

SCHOOL BUSINESS LAW: THINGS YOU NEED TO KNOW IN THIS ECONOMY

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I. E-RATE RULES

A. CMAS.

Use of the state master contracts, known as CMAS contracts, are an exception to the non-construction bidding requirements, regardless of the size of the contract. The pricing in the CMAS contract is permissibly variable, meaning the official pricing of any CMAS contract or matrix of prices is “the most you can be charged” for the listed item. CMAS vendors are permitted to offer discounts from listed pricing, and you are permitted to engage several vendors of like items in a competitive negotiation to find the best available CMAS price.

However, E-rate rules require you to obtain the most cost-effective price, which means when CMAS quotes are solicited by an agency, all vendors must be treated the same, and if you contact one CMAS vendor for a quote, you must contact all CMAS vendors of the product sought, or your selection may not be deemed the most cost-effective. If all you do is post your Form 470 for CMAS products, and do not attempt to engage any specific vendor of those products, you don’t have further obligation to contact all CMAS vendors, as your posting of the Form 470 is fair access to all. If you solicit a price from your “preferred” CMAS vendor, and not from anyone else, you may not have complied with E-rate rules, even though you may have complied with California bidding rules.

B. BIDDING.

E-rate rules permit you to look at factors other than price, such as service records, experience, etc, in selecting a vendor for E-rate approved items. However, if you are under circumstances that require formal competitive bidding under California bidding rules, you are not permitted to look at anything but price in awarding many contracts. Some rules permit flexibility, such as for data processing equipment and software, and comparing product suppliers offering sale off of a “piggyback” contract may also comply with California rules, but the circumstances of each purchase define your obligations, and consultation with legal counsel could prevent possible E-rate audit findings that lead to an obligation to return the E-rate money.

II. GETTING OUT OF CONTRACTS

A. NON-APPROPRIATIONS CLAUSE.

A school board should not enter into agreements that financially tie the hands of future boards. Contracts that extend beyond the current budget should be fully funded, or have an “escape” clause, called a “non-appropriations” clause that permits the future board to determine the district lacks funding to continue the contract. Contracts such as multi-year equipment leases, or purchases, should contain a clause expressly recognizing the possibility of funding not being appropriated for the purpose of the contract, and spelling out the outcome of such eventuality.

Typical provisions require the return of the equipment, and often attempt to impose a ban on obtaining, within the budget year, other equipment that would perform the same function. Everything is negotiable, unless you have limited your choices to a specific source or type of the product.

B. CONTRACT TERM OPTIONS.

Where an agency wants the option to keep equipment for more than a year, as where the agency is testing the equipment to see if it meets their needs, our recommendation is to keep the initial duration of the contract as short as possible, but long enough to be able to make your determination of suitability. At the same time, include in the contract an option to renew the contract, in increments of one-year at a time, with a maximum of five years. The option should not be an “automatic” extension, as that makes the contract appear to be a five year contract, raising possible bidding questions and mandating a non-appropriations clause.

C. BREACH OF CONTRACT.

A district cannot simply determine not to comply with the obligations of an existing contract. Refusal to honor the contract constitutes a breach of the contract, and damages for breach may be awarded by a court. Damages for breach of contract include, but are not limited to, lost profits. Rather than breaching a contract, it is recommended that legal counsel be contacted to assist with a negotiated rescission of the contract, which may include some payment to the other party.

III. CONTRACTING FOR OUTSIDE SERVICES

In 2002, the Legislature passed SB 1419 which expressly permitted contracting out for services which would otherwise be provided by the classified service. However, the new rules do not apply to any contracted services in existence before January 1, 2003. As to contracts in existence before that time, those contracts may be continued, even if new vendors have to be selected. As to any “new” contracts, first entered into after that date, the right to contract out was limited to situations where there was sufficient cost savings, without undercutting the pay scale that would be paid to classified staff, and without

“displacement” of district employees. Additionally, the contracts had to be awarded after competitive bidding, and the contracting agency had to give assurance of non-discriminatory hiring practices.

These rules do not apply to contracts for new district functions mandating or authorizing outside contractors, or where services are not available within the district, or are incidental to an equipment lease or purchase, or where the purposes of the district cannot be met by using district employees, or an emergency exists that does not permit following the usual hiring practices, or where equipment, materials, facilities or support services cannot reasonably be provided in the location where the services are to be performed, or where the temporary nature of the services would be frustrated by following the typical hiring practices.

IV. REGISTERED WARRANTS

In this economy, it is possible, if not likely, that we will see some use of “registered orders” and/or “registered warrants” in the future, and it seems advisable to remind those interested of the rules for use of these items. We are also aware that the SFSS committee of BASC is finalizing a comprehensive procedure for COE use in working with these items. That package should be available within the next month or so. We may take an additional look at the situation at that time to see if the subject is fully covered. In the meantime, these are our restatements of the rules. All citations are to the California Education Code unless otherwise specified, and these rules apply only to situations involving registered orders or warrants and are not generally applicable to payment of orders or warrants.

Presentation of Valid Order to County Superintendent Where Funds are Unavailable.

When any valid order against the funds of a school district is presented to the county superintendent of schools (superintendent) and moneys are not available in the funds of the district from which to pay the order, the superintendent endorses on the order the words "Not Approved for Want of Funds" and registers the order in the records of the superintendent's office. [42670]

Transmission Back to District and Delivery to Payee.

The superintendent numbers and dates the registered order (order) and transmits it back to the school district which drew the order. The district delivers the order to the payee or as the payee directs. From the date of registration, the order bears interest at the rate of five percent per annum until the date upon which notice is given, pursuant to Section 42672, that the superintendent is ready to approve the order. [42671]

Notice of Intent to Approve the Order When Moneys Become Available.

