition with Irvine USD to protest the awards on the grounds that they had been illegally awarded without providing Great West due process. At this time, Great West also requested bid information about the firms who had received the awards, which they received on June 4, more than 10 days after their initial request. Upon receipt of the bid documents, Great West discovered the winning bidders demonstrated identical licensing issues to Great West. The California Court of Appeals ruled that the Irvine USD had not only failed to provide Great West due process, but also demonstrated favoritism in information provision and contract awarding.

To allow bid protests to serve their intended purpose, school districts should have clear, understandable, and publicly-available bid protest procedures.

Rejection of All Bids

California case law provides ample support for school districts' authority to reserve the right to reject all bids received in a competitive bidding process. Under the general provisions of contract law, a call for bids made by a school district does not constitute a contract proposal and therefore does not place any explicit or implicit obligations upon the district.^{xviii} Most agencies reserve the right to reject all bids during the solicitation process by including an explicit clause in their solicitation documents.

Although the rejection of all bids is well within the authority of all school districts, the implications of doing so should be weighed carefully by the district. The California Supreme Court affirmed its position on this issue in *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transit Authority*^{xix}, stating: “while a governmental entity may have the right to reject all bids, it has no right to act arbitrarily and disregard applicable regulations in letting a public works contract.” There are several reasons why school districts should reject all bids only under restricted circumstances. First, rejecting all bids contributes to reduced competition in the bidding process. When bids are received and opened, bidders learn a significant amount of information about their competitors' proposals; this information can alter the scope of competition should the agency decide to reject all bids and rebid the contract. Additionally, extra rounds of bidding require expenditure of additional time and resources by both bidders and the school district. Rejection of all bids without a clear and coherent reason may also reduce the school district's transparency and the trust of future bidders in the fairness and objectivity of the school district's bidding process.

Fortunately for school districts, PCC and several court rulings provide a guide to the appropriate circumstances under which a school district may or should reject all bids. In providing guidance on this issue to State administrators, the PCC states that all bids may be rejected if it is believed to be “for the best interests of the state”.^{xx} PCC also directs administrators to clearly state the rationale for their decision to reject all bids prior to taking such action.

The first, and most apparent, circumstance in which it would be in a school district's best interest to reject all bids is when all bids received are found to be either non-responsive or non-responsible. As school districts are obligated to award a competitively bid contract to the lowest responsive bid made by a responsible bidder, they are equally obligated to not award a contract to a non-responsive or non-responsible bidder. Under these circumstances, the school district should clearly present its rationale for finding each bidder non-responsive or non-responsible and provide all bidders due process in rebuttal of the school districts findings prior to rejecting all bids.

Several court rulings in California and other states have provided guidance as to other circumstances under which it is in the best interest of a public agency to reject all bids. While these rulings do not directly obligate school districts in the same manner they obligate the respective states, they provide established examples to guide school districts in their own policy development. One such significant case in California, *Charles Harvey Inc. v. Durkee, Director of Public Works*, outlined several circumstances in which it may be in the best interest of a public agency to reject all bids. In its ruling, the California District Court of Appeals held that the following are all valid reasons to reject all bids received: a change in the scope of proposed work, new public agency staff cost estimates, insufficient funds to complete the proposed work, or a situation in which all bids received exceed the agency's cost estimates or budget. Several rulings in other jurisdictions have found that unclear or uncertain RFP language also constitutes a valid reason for a public agency to reject all bids, as unclear RFP language can result in potentially costly and time-consuming litigation^{xxi} or may lead to confusion among

bidders about the specific details of a proposed project^{xxii}.

To ensure that school districts adequately consider the implications of rejecting all bids received, school districts should create written policies to direct officials as to when it is appropriate to do so.

Published Bid Results

Publishing of bid results is a relatively simple way for school districts to demonstrate to the public that contracts are being awarded in a manner that promotes cost-effectiveness. It also allows districts to demonstrate to current and future contractors that the district follows applicable legal requirements in contract awarding. For this reason, school districts should post results of all bids on their website.

Published List of Donors

California Government Code §87100 states,

“No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.”

Conflict of interest is continually an area of concern in contract awarding and the primary reason for many of the current legal regulations that exist related to public contract procurement. The importance of guaranteeing that contracts are awarded beyond the influence of outside considerations (financial or otherwise) is consistently reaffirmed by state regulations, guidelines, and case law. For example, in regard to procurement of professional services, state law requires “procedures shall specifically prohibit practices which might result in unlawful activity including, but not limited to, rebates, kickbacks, or other unlawful consideration, and shall specifically prohibit government agency employees from participating in the selection process when those employees have a relationship with a person or business entity seeking a contract”^{xxiii}.

A simple measure districts can take to mitigate conflict of interest issues in public contracting is to annually publish on their websites a list of donors to the school district, any related foundations, and bond program campaigns.

Post-Award Debriefing

Post-award debriefing is a process that allows bidders to receive additional information about a district's decisionmaking process following the awarding of a contract. Typically, bidders can receive the following information in a post-award debriefing session:

- Description of the district's evaluation of the bidder's proposal and outlining of significant weaknesses;
- Review of bidder's scoring according to district rationale (if applicable);
- Rationale for the district's decision to award the contract;
- Responses to questions regarding district's adherence to district policies and state regulations;
- Response to questions regarding district's policies and state regulations in general.

In general, post-award debriefing does not provide bidders additional detailed information about other bidders' proposals or the district's evaluation of other bidders' proposals. Post-award debriefing is beneficial to contractors for several reasons:

- It provides information on how to write more successful future proposals;
- Contractors can learn about district procedures or regulations with which they may not have been previously familiar;
- Bidders can identify bases upon which to protest the district's decision, allowing contractors to hold the district accountable to its stated policies;
- It introduces contractors to district staff with whom they may work on future proposals or projects.

These benefits are especially important for new or smaller firms who may be unfamiliar with the procurement process and may lack adequate resources to become informed without additional assistance. Overall, post-award debriefing promotes healthy competition by encouraging unsuccessful bidders to compete for future contracts and increases district accountability and transparency.

