SCHOOLS LEGAL SERVICE

LAW UPDATE
SCHOOL BUSINESS

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ATTORNEY GENERAL OPINION TAKES POSITION THAT PRE-ELECTION SCHOOL CONSTRUCTION BOND CAMPAIGN EXPENDITURES MAY NOT BE PAID FROM BOND PROCEEDS

In an opinion issued January 26, 2016, (13-304) Attorney General Kamala Harris responded to a series of five questions posed by Treasurer John Chiang concerning use of school construction bond proceeds[1] and contingent financial services contracts. The *verbatim* questions posed by the Treasurer and a summary of the responses by the Attorney General are provided below.

Question 1. Does a school or community college district violate California constitutional and statutory prohibitions against using public funds to advocate passage of a bond measure by contracting with a person or entity for services related to a bond election campaign?

Abbreviated Response: Yes, if the particular pre-election services may be fairly characterized as campaign activity (advocacy) rather than informational services providing the public with a fair presentation of relevant information.

Question 2. Does a school or community college district violate California prohibitions against using public funds to advocate passage of a bond measure if the district enters into an agreement with a municipal finance firm under which the district obtains pre-bond-election services in return for guaranteeing the firm an exclusive contract to provide bond-sale services if the election is successful?

Abbreviated Response: Contingent–compensation or "no bid" contracts for consultant services are not *per se* illegal so long as a resolution for a negotiated sale is adopted prior to the sale of the bonds. However, such contracts would violate the law if:

a. The District's agreement was for the purpose (sole or partial) of inducing the firm to support the election, or

b. The firm's fee was inflated to account for the firm's contribution (of money or services) to the campaign and the district failed to take reasonable steps to ensure that the fee was not inflated.

[1] See Government Code § 8314, Education Code § 7054 and *Stanson v. Mott* (1976) 17 Cal. 3d 206 for more background on advocacy versus informational expenditures of district funds and bond proceeds.

Question 3. In the case of an agreement as described in Question 2, does a school or community college district violate California law concerning the use of bond proceeds if the district reimburses the municipal finance firm for the cost of providing the pre- election services from the proceeds raised from the bond sale?

Abbreviated Response: Yes, a district violates California law concerning use of bond proceeds if the district reimburses the municipal finance firm for the cost of such pre-election services from bond proceeds.

Question 4. In the scenario described in Question 3, does a school or community college district violate California law concerning the use of bond proceeds, even where the reimbursement is not an itemized component of the fees the district pays to the firm in connection with the bond sale?

Abbreviated Response: Yes, such reimbursement is a violation of California law concerning the use of bond proceeds whether or not the reimbursement is shown as a component of the fees the district pays to the firm in connection with the sale of the bonds.

Question 5. Does an entity providing campaign services to a bond measure campaign in exchange for an exclusive agreement with the district to sell the bonds incur an obligation to report the cost of such services as a contribution to the bond measure campaign in accordance with state law?

Abbreviated Response: Yes, if the value of such services is $10,000 or more in a calendar year, the entity providing the services to a bond measure committee has an obligation to report the value of such services to the Fair Political Practices Commission.

It should be noted that opinions of the Attorney General do not have the force of law but are considered persuasive by most courts. Districts should discuss this opinion with their financial advisor and any proposed underwriting firms prior to their retention.

If you have any questions concerning this update or would like to discuss the implications of it for your district, do not hesitate to contact our office.

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