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May 1, 2012

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Halsey:

Commission on State Mandates Draft Staff Analysis—Public Contracts (02-TC-35)

We reviewed the Commission on State Mandates (Commission) April 3, 2012 draft staff analysis of the *Public Contracts* test claim (02-TC-35) and agree that Public Contract Code (PCC) sections 20111, 20111.5, 20116, 20651, 20651.5, 20657, 20659, 6610, 7107, 7109, 9203, 10299, 12109, and 20107 do not constitute a reimbursable state mandate. However, we disagree with the staff analysis that the following activities are a reimbursable state mandate for required repair and maintenance contracts:

- Specifying the classification of the contractor's license that a contractor must possess at the time a contract is awarded in the plans and bid notices (PCC section 3300).
- Including a differing site conditions clause in public works contracts (PCC section 7104).
- Activities associated with the resolution process of construction claims and the prompt payment of progress payments (PCC sections 20104, 20104.2, and 20104.50).
- Permitting the substitution of securities for any money retained by districts in any invitation for bid and in any contract documents (PCC section 22300).
- Verifying that a contractor is properly licensed (Business and Professions Code section 7028.15).
- Providing participation in community college contracts and to report to minority business enterprises, women business enterprises, and disabled veteran business enterprises (California Code of Regulations, title 5, sections 59500, 59504, 59505, 59506, and 59509).

We disagree that these activities constitute a reimbursable state mandate because: (1) projects for new construction proposed by school districts and community college districts are discretionary; and (2) costs incurred complying with general provisions of the Local Agency Public Construction Act are offset with funding available from various existing state grants and programs.

1) Projects for new construction proposed by school districts and community college districts are discretionary.

Current law provides school districts with flexibility, discretion, and choice over the manner in which districts elect to house their student populations. For example, school districts have the discretion to operate year round multi-track schools or two kindergarten sessions per day, use

portable classrooms, or transport students to under-used schools. Community colleges can offer night/weekend classes or lease offsite facilities. It is the district's voluntary decision to construct a facility rather than using an aforementioned alternative. It is this voluntary decision that compels districts to carry out activities required under the Local Agency Public Construction Act. Therefore, any costs of complying with the Local Agency Public Construction Act are voluntary and not reimbursable. We note that this rationale is consistent with the statement of decision provided by the Commission on March 24, 2011 regarding the *School Facilities Funding Requirements* test claim (02-TC-30) which states:

6. The statutes below, which generally require compliance school facility funding requirements, do not mandate school districts to perform any activities because:
 - a) School districts are not legally compelled to do any of the following activities which would trigger the requirement to comply with the school facilities funding requirements contained in the test claim statutes and regulations: acquire new school sites, build new schools, undertake modernization projects, add portable classrooms, participate in other state programs to further such projects, request and accept SFP funding, or issue local bonds.
 - b) There is no evidence in the record to support a finding that school districts are practically compelled to: acquire new school sites, build new schools, undertake modernization projects, add portable classrooms, request and accept SFP funding, issue local bonds, or opt to participate in other state programs to further such projects, which would trigger the requirement to comply with SFFRs contained in the test claim statutes and regulations.

2) The costs incurred complying with the Local Agency Public Construction Act are offset with funding available from various existing state grants and programs.

The Department of Finance (Finance) disagrees with the draft staff analysis that the use of funds under the various school facilities programs in the state are limited to only the cost of actual maintenance and repairs (excluding contracting). It appears the draft staff analysis attempts to cite the absence of a program that provides funding solely for contracting for repairs and maintenance to support partial approval of this claim. Finance disagrees with this rationale as costs for contracting for repairs and maintenance are eligible expenditures of state funds in both the School Facilities Program and the Deferred Maintenance Program as long as the costs can be attributed to a specific project. Education Code Section 17070.98 specifically allows districts that do not have staff with construction management experience to use state funding for construction management services. Finance also notes that there are various programs currently available for district participation that do not expressly prohibit use of funds for contracting, thus, these programs should be viewed as providing offsetting revenues for the activities included in this claim. To this point, the modernization, new construction, State School Deferred Maintenance and Community College Facility Deferred Maintenance and Special Repair, and Emergency Repair programs provided \$770 million, \$653 million, \$250.9 million, and \$51 million respectively in 2010-11 to help districts pay for the costs of school construction, including contracting for repair and maintenance services. Additionally, districts are required to maintain a Routine Restricted Maintenance account to assist in funding these activities. In the event that a district needs further financial assistance to perform these activities, they have the discretion to levy fees against any construction within district boundaries for the purpose of funding school construction.

- The State Allocation Board provides modernization and new construction grants through the State School Facilities Program to cover the State's share of all necessary project costs, which would include costs incurred complying with the Local Agency Public Construction Act. The State's share is typically 50 percent for new construction and 60

percent for modernization, but may be up to 100 percent if a district receives financial hardship funding. The State budget act also appropriates capital outlay funds for community college districts to construct and modernize facilities. These funds can cover up to 100 percent of the projects costs and require no matching funds. Therefore, funding received from the State would offset any necessary costs of the Local Agency Public Construction Act for modernization and new construction projects.

- The State School Deferred Maintenance Program and the Community Colleges Facility Deferred Maintenance and Special Repair Program provide State-matching funds, on a dollar-for-dollar basis, to assist school and community college districts with expenditures for major repair or replacement of existing school building components. Therefore, any projects funded through the State School Deferred Maintenance Program or the Community Colleges Facility Deferred Maintenance and Special Repair Program would have received funding to cover the State's share of any necessary costs of the Local Agency Public Construction Act.
- Some districts utilize the Emergency Repair Program grant funding in order to perform school site maintenance. This grant program is for emergency repair or replacement projects that pose a health and safety threat to pupils and staff. Generally, something is eligible to be funded from this program if a component is broken or not functioning properly or if a system or component creates a health and safety hazard. Although not every district will receive grant funding through this program, many districts will be able to fund repairs or replacement of existing items in order to restore them to a safely functioning state.
- Districts are required to maintain a Routine Restricted Maintenance Fund that dedicates one percent of their general fund budget to this purpose. In addition, they can receive state funds for deferred maintenance projects as long as they provide matching local funds.
- At the discretion of a school district, fees can be levied against any construction within its district boundaries for the purpose of funding school construction. Section 17556(d) of the Government Code provides that the Commission on State Mandates shall not find a reimbursable mandate in a statute or executive order if the affected local agencies have authority to levy service charges, fees, or assessments sufficient to pay for the mandated program in the statute or executive order.

If you have any questions regarding this letter, please contact Chris Ferguson, Principal Program Budget Analyst at (916) 445-0328.

Sincerely,



Nick Schweizer
Program Budget Manager