While some smaller agencies, such as school districts, have established provisions guaranteeing bidders the right to a post-award debriefing, this is more commonly the practice of larger agencies (state and federal level). Federal Acquisition Regulation (FAR) provides this guarantee to contractors bidding on federal projects and serves as a model to lower-level agencies, such as school districts, that wish to establish post-award debriefing policies. FAR 15.506 states:

- “(a)(1) An offeror, upon its written request received by the agency within 3 days after the date on which that offeror has received notification of contract award in accordance with 15.503(b), shall be debriefed and furnished the basis for the selection decision and contract award.
- (2) To the maximum extent practicable, the debriefing should occur within 5 days after receipt of the written request. Offerors that requested a postaward debriefing in lieu of a preaward debriefing, or whose debriefing was delayed for compelling reasons beyond contract award, also should be debriefed within this time period.
- (3) An offeror that was notified of exclusion from the competition (see 15.505(a)), but failed to submit a timely request, is not entitled to a debriefing.
- (4)(i) Untimely debriefing requests may be accommodated.
- (ii) Government accommodation of a request for delayed debriefing pursuant to 15.505(a)(2), or any untimely debriefing request, does not automatically extend the deadlines for filing protests. Debriefings delayed pursuant to 15.505(a)(2) could affect the timeliness of any protest filed subsequent to the debriefing.
- (b) Debriefings of successful and unsuccessful offerors may be done orally, in writing, or by any other method acceptable to the contracting officer.
- (c) The contracting officer should normally chair any debriefing session held. Individuals who conducted the evaluations shall provide support.
- (d) At a minimum, the debriefing information shall include—
- (1) The Government’s evaluation of the significant weaknesses or deficiencies in the offeror’s proposal, if applicable;
 - (2) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;

- (3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;
 - (4) A summary of the rationale for award;
 - (5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and
 - (6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.
- (e) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing shall not reveal any information prohibited from disclosure by 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C 552) including—
- (1) Trade secrets;
 - (2) Privileged or confidential manufacturing processes and techniques;
 - (3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and
 - (4) The names of individuals providing reference information about an offeror's past performance.”

Transparency

Transparency refers in general to policies and practices that promote openness, ease of communication, freedom of information, and accountability. Transparency is vital to the successful operation of any elected governing body as it engenders citizens' confidence and trust in the governing body and increases the likelihood of citizen engagement. The need for transparency in government operations is perhaps especially true for the management of school facilities bond programs by public school districts as these programs commonly involve the expenditure of hundreds of millions of taxpayer dollars.

With the passage of AB 1908, the State assigned high priority to the assurance of transparency for all school facilities bonds. AB 1908 requires that upon the passage of a school facilities bond, at the 55% threshold pursuant to Proposition 39, a school district must establish an independent citizen's oversight committee (ICOC) to facilitate the provision of information about the bond program to the public. Fundamentally, ICOC's are asked to “actively review and report on the proper expenditure of taxpayers' money for school construction.” To this end, committees should receive and review copies of bond program performance and financial audits, inspect school facilities and grounds, review school facilities deferred maintenance plans, and oversee efforts by school districts to maximize bond revenues by implementing cost saving measures.

Beyond the basic provision of bond program information to the public, it is important for a school district to be transparent in its policies and procedures. Transparent procurement practices eliminate the possibility of favoritism in contract awarding, assure potential contractors that their proposals will be considered fairly and objectively, and assure the public that taxpayer dollars are being utilized efficiently.

SDCTA has historically supported the required establishment of ICOC's as part of the execution of school bond programs prior to it being legally required. In fact, SDCTA has advocated for increased school district transparency and increased oversight that exceed the legal requirements of Proposition

39 and AB 1908. As part of the 2007 bond-financed facilities report, SDCTA measured how well San Diego County school districts had met their standards of transparency and oversight and found that several districts failed to readily provide more than 50% of important program information to the public, demonstrating significant room for improvement in school district transparency.

To measure the transparency of each bond program, we consider the district's information provision and openness in procurement policies and practices. Measurement of information provision is divided into two categories, the quality of information provided through the school district's website and the quality of information provided through annual reports and audit documents. Performance in these categories is measured by the presence of observable information, as outlined in the tables below.

Website Information Provision Evaluation Criteria
Committee bylaws
Member information
Meeting minutes/agendas
Annual Reports
Performance Audits
Financial Audits
Project list
Project descriptions (including budget)
Project progress (including costs)
Bond background (including resolution and ballot information)
Contact information

Annual Report/Audit Information Provision Evaluation Criteria
Budget overview
Program status updates (including unambiguous metrics such as project time-lines or percentage completion)
Detailed discussion of individual projects
Basic financial information (Fund balances, revenues, and expenditures)
Expenditures itemized by project/site
Review of Prop 39 required audit findings
Review of additional audit finds/recommendations beyond Prop 39 requirements
Detailed ICOC member information (name, affiliation, length of service)
Creation of mid-year or monthly project progress reports

Findings

Summary of Key Findings

Overall Bond Performance

- Overall, active bond programs in San Diego County have delivered on average 93.4% of projects originally promised to voters. To date, half of the programs considered (eight) are expected to deliver 100% of the projects originally promised to voters.
- Review of change order rates finds that no districts report average change order rates above 10%, with the highest being 5.7% and the lowest being 1.9%.
- The majority of bond program facilities projects in the County are implemented using non-traditional project delivery methods, such as LLB, DB, MP, and CM-at-risk.
- Several school districts report favorable results from the use of LLB on school facilities projects. For example, Oceanside Unified School District used LLB for modernization projects at Lincoln Middle School and experienced no project delays and savings of 12.4% under the original project budget.
- A review of projects using various types of project delivery methods finds that LLB projects had the highest average savings and lowest change order rates. On the other hand, DBB projects resulted in the highest change order rates and most reports of project delays.
- Several school bond programs are found to have been adversely affected by reliance on state-matching funds, of which payment has been delayed due to the State's current fiscal crisis.

Procurement Practices

- Overall, we find three of our identified best practices to be common among school districts: (1) statement of evaluation criteria in solicitation documents, (2) publicly available bid protest policies and procedures and (3) publication of bid results on respective district websites.
- On other hand, we find that districts have almost completely failed to implement our remaining three procurement best practices, with only two districts publishing a donor list on their website, one district having an established post-award debriefing procedure, and no districts having written policies regarding the appropriate rejection of all bids received.
- Although most districts included evaluation criteria in their solicitation documents, only one district included a description of the weighting system and evaluation methodology to be used when they were not expressly required to do so by state law.
- Among those districts who have established bid protest procedures, no districts have procedures which expressly apply to procurement of professional or LLB services.
- All currently established bid protest procedures require protests to be submitted within five days or less; however, they do not provide bidders with assurance that they will receive necessary supporting materials within this time period.
- Only two districts publish a donor list of any kind, and no district publishes information about donations to the district directly, elected officials, or bond campaigns.
- Despite a trend among school districts in the County toward the use of LLB, no districts have established written policies related to the procurement of LLB services. However, the majority

of districts using LLB have established practices demonstrating commitment to fair and objective procurement, such as procurement through a competitive RFQ process and use of predetermined evaluation criteria.

- Recent litigation against Santee School District demonstrates the importance of having a well-developed program plan in the early phases of program implementation, and of creating thorough and complete solicitation and contract documents that follow industry standards.

Transparency

- School districts performed very well in the website information provision category, with five school districts receiving a perfect score and five districts missing two points or less.
- The most commonly-noted deficiencies in current school district websites were lack of updated information on project status and performance and lack of specific financial information about individual projects.
- Performance in the annual report/audit information provision category is also strong; however, no district received a perfect score.
- Six districts hire outside firms to conduct annual bond program performance reviews. We find in several instances that these performance reviews have resulted in findings and related recommendations that dramatically improved bond program implementation going forward.

