

CEC Prop 39 CEC Draft Guidelines: Comments**Subject: 13-CCEFA-1, Comments on Proposition 39**

These comments concern the following language in the contracts discussion (page 28 of the draft guidelines) that may block projects based on unique products and services if further clarification and guidance is not provided:

LEAs shall not use a sole-source process to award grant proceeds. LEAs may use the best-value criteria as defined in paragraph (1) of subdivision (c) of Section 20133 of the Public Contract Code to award funds. Public Resources Code section 26235(c).

While this language is from the enabling legislation, the lack of clarification in the guidelines leaves the impression that procuring unique products or services is not allowed. For example, some energy efficiency and clean energy technologies and services are new, unique or proprietary, hence, not competitively available in the marketplace. It is probably not the intent of the legislature to hinder innovation by prohibiting new energy saving technologies that can only be procured from a single provider. However, the above language may do just that if no further guidance is provided.

Providing clearer guidance on this is especially important because California contract code for schools and community colleges is not explicit about when competitive bidding doesn't apply. Current code does not have an explicit "sole-source process" but may allow exceptions to competitive bidding for projects under specified dollar amounts, in part recognizing that there is no advantage if the cost of conducting a competitive bid will exceed any possible savings.

Clearer guidance provided by case law has generally focused on two reasons for non-competitive bids: 1) there are no alternative products or services, and 2) competitive bidding will not produce any advantage. The following excerpt from the *Guide to Bidding and Contracting for School Districts and Community College Districts* summarizes the case law:

"The purposes of competitive bidding statutes are to secure economy in the construction of public works and the expenditures of public funds for materials and supplies needed by public bodies; to protect the public from collusive contracts; to exclude favoritism and corruption and to promote competition among bidders so as to ensure that all public contracts are secured at the lowest cost to taxpayers. 64 Am.Jur. 2d, Public Works and Contracts, 37.

However, where competitive bidding proposals do not produce an advantage, a statute requiring competitive bidding does not apply. The law in California on this point holds that where competitive bidding works an incongruity and is unavailing as affecting the final result, or where it does not produce any advantage or it is practically impossible to obtain what is required and observe such forms, then competitive bidding may be dispensed with."¹

¹ Excerpted from the *Guide to Bidding and Contracting for School Districts and Community College Districts* published by the California Association of School Business Officials San Diego – Imperial Section Professional Council March 22, 2013.

In this context, the Prop 39 enabling legislation is conflicting and appears to create a Catch-22 for schools: Is it using a “sole source process” when a school wants to procure a unique product or service from a sole provider and for which it would be impossible to obtain a competitive bid? If so, those of us with unique energy efficiency products and services who regularly contract with schools and other public agencies may be frozen out of Prop 39 financed projects. No school district will want to be the test case for a legal challenge and will be reluctant to take on projects that under normal circumstances would be legal and pragmatic.

The “best-value criteria” referred to in the guidebook is defined in the Code as follows:

(c) As used in this section:

(1) "Best value" means a value determined by objective criteria related to price, features, functions, and life-cycle costs.

(This definition is in a code section (20133) specifically intended for counties to allow a design-build process for building projects costing more than \$2.5 million. It is not related to the contract code specific to schools and community colleges. Therefore, it may be safe to assume that we are supposed to apply the definition and not its context.)

Does “best value” in the case of Prop 39 contracts apply to unique energy efficiency products and services available from a sole provider? Would an “objective” analysis by the school of “best value” for the specific project be an acceptable way to choose a contractor with a unique technology or service?

Schools and colleges generally have strict criteria that have to be met when procuring products and services without competitive bidding. “Price, features and functions” would normally be included. If adding the “life-cycle cost” (especially related to the energy cost) were included, would that meet the criteria for awarding a contract to a sole provider of unique energy efficiency technology and services not otherwise available in the marketplace?

If so, it would be helpful to spell this out in the guidelines for the schools and community colleges as well as the state agency staff charged with reviewing the proposed projects.

Thanks,

Tim Rosenfeld
HMW International, Inc.
131 Camino Alto, Suite D
Mill Valley, CA 94941

tim@hmwinternational.com

415-389-1348