When moneys become available for payment of the order, the superintendent gives notice in a newspaper published in the county, or if there is no newspaper, by written

notice posted at the courthouse, stating that the superintendent is ready to approve the order. The notice may list any number of orders, of one or more districts, for payment of which moneys are available, giving the names of the districts and listing them in the order of registration for each district. [42672]

60-Day Set Aside of Funds.

At the time of giving the notice, the superintendent sets aside funds of each district in the amount necessary for payment of the orders of the district, as listed in the notice. The funds are set aside for 60 days. If an order is not presented to the superintendent for payment within 60 days after the notice has been given, and if moneys are no longer available to pay the order at the time of presentation, it is not approved for payment until money becomes available for that purpose and until notice is again given that the superintendent is ready to pay it. [42673]

Approval in Order of Presentation.

On presentation, the superintendent approves the orders of each district and signs them as requisitions on the county auditor in the order of presentation. The superintendent enters on each order the amount of interest due and the total amount payable, including principal and interest. Each approved order is then governed by the procedure established in the Education Code relating to payments from school district funds. [42674]

Alternative Method - Special Interest Requisition.

As an alternative to the method provided in Section 42674, when any corporation, firm, or person presents two or more orders for payment at the same time, registered on the same date, issued against the funds of the same district, the orders may be approved, allowed, and consecutively numbered by the superintendent and the county auditor as requisitions and warrants on the funds of the district, and a special interest requisition may be issued by the county superintendent against the funds of the district for the total amount of the interest payable on the orders. [42675]

Form of Special Interest Requisitions.

A special interest requisition bears upon its face substantially the following notation: "In full payment of interest due on warrants numbered _____ to _____, inclusive, of the _____ School District." [42676]

Numbering Special Interest Requisitions.

A special interest requisition is numbered by the superintendent and county auditor, and is given the number immediately following the number assigned to the last of the requisitions and warrants referred to in Section 42675. [42677]

Report of Interest on Orders.

Within 10 days after the end of each month, the superintendent reports to the county treasurer and county auditor the amount of the interest computed pursuant to the order process. The report shows each district for which interest has been computed, the numbers of the orders for which the interest is to be paid, and the total amount of the interest charged to each district. Upon transmitting to the governing board of any school district orders which have been approved and allowed as warrants against the funds of the district, the superintendent also reports in writing to the clerk or secretary of the district the amount of interest computed on the orders and the numbers of the orders for which the interest is to be paid. [42678]

Alternative Procedure:

In place of the process for registration of district warrants (the process commencing with Section 42670) the following process may be used, if a resolution to that effect is adopted by the county board of supervisors. [42690]

When any order on school district funds is received by the superintendent and there is insufficient money in the fund or funds against which the order is drawn to pay the order in full, the superintendent endorses on the order "To be Registered for Lack of Sufficient Funds," signs, dates, and numbers the order as a requisition on the county auditor and transmits the requisition to the county auditor. The county auditor endorses on the order "Examined and Allowed," signs, dates, and numbers it as a warrant on the county treasurer, and returns the warrant to the superintendent, who transmits it to the district for issuance to the payee or as the payee directs. [42691]

When the warrant is presented to the county treasurer for payment, the treasurer endorses, registers, advertises, and pays it, with interest at the rate of five percent per annum, in the manner prescribed, as nearly as may be, for county warrants in Sections 29821 to 29824, inclusive, and Sections 29826 and 29827 of the California Government Code. [42692]

If the warrants are not again presented for payment within 60 days from the time the notice provided for in Section 29823 of the Government Code is given, the fund set aside for payment of the warrants is applied by the treasurer to the payment of unpaid warrants next in order of registry. [42693]

Within 10 days after the end of the month, the county auditor reports to the superintendent the amount of interest added to registered warrants and paid during the preceding month. The report submitted shows each district to whose registered warrants, paid during the month covered by the report, interest was added, and the amount of the interest for the district. The superintendent immediately reports the amount of the interest paid for the district, in writing, to the clerk or secretary of each district for which interest was paid. [42694]

V. FLEXIBILITY IN USING PROCEEDS OF THE SALE OF SURPLUS PROPERTY

Many districts in these difficult times are considering, perhaps for the first time, the sale or lease of surplus property. Under a provision in the Omnibus Education Trailer Bill, ABX4 2, signed by the Governor on July 28, 2009, districts may now use the proceeds of a surplus real property sale for general fund purposes, under certain conditions.

Prior to the passage of ABX4 2, proceeds from the sale of surplus property had to be used for capital outlay or for costs of maintenance of school district property only. [Education Code section 17462] In contrast, districts could use the proceeds from the lease of surplus property as revenue for general fund purposes.

The new statute codified as Education Code section 17463.7 will allow, for a period of three years, until January 1, 2012, a portion of the proceeds from the sale of surplus real property originally purchased with district funds to be used for general fund purposes. In order to take advantage of the flexibility provided by the statute the following conditions must be met:

- A. The property must have been purchased originally with local funds.
- B. Only sales proceeds in excess of the proportion of the original purchase price to the sales price may be deposited into the general fund of the district.
- C. The district is ineligible for hardship funding from the State School Deferred Maintenance Fund for a period of five years from the date of deposit of proceeds into the general fund.
- D. Any SFP apportionment will be reduced by the amount of the sale proceeds used for general fund purposes.
- E. The Governing Board must certify to the SAB that:
 - 1. The district has no major deferred maintenance requirements;
 - 2. The sale does not violate the provisions of a local bond act;
 - 3. The real property is not suitable to meet projected school construction needs for the next 10 years.
- F. The Governing Board must present a plan at a regularly scheduled meeting for expending the one-time money, including source and use of funds and a description of why the expenditure will not result in ongoing fiscal obligations for the district.