Overall Bond Performance

Note: Review of bond performance was limited by the amount of publicly available information on each bond program. In addition, comparability of performance metrics is limited by varying levels of information provided and specific circumstances, such as year of approval, timeframe, total budget, size of district, and available district resources. *For this reason, this performance review should not be considered a comprehensive grading, nor should it be considered a validation of any district's current activities or performance.* Rather these findings are intended to be an informative description of the available information on active bond programs. Detailed discussion of each bond program can be found in Appendix A.

Prop	School District	Year	% of Original Projects Completed/To Be Completed
Prop R	Grossmont-Cuyamaca Community College District (GCCCD)	2002	88.1%
Prop S	San Diego Community College District (SDCCD)	2002	76.4%*
Prop O	Vista Unified School District (VUSD)	2002	92.9%
Prop H	Grossmont Union High School District (GUHSD)	2004	72.0%
Prop P	Carlsbad Unified School District (CUSD)	2006	100.0%
Prop M	Palomar Community College District (PCCD)	2006	95.0%
Prop N	San Diego Community College District (SDCCD)	2006	100.0%*
Prop R	Santee School District (SSD)	2006	100.0%
Prop O	Sweetwater Union High School District (SUHSD)	2006	100.0%
Prop D	Cajon Valley Union School District (CVUSD)	2008	86.2%
Prop T	Escondido Union High School District (EUHSD)	2008	84.6%
Prop U	Grossmont Union High School District (GUHSD)	2008	100.0%
Prop H	Oceanside Unified School District (OUSD)	2008	100.0%
Prop C	Poway Unified School District (PUSD)	2008	100.0%
Prop S	San Diego Unified School District (SDUSD)	2008	93.3% - 100.0%
Prop X	South Bay Union School District (SBUSD)	2008	100.0%
San Diego County Average			93.4%

* Percentage of identified facilities needs fulfilled

Bond programs in San Diego County have, on average, delivered on 84.4% of the projects originally promised to voters. Half of the programs considered are expected to deliver 100% of the projects promised to voters.

No district is found to have average change order rates at or above 10%. The highest available reported change order rate is 5.7% (SDCCD, Prop S), while the lowest is 1.9% (SDUSD, Prop S). Change orders appear to be significantly lower among bond programs approved in 2008 as compared to all other years; the overall average change order rate among all bond programs considered above is 3.7%, while the average change order rate among programs approved in 2008 is only 2.5%. This result is expected as programs that are further along are more likely to have experienced unexpected circumstances and changes in scope.

Proposition	School District	Year	Average Change Order Rate
Prop R	Grossmont-Cuyamaca Community College District	2002	3.8%
Prop S	San Diego Community College District	2002	5.7%
Prop H	Grossmont Union High School District	2004	5.6%
Prop P	Carlsbad Unified School District	2006	3.0%
Prop N	San Diego Community College District	2006	4.8%
Prop R	Santee School District	2006	2.7%
Prop U	Grossmont Union High School District	2008	2.2%
Prop H	Oceanside Unified School District	2008	3.5%
Prop S	San Diego Unified School District	2008	1.9%

Project Delivery Methods

Among school districts in San Diego County, there appears to be a trend away from traditional DBB and toward alternative delivery methods. Among K-12 school districts, this trend is marked specifically by a shift to LLB project delivery. Many districts have recently reported favorable results from shifting to LLB delivery. OUSD tested LLB on one of its initial Prop H programs, modernization of Lincoln Middle School. The project was completed on schedule with no noted issues and resulted in a \$3 million (12.4%) savings for the District. As a result, the District now intends to consider LLB for several future projects. SSD employed the LLB methodology for the modernization of five schools in Phase 1 of its Prop R program and reported “no major delays to project completions” and savings of \$9.2 million (19.6%) overall.

For comparison, we compiled information about several projects constructed using three of the primary project delivery methods we found used among districts in the County. According to this review, LLB projects resulted in more savings, lower change order rates, and fewer reports of project delays than the other delivery methods; while DBB resulted in the highest change order rates and most reports of project delays. While this analysis is limited by availability of information and comparability of projects across districts, it does suggest that districts can recognize significant gains in project performance by using alternative project delivery methods in the appropriate situations.

Comparison of Project Delivery Method Performance

DBB				
<i>Project</i>	<i>Budget</i>	<i>Savings</i>	<i>C.O. Rate*</i>	<i>On Time</i>
SDCCD – Renovate L Building	\$10.3 m	9.4%	6.8%	✓
SDCCD – Hourglass Park Fieldhouse	\$27.5 m	4.0%	18.7%	
SDCCD – Science and Technology Building	\$9.0 m	0.0%	6.8%	✓
GUHSD – GHS Science Building	\$15.8 m	8.9%	N/A	✓
CUSD – Elementary & Middle School Modernizations	\$14.5 m	22.8%	3.0%	✓
GCCCD – Parking Structure	\$21.4 m	8.9%	4.4%	
Average	\$15.9 m	9.0%	7.9%	66.7%
Multi-Prime				
<i>Project</i>	<i>Budget</i>	<i>Savings</i>	<i>C.O. Rate</i>	<i>On Time</i>
SDCCD – Career Technology Center	\$63.1 m	6.1%	0.6%	✓
SDCCD – Allied Health Center	\$29.0 m	8.2%	8.8%	✓
GUHSD – MVHS Modernization	\$9.5 m	-2.4%	9.2%	✓
GUHSD – HHS Modernization	\$11.4 m	-8.4%	N/A	✓
Average	\$28.3 m	0.9%	6.2%	100.0%
LLB				
<i>Project</i>	<i>Budget</i>	<i>Savings</i>	<i>C.O. Rate</i>	<i>On Time</i>
GUHSD – VHS Modernization	\$13.5 m	3.5%	4.2% ^{xxiv}	✓
OUSD – LMS Modernization	\$24.2 m	12.4%	N/A	✓
SSD – Phase 1 Modernizations	\$47.2 m	19.5%	2.7%	✓
CUSD – Middle School Modernizations	\$4.9m	14.6%	3.1%	✓
Average	\$22.4 m	12.5%	3.3%	100.00%

*Change order rate

State Funding

The State of California is currently in a fiscal crisis, with projected annual budget deficits of about \$20 billion per year through Fiscal Year 2016.^{xxv} California's financial status has severely hampered its ability to finance operations and capital projects through issuance of bonds. In February of 2009, the State Treasurer announced that the State was no longer able to issue bonds and this situation has persisted into the present.

The State Pooled Money Investment Account (PMIA) is used by the State Treasurer to manage the State's cash flow by investing idle state funds. State funding for school bond programs approved by the State Allocation Board (SAB) are generally paid through the PMIA. However, in December of 2008,

the Pooled Money Investment Board, the governing authority of the PMIA, halted appropriations from the PMIA to capital projects, including school facilities projects, in order to conserve funding for other State obligations. This halted funding to school facilities projects statewide, including several programs in San Diego County.

Bond Programs Impacted by State Funding Delay

Carlsbad Unified School District – Prop P

Percent of anticipated state-matching funds received to date: 24.9%

Discussion: The Prop P program has seen a dramatic increase in anticipated state funding since its inception in 2006, growing from \$25.2 million to \$35.4 million. However, the 2008-2009 Prop P Performance Review notes that “CUSD has thus far received no funds,” and goes on to state that “there currently is no assurance that CUSD will receive any state funds in time to complete its last project in the construction cycle, the New High School.” Since the Performance Audit was published, the District has received \$8.8 million in state funding. However, without additional state funding, the District will likely need to seek alternative funding to cover a deficiency in funding for construction of the New High School.

Grossmont Union High School District – Prop H

Percent of anticipated state-matching funds received to date: 35.9%

Discussion: Original Prop H program plans anticipated the receipt of \$99.5 million in state funding for various Prop H projects. However, as of June 2010, the District reports receiving only \$35.7 million in state funding. Although some of this discrepancy can be attributed to projects yet to be completed, it should be noted that the majority of Prop H projects are completed or nearing completion. The Prop H/U 2008-2009 Performance Review states that if the remaining state funding does not materialize “Prop H spending will exceed the available cash by 2010/2011,” although Prop H construction is planned to last through 2013.

Santee School District – Prop R

Percent of anticipated state-matching funds received to date: 36.5%

Discussion: The Prop R program is segmented into two phases, with work to be done at five schools in Phase 1 and an additional four schools in Phase 2. Phase 1 projects were funded partially by \$41 million in Prop R bond issuance, representing use of more than two-thirds of total authorized Prop R bond issuance, in anticipation that Phase 2 projects could be funded by several other sources, primarily state funding. Due to the State’s recent fiscal crisis, payment of \$33 million in State funding to the District has been deferred without a guaranteed timetable of future payment. As a result, Phase 2 projects, scheduled to begin in 2009, have been delayed to 2011 or later.

Procurement Practices Scorecard

School District	Evaluation Criteria	Bid Protest	Bid Rejection	Public Bid Results	Public Donor List	Post-award Debriefing
Cajon Valley Union School District						
Carlsbad Unified School District		✓		✓		
Escondido Union High School District	✓	✓				
Grossmont Union High School District	✓	✓		✓		
Grossmont-Cuyamaca Community College District	✓					
Oceanside Unified School District	✓	✓		✓		
Palomar Community College District				✓	✓	
Poway Unified School District				✓		
San Diego Community College District	✓			✓		✓
San Diego Unified School District	✓			✓		
Santee School District	✓	✓		✓		
South Bay Union School District	✓	✓				
Southwestern Community College	✓			✓	✓	
Sweetwater Union High School District	✓	✓		✓		
Vista Unified School District	✓	✓		✓		

Procurement

Bid Evaluation Criteria

Overall, we find that inclusion of evaluation criteria in solicitation documents is a common practice among school districts. However, the evaluation criteria used vary substantially across districts primarily resulting from differences in project delivery methods and related procurement practices. Although we find that most districts include evaluation criteria in solicitation documents, only a few districts include a description of a weighting system to be used in conjunction with the evaluation criteria to arrive at a final decision. Of these, only one, SBUSD, included weighing information in its solicitation documents when it was not expressly required by state law. Without a predetermined weighting or scoring methodology, evaluation criteria are open to the interpretation of various district staff and public officials and therefore provide little accountability in the district's final decision.

Bid Protests

Of the fifteen districts considered, slightly more than half (eight) have established bid protest procedures. The bid protest procedures of these eight districts are similar in language and substance, varying only on a few minor procedural details. Five of these districts (CUSD, EUHSD, OUSD, SSD, and SBUSD) have identical bid protest procedures. Among the provisions found in all or most bid protest procedures are:

- A statement affording a bidder the right to file a bid protest if he/she believes that the award is inconsistent with Board policy, the bid's specifications, or was not in compliance with law;
- An appeals process that allows the protesters to challenge the decision of district staff and have the protest considered by the district Board;
- A requirement that protests be submitted within five working days (two days for SBUSD).

Two districts, GUHSD and SUHSD, have provisions that are unique among the districts considered. GUHSD's bid protest procedures include specific conditions that must be met for a bid protest to be considered by the District:

“In order for a protest to be valid and be considered by the District the protest must:

- (a) be filed not later than 4:00 p.m. on the fifth business day following the opening of bids;
- (b) clearly identify the bidder on whose behalf the protest is being filed, together with the name, address and telephone number of the person representing the bidder for purposes of the protest;
- (c) clearly identify the specific bidding process, bid, or award of contract being protested;
- (d) clearly identify and describe in detail the specific basis or bases for the protest and all facts relevant thereto and in support thereof;
- (e) clearly identify all references to the specific portions of all documents relevant to the protest;
- (f) clearly identify and describe in detail all arguments in support of the protest, including, not as a limitation, citations to all legal authorities; and
- (g) be submitted with all documentation that is relevant to and supports the basis or bases underlying the protest.”

Inclusion of a detailed description of the District's bid protest requirements provides assistance to those bidders with limited experience in filing bid protests, and may be especially helpful to new or small firms.

SUHSD requires the submission of a bid protest bond, which must be equal to the lesser of 25% of the total value of the bid submitted or \$250. If the protest is upheld, the bond will be returned in full to the protester. However, if the protest is not upheld, then the District may file a claim against the bond in an amount equal to the District's expenses related to processing the bid protest. While the requirement of a bid protest bond is uncommon among the school districts considered, it is more common among State departments and agencies. PCC §12126 provides State agencies the authority to submit a bid protest to the Department of General Services to determine if the protest is frivolous. If the bid protest is determined to be frivolous, the bid protest will not be considered until the protesting party posts a bond no less than 10% of the estimated contract value.

In reviewing the currently established bid protest procedures, we find them to be lacking in two primary aspects: (1) no provisions are made to guarantee that bid protesters will receive necessary information from the district in a timely manner, and (2) procedures only apply to contracts that have been awarded through a competitive process and do not expressly apply to those awarded through informal competition, such as an RFQ process for LLB or professional services.

As shown on the procurement scorecard above, only one district, SDCCD, has an established post-award debriefing procedure which guarantees bidders access to information which may assist in the preparation of a bid protest. As demonstrated by *Great West Contractors Inc. v. Irvine Unified School District*, without the assurance of district staff cooperation it can be difficult for a bidder to submit an adequately completed bid protest in a timely manner, especially given that bid protests must be submitted within five working days. However, we find that school districts have included no provisions in their bid protest procedures to address this issue.

While bid protests are an important part of the formal competitive bidding process, it is arguably more important for bid protest procedures to be developed for an informal competitive process, as the degree of subjectivity and need for additional checks and balances are greater for these types of contracts. The current language of the established bid protest procedures reviewed states that any "bid award" may be subject to a bid protest. However, most contracts for LLB or professional services are not awarded pursuant to a bid, but rather a negotiation between a district and a selected contractor following an RFQ process. For this reason, bid protest procedures as currently worded would not apply to these contracts. However, contracts of this type are no less in need of the added accountability and transparency that a bid protest procedure would afford than formal competitive bidding and should therefore be subject to an equivalent form of appeal. We find that no district has developed an equivalent form of appeal to be used for contracts awarded through an informal competitive process.

Rejection of All Bids

Although we find that it is a common practice for school districts to reserve the right to reject all bids or proposals received, none of the districts considered have developed policies that dictate the appropriate circumstances under which a district should reject all bids.

Published Bid Results

Eleven of the fifteen districts considered publish bid results on their websites. These bid results provided varying levels of information, but most typically include basic bid information, contractor and subcontractor names, and bid amounts. A few districts (CUSD, PCCD, and SDCCD) provide several pieces of additional information not found on other district websites. Bid results on these districts' websites are clearly organized by date and school site, and include additional information along with bid results, such as links to original solicitation and proposal documents, original district cost estimates, and bid walk attendee information.

Published Donor List

According to information published by the San Diego County Registrar of Voters, two campaigns in support of school bond programs in 2008, Prop R (Southwestern Community College District) and Prop T (Escondido Union High School District), received funding from construction and professional services firms who later received contracts funded by bond program proceeds.

Donor firms receiving board approval for contracts*

Prop R	
<i>Firm</i>	<i>Donation</i>
Barnhart, Inc.	\$30,000
Piper Jaffray & Co.	\$25,000
Stradling, Yocca, Carlson & Rauth	\$5,000
BCA Architects	\$5,000
Echo Pacific	\$1,000
Prop T	
<i>Firm</i>	<i>Donation</i>
NTD Architecture	\$30,000
Dolinka Group LLP	\$2,500
Jaynes Corporation	\$2,000
Eric Hall and Associates	\$1,000

*Based on available public information and therefore not a comprehensive listing

While we do not question the legality or propriety of this practice, we recognize that it has the potential to generate distrust among the public and potential future contractors. In fact, we find that the procurement practices of these districts, Southwestern Community College District in particular, have come under increased public and media scrutiny with the passage of their most recent bond programs.^{xxvi} Given this potential for increased public distrust, school districts should take additional measures to promote transparency and ensure the public that contract awards are not influenced by donations. Readily acknowledging any financial contributions received is a primary means of avoiding the perception of impropriety among the public. Publishing a donor list on their website is a simple step school districts can take to meet this goal. However, we find that only two of the districts

considered, PCCD and SWCCD, have published any form of donor list on their respective websites. These districts have published annual reports detailing the contributions, which can be used for anything from student scholarships to facilities improvements, made to their respective foundations. However, we find that no district has disclosed information about contributions to the district in general, public officials, or bond program campaigns.

In addition to the above example, conflict of interest issues have been raised with Southwestern Community College District's procurement practices on multiple occasions. One case in particular demonstrates a situation in which we believe the District may have failed to adhere to State conflict of interest laws. According to allegations in a recent press article, an opportunity to accompany the District's vice president for business and financial affairs on a Napa Valley wine and golf getaway was auctioned off at a recent fundraiser for the District's educational foundation.^{xxvii} The trip was bid on by several firms who contract with the District and eventually won by Echo Pacific Construction. The costs associated with the District administrator's portion of the trip were paid out of the District's educational foundation.

With regard to procurement of professional services, State law clearly dictates that procedures “shall specifically prohibit government agency employees from participating in the selection process when those employees have a relationship with a person or business entity seeking a contract.”^{xxviii} While the definition of “relationship” is certainly subject to interpretation, we believe it is within the legislative intent of this law to prohibit actions such as those made by Southwestern.

Post-award Debriefing

Of school districts with active school bond programs, only one, SDCCD, has an established post-award debriefing process. The District's debriefing process is similar to the process used by federal agencies pursuant to FAR. Debriefing provisions are included in the District's solicitation documents. The following describes the District's debriefing processes for DB contracts:

“After issuance of the Board of Education’s Approval to Award the contract, the District will make available, for those unsuccessful Proposers requesting it, an opportunity for a debriefing. Debriefings will be conducted in accordance with the RFP Schedule. At the debriefing, Proposers will be provided with: (1) a summary of the District's evaluation of significant weaknesses or deficiencies in the Proposer's DB Proposal; (2) the overall rating of the Proposer's cost and technical elements of its DB Proposal; (3) the overall ranking of all DB Proposals; and (4) a summary of the rationale for the Award. Copies of competing DB Proposals and evaluation work sheets of the RFP Selection Committee will not be provided. Debriefings shall not include a point-by-point comparison of the de-briefed DB Proposal with other DB Proposals. Debriefings shall not include disclosure of any information prohibited from disclosure by Applicable Laws or exempt from release under Applicable Laws pertaining to release of public records, including, without limitation, information constituting trade secrets or other proprietary information.”

Lease-leaseback

The LLB project delivery method is attractive to school districts for several reasons. School districts are able to contract with various parties (general contractor, architect, etc.) at will, allowing them to consider contractor merit and capacity as opposed to lowest price. Avoiding formal competitive bidding can also reduce the amount of time and staff resources required to procure necessary

contracts. Hiring a LLB team (general contractor, architect, subcontractors) who has a previous history of working well together can facilitate successful project completion and limit change orders. Finally, LLB agreements allow school districts to establish a GMP. Therefore, it is not surprising to find a recent trend toward use of LLB among school districts in San Diego County and statewide.

Districts which utilize LLB as a primary delivery method

District	Proposition	Year
Carlsbad Unified School District	Prop P	2006
Escondido Union High School District	Prop T	2008
Oceanside Unified School District	Prop H	2008
Poway Unified School District	Prop C	2008
Santee School District	Prop R	2006
South Bay Union School District	Prop X	2008
Sweetwater Union High School District	Prop O	2006

However, LLB does not come without potential drawbacks. Although exclusion from formal competitive bidding provides several benefits to a district, it also introduces considerably more flexibility in contract awarding and increases subjectivity in the selection process. Without adequate safeguards, this increased opportunity for subjective assessment introduces the threat of questionable procurement practices and favoritism in contract awarding. The susceptibility of LLB to these questionable practices is notably greater than other alternative project delivery methods because, unlike DB, CM-at-risk, and MP, there currently exist no legal requirements for advertisement of potential contracting opportunities or evaluation of potential contractors via a standardized process.

In addition to potential problems with procurement transparency, the fact that the use of LLB in the public sector is a recent development introduces several issues. Traditional competitive bidding has been utilized by districts for the better part of the past century and therefore its legal boundaries and requirements are well known; however, this is not true for LLB. In fact, disagreement still exists among some public officials and legal professionals about the legality of the LLB delivery method in its current form. The primary concern among opponents of the current use of LLB is that it is being used to circumvent competitive bidding requirements. The SAB and OPSC have expressed that they believe awarding a LLB contract without following a competitive process is potentially illegal under PCC.^{xxix} Others question whether some LLB agreements actually constitute a legally enforceable contract. In *City of Los Angeles v. Offner*^{xxx}, the Supreme Court found that

“It has been held generally in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary, confines liability to each installment as it falls due and each year’s payment is for the consideration actually furnished that year, no violence is done to the constitutional provision. If, however, the instrument creates a full and complete liability upon its execution, or if its designation as a ‘lease’ is a subterfuge and is actually a sales contract in which the ‘rentals’ are installment payments on the purchase price for the aggregate of which and immediate and present

indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void.”

Application of this ruling could suggest that LLB agreements in which “lease” payments are actually installment payments to cover the total cost of construction and purchase of facilities, and are therefore not used as a financing mechanism, may constitute a “subterfuge” and therefore an unenforceable contract.

In 2004, Assembly Bill (AB) 1486 was drafted to require, among other things, that LLB contracts be let through a formal competitive process. AB 1486 passed both houses of the Legislature, but was ultimately vetoed by Governor Arnold Schwarzenegger. The Governor's veto statement read,

“I am supportive of using a competitive process for public works projects and understand that this bill is needed to clarify that process. However, this bill imposes restrictions on LLB contracts that could limit competition, inadvertently limit schools’ flexibility, and drive higher administrative costs; thereby potentially increasing the overall cost of school facility construction.”

Given the relative complexity of LLB agreements, which require the concurrent execution of multiple contracts, it is unclear that accepted and well-developed procedures for carrying them out have been fully established. It is also unclear whether knowledge among school district staff is sufficient to successfully carry out a LLB agreement.

In light of these various concerns with the use of LLB, we find that school districts should take several steps to carefully consider the benefits and costs of LLB and to ensure that LLB contracts are awarded fairly and openly:

1. Districts should not look to LLB as a project delivery method that produces optimal results in all circumstances. Rather, districts should develop Board Policies for evaluating project delivery methods on a project-by-project basis;
2. Districts should establish Board Policies regarding procedures for procurement and execution of LLB agreements;
3. Districts should fully evaluate the knowledge and experience of current staff to ensure that proper capacity exists to effectively carry out a LLB agreement and seek private program management and construction services as necessary;
4. LLB agreements should be procured through a competitive process;
5. Potential contractors should be evaluated using predetermined and publicly-available criteria;
6. Potential contractors should be evaluated by a selection panel consisting of both district staff and outside parties knowledgeable in public works contracting and/or construction; and
7. LLB agreements should be submitted for validation pursuant to Government Code §53511.

Scorecard of LLB districts

District	Board Policies	Competitive Procurement	Evaluation Criteria	Selection Panel
Carlsbad Unified School District		✓	✓	
Escondido Union High School District		✓	✓	
Oceanside Unified School District		✓	✓	
Poway Unified School District		✓	✓	
Santee School District		✓	✓	
South Bay Union School District		✓	✓	✓
Sweetwater Union High School District		✓	✓	✓

Overall, we find that districts that have elected to use LLB methodology have taken several steps to ensure that procurement is carried out fairly and objectively. Most often, districts utilize a request for qualifications (RFQ) to conduct an informal competitive procurement process in which price may or may not be a consideration in awarding the final contract. These RFQs contain the requirements of potential contractors, specific submission instructions, and a description of the District's evaluation methodology and criteria. By defining the parameters of the selection process beforehand, districts provide assurance to potential bidders that their proposals will be evaluated fairly and objectively.

Although we commend these districts for the steps they have taken to achieve fair procurement practices, we find that several opportunities still exist for districts to increase transparency and objectivity in procurement of LLB contracts. A review of the Board Policies of these districts reveals that current procurement policies only relate to procurement through formal competitive bidding and do not outline policies or procedures for procurement of LLB services. Written procurement procedures are important to both the district and firms with which the district contracts. For district staff, written procedures provide a guide for how procurement should be appropriately carried out. For potential contractors, written procedures give firms standards for which they can hold the district accountable.

We also find that districts should develop Board Policies that outline a procedure for determining the correct project delivery method on a case-by-case basis, and we caution districts against choosing a single project delivery method, such as LLB, for all or the majority of a bond program's projects without careful consideration. Some districts have recognized this concept, as demonstrated by an OUSD district staff recommendation to their Board that “as future projects arise staff will evaluate the suitability of using the LLB delivery method on a project-by-project basis.”^{xxxi}

Finally, districts should follow the model used for procurement of DB services and prequalification of contractors under DBB, and require the use of a selection committee in evaluating potential LLB contractors. A selection committee is currently used by two of the seven districts considered, while the other districts utilize only district staff. Use of a selection committee – comprised of both district staff and a member of another school district or other outside expert in public works contracting – introduces an objective outside opinion to the selection process.

Preparation of Solicitation Documents

Recent litigation brought against Santee School District highlights several areas of caution for school districts related to procurement practices. On September 8, 2008 the Santee School District Board moved to terminate its current contract with Sprotte + Watson Architects, the firm who had done all Prop R project design work to that date, citing unclear and unfavorable contract terms, contract abuse by the firm, and incompatibility of the contract with the LLB methodology. Specifically, as stated in the 2008-2009 Prop R Performance Review, the contract “did not align itself with the LLB methodology, and . . . it did not fully define scope, budget, and schedule in detail”. The Review also expressed concern that the contract “was not based on a standard American Institute of Architects (AIA) document, nor a format that is commonly used.” The termination of the program's primary architect in the midst of program implementation put the District at risk for delays or complications in construction of projects going forward, yet the District determined that the issues with Sprotte + Watson's contract were too significant to move forward. Sprotte + Watson has since filed a wrongful termination suit against the District, which is ongoing.

This case raises two key issues with the District's procurement practices. Firstly, solicitation and contract documents need to be clearly written with all necessary terms outlined definitively. Secondly, the District should determine the primary project delivery method to be used prior to procurement of contractual services. The 2008-2009 Performance Review reiterates this issue, stating:

“AFC recommends that if future architectural contracts are negotiated by the District that they be carefully reviewed by legal counsel and that they continue to be tailored to the construction methodology employed, scope, and schedule for the projects to be executed.”

Of primary concern is the District's decision to terminate Sprotte + Watson's contract because it was not aligned with LLB. The District could have avoided this problem had they established that LLB would be used earlier in the development of the Prop R program, more specifically prior to contracting with Sprotte + Watson.

Transparency Scorecard

	CVUSD	CUSD	EUHSD*	GUHSD	GCCCD	OUSD	PCCD	PUSD	SDCCD	SDUSD	SSD	SBUSD*	SWCCD*	SUHSD	VUSD
<i>Website Information Provision</i>															
Committee bylaws		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Member Information	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Meeting minutes/agendas	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Annual Reports	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓			✓	✓
Performance Audits	✓	✓		✓	✓	✓	✓		✓	✓	✓			✓	✓
Financial Audits	✓	✓		✓	✓	✓	✓		✓	✓	✓			✓	✓
Project list	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Project descriptions		✓		✓	✓				✓	✓					
Project progress	✓	✓		✓	✓	✓	✓		✓	✓					
Bond background	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Contact information	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<i>Report/Audit Information Provision</i>															
Budget overview	✓	✓		✓	✓	✓	✓	✓		✓	✓			✓	✓
Program status updates	✓	✓		✓	✓	✓		✓	✓	✓	✓				✓
Detailed discussion of projects	✓	✓			✓	✓	✓		✓		✓			✓	
Basic financial information	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓			✓	✓
Expenditures itemized by project/site	✓	✓		✓	✓		✓	✓	✓	✓				✓	
Prop 39 required audit findings	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓			✓	✓
Additional Recommendations		✓		✓		✓		✓		✓	✓				
Detailed ICOC member information				✓		✓								✓	
Project progress reports		✓			✓	✓			✓	✓					

*No annual reports have been issued to date.

Transparency

Website Information Provision

Overall, the majority of school districts in San Diego County provide a sufficient amount of bond program information on their website for members of the public to remain well informed. Among the fifteen districts considered, five received perfect scores while five others missed two points or less. However, a great deal of variation exists between the high and low performers in this category, with several low performers failing to post even basic bond program materials on their websites, such as annual reports and audits.

Of those that do not currently provide an adequate level of information, many possess the necessary website framework to deliver an improved level of information at a limited cost of additional time and resources. More specifically, several school districts have created individual web pages for each school bond project but have failed to use these pages to provide detailed information about the respective project. The most commonly-noted deficiencies in current school district websites were lack of updated information on project status and performance and lack of specific financial information about individual projects.

Annual Report/Audit Information Provision

As with the provision of website information, overall we find that the majority of districts provide a sufficient amount of bond program information in their ICOC Annual Reports and Audits, although performance across the board is lower in this category than in website information provision and no districts received a perfect score. Many school districts failed to implement two practices that we believe serve to greatly improve bond program transparency: (1) have a performance review conducted by an outside auditor, and (2) provide mid-year or monthly progress reports.

Six of the fifteen districts considered have elected to conduct outside performance reviews. These involve third-party analysis of bond program progress, adherence to district policies and procedures, in-depth analysis of individual projects, detailed review of program expenditures, review of change orders, and recommendations on how the district can improve performance going forward. In several instances, these performance reviews have resulted in findings and related recommendations that have dramatically improved bond program implementation going forward. For instance, in 2007, pursuant to the findings and recommendations of a third-party performance review, GUHSD made several beneficial changes to its bond program including hiring a program/construction manager, revising the bond program manual, and standardizing its bond program reports including the creation of monthly project progress reports.

Highlighting Exemplary Information Provision *Project Status Indicators*

Construction Bond Program > Program Status > Pages > program.aspx
PROGRAM STATUS

Project Performance Measures		Budget	Schedule	Other
Expedition	Link			
all Campus City College (19)				
11110	Construct Humanities Building			
11140	Land Acquisition - Vocational Technology			
11150	Campus Site Design & Env Review			
11210	Construct Child Development Center			
11220	Career Technology Center			
11240	Business Technology Building			
11250	Engineering Technology Building			
11260	Science Building			
11310	Repair and Renovate "F" Building			
11320	"D" Building Roof			
11330	"A" Building Renovation			
11340	"C" Building Classrooms			



Program Status Legend

- Serious Concern
- Concern
- Going Well
- Project Complete
- Scheduled

Two districts, Grossmont Union High School District and San Diego Community College District, make use of project status visual aids which allow users to quickly survey the recent performance of facilities projects. If users desire more detailed information about a specific project, a link is provided to a more detailed description and progress update of the project.

Environmental Impact Reports

Several districts included copies of Environmental Impact Reports created prior to construction at various school project sites. The inclusion of these Environmental Impact Reports alerts residents and taxpayers to possible project delays and difficulties that may arise as the result of environmental concerns.

School Project Maps

Five school districts (Grossmont Union High School District, Carlsbad Unified High School District, Escondido Union High School District, Poway Unified School District, and San Diego Unified School District) included some form of school project map on their website. Many districts use this tool as the primary avenue for users to link to specific information about individual projects. These visuals provide an alternative form of information delivery to a standard list of individual project links and in many cases was accompanied by a more basic drop-down menu or simple list.



Future Project Timelines

Several ICOC's included a simple timeline of future projects in their annual reports. These timelines provide basic information about the project, site, and expected start and completion dates. They allow residents to quickly determine when construction will occur at schools in their area and provide a source that can be referenced in the future to gauge the progress and performance of the construction.

Conclusions/Recommendations

Overall Bond Program Performance

In our findings we highlighted two areas that we believe to be major influences on the success of active bond programs in San Diego County: (1) the selection of an appropriate project delivery method, and (2) the availability of state-matching funds.

Selection of Project Delivery Method

Several initiatives in school facilities financing and project delivery now afford school districts alternatives to traditional competitive bidding and design-bid-build delivery. Each of these alternatives has specific advantages and disadvantages and none is perfect in all circumstances. For this reason, school districts should carefully consider which project delivery method is appropriate for each given project. Several factors that influence a school district's choice may be^{xxxii}:

- District staff capabilities
- Time considerations
- Project complexity
- Degree of district control and oversight desired
- Type of contractors the district wants to attract
- Budget
- Predominant trade practices in region
- Appropriate community and business participation; and
- Level of acceptable district legal and financial risk

The table below provides a summary of the advantages and disadvantages of each of the project delivery methods.

Design-bid-build	
<i>Advantages</i>	<i>Disadvantages</i>
<ul style="list-style-type: none"> • Familiar and established procedures • Project design documents must be thorough prior to beginning a project in order to carry out competitive bidding • Case law has clearly defined legal parameters • Protects against favoritism in contract awarding • Promotes competition between contractors 	<ul style="list-style-type: none"> • There is limited involvement of construction firms early in the project development • Conflicts may arise between architect and construction firm • Limited flexibility in contract awarding • Lowest bidder may not be most qualified • Lengthy procedural requirements • High potential for bid protests and litigation
Design-build	
<i>Advantages</i>	<i>Disadvantages</i>
<ul style="list-style-type: none"> • Reduced chance of conflict between architect and construction firm because they are a single entity • Only one RFP/RFQ and contract required for both architectural and construction services 	<ul style="list-style-type: none"> • New process and legal requirements for districts to learn • Limited to projects greater than \$10 million • Less contractor over project design

<ul style="list-style-type: none"> • Potential contractors may be evaluated on a value basis as opposed to awarding contract to lowest bidder • Potential for less length procedures and shortened project delivery time • Contract includes Guaranteed Maximum Price 	<ul style="list-style-type: none"> • Value based contractor evaluation may lead to favoritism in awarding contracts or lack of transparency • May exclude some potential contractors from responding to district solicitation for services
Construction Manager at-Risk	
<i>Advantages</i>	<i>Disadvantages</i>
<ul style="list-style-type: none"> • Construction manager may be selected through value based evaluation • Subcontractors are still procured through competitive bidding process • Construction manager provides district with expertise through all phases of project including design, planning, permitting, bidding, and construction • Contract generally includes Guaranteed Maximum Price 	<ul style="list-style-type: none"> • Increased construction manager fees as contractor assumes all risk • No common standards exist • Construction manager's relationship with district changes midway through the project • Total price is unknown to district until all subcontractor bids are received • Potential for favoritism in selection of construction manager
Multi-Prime	
<i>Advantages</i>	<i>Disadvantages</i>
<ul style="list-style-type: none"> • Construction manager may be selected through value based evaluation • Subcontractors are still procured through competitive bidding process and contracts are held with the district • Avoids general contractor markup of subcontractor services • Construction manager provides district with expertise through all phases of project including design, planning, permitting, bidding, and construction • Contract generally includes Guaranteed Maximum Price 	<ul style="list-style-type: none"> • More contracts for the district to manage • District assumes more risk than Construction Manager at-Risk as district holds contracts with subcontractors • Each contract package is subject to litigation • Total price is unknown to district until all subcontractor bids are received • Potential for favoritism in selection of construction manager
Lease-leaseback	
<i>Advantages</i>	<i>Disadvantages</i>
<ul style="list-style-type: none"> • Elimination of formal bidding procedures reduces implementation time • The district has greater flexibility in selection of general contractor, architect, and subcontractors • Reduced chance of conflict between architect and construction firm because they are a single entity • Only one RFP/RFQ and contract required for both architectural and construction services • Reduces the potential of change orders • Contract generally includes Guaranteed Maximum Price 	<ul style="list-style-type: none"> • Flexibility in solicitation leaves greatest opportunity for fraud or favoritism in contract awarding • Lease-leaseback is new to school districts and not well understood • Many legal parameters are still unestablished

The Association of California Construction Managers has developed an objective scoring system, endorsed by the California State Department of General Services, which assists school districts

in the selection of an appropriate project delivery method for a specific project. We recommend that districts use a version of this scorecard, which can be found in Appendix B. The original version may be found at the Department of General Services website.

Managing Uncertain State Funding

The progress of several bond programs in San Diego County has been inhibited by the delayed availability of anticipated state matching funds. The State's inability to issue bonds has caused the SAB to defer payment on \$2.5 billion in funds previously dedicated to school bond projects, with no guarantee of future payment. Therefore, school districts should take several measures to mitigate the risk of reliance on state funds for current and future school facilities projects:

- School districts should continually monitor the State's fiscal condition in order to accurately project if and when the State will be able to issue additional bonds;
- School districts should continually monitor the activities of the SAB and OPSC for information about the future payment of state funding;
- Future bond programs which plan to utilize state funding should increase the overall bond program contingency in proportion to the amount of state funding anticipated; and
- School districts should consider hiring a consultant or program manager with expertise in state financing issues in order to carry out the recommendations above.

Procurement

In evaluating the procurement practices of school districts in San Diego County, we found that many school districts had failed to implement basic practices which we believe would improve transparency and objectivity in procurement. Additionally, although we did find evidence of implementation of some of our suggested practices, we outlined several additional steps that could be taken to improve currently established practices. In response to these findings, we suggest the following recommendations which can be implemented by school districts to improve their procurement processes:

- Board policies should explicitly define all district guidelines, regulations, and procedures related to procurement of contracts through competitive bidding, including detailed procedures for procurement of professional services;
- School districts should avoid issuing any solicitation documents if it is not their ultimate intention to award a contract;
- Prior to using LLB, school districts should establish measures to ensure transparent and objective procurement of LLB services;
- Prior to issuing any solicitation documents, school districts should fully develop their intended scope of work, select an appropriate project delivery method, and determine how the project will be managed;
- All solicitation documents should be clearly written with all necessary terms outlined definitively;
- School districts should adopt the San Diego County Office of Education's recommended procedures for prequalification, if applicable;
- Predetermined evaluation criteria, an objective, standardized scoring system, and a selection panel should be used for any evaluation of potential contractors via non-price

criteria;

- After a district has made a final contract award determination, but prior to actually awarding the contract, the district should send a notice of intent to award to all bidders;
- Bid protest procedures should be clearly defined within Board Policies and allow for appeal of contracts awarded through non-traditional competitive bidding;
- School districts should offer post-award debriefing for all unsuccessful bidders;
- All bid results should be published on the school district's website;
- School districts should annually publish on their website a list of all parties who have donated to: (1) the district, (2) district elected officials, (3) related educational foundations and/or (4) any recent bond campaign; and
- School district staff and officials should excuse themselves from participating in a particular procurement process and/or decision to award a contract if he/she: (1) knows or has reason to know he/she has a financial interest and/or (2) has a relationship with the person or business entity seeking a contract which would reasonably influence his/her decision.

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- i Note: Only school bond programs with over \$50 million in total bond issuance were reviewed.
 - ii Government Code §4525
 - iii PCC §20111
 - iv PCC §100
 - v PCC §20103.8
 - vi PCC §1103
 - vii PCC §2000
 - viii PCC §20111
 - ix PCC §20111.5
 - x Education Code §17250
 - xi Education Code §17250.25
 - xii Education Code §17406
 - xiii GC § 4525 et seq.
 - xiv Education Code §17250.25
 - xv *The Project Delivery Handbook*, Association of California Construction Managers
 - xvi 146 Cal. App. 4th 757 (Cal. App. 5th Dist. 2007).
 - xvii 187 Cal. App. 4th 1425 (Cal. App. 4th Dist. 2010).
 - xviii CPCC §22038; *Universal By-Products, Inc. v. City of Modesto*, 43 Cal. App. 3d 145 (Cal. App. 5th Dist. 1974).
 - xix 69 Cal. App. 4th 1458 (Cal. App. 2d Dist. 1999).
 - xx CPCC §10185
 - xxi *Bielec Wrecking & Lumber Co. v. McMorran*, 21 A.D.2d 949, 951 (N.Y. App. Div. 3d Dep't 1964).
 - xxii *A&D Constr., Inc. v. Vineland*, 175 N.J. Super. 401 (Law Div. 1980).
 - xxiii GC § 4525 et seq.
 - xxiv This change order rate was calculated based on the dollar amount of requested scope changes as reported in 2008-2009 Performance Review
 - xxv Legislative Analyst's Office, "The 2011-2012 Budget: California's Fiscal Outlook"
 - xxvi Sierra, Tanya. "College VP Raises Money from Contractors He Oversees". San Diego Union-Tribune. August 21, 2010.
 - xxvii Sierra, Tanya. "Gala prize was Napa weekend with official ." San Diego Union-Tribune. October 29, 2010.
 - xxviii GC § 4525 et seq.
 - xxix *The Project Delivery Handbook*, Association of California Construction Managers
 - xxx 19 Cal. 2d 483 (Cal. 1942).
 - xxxi Board of Trustees Meeting, Oceanside Unified School District, January 26, 2010.
 - xxxii *The Project Delivery Handbook*, Association of California Construction Managers