BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Public Contract Code Sections 2000, 2001, 3300, 6610, 7104, 7107, 7109, 9203, 10299, 12109, 20100, 20101, 20102, 20103.5, 20103.6, 20103.8, 20104, 20104.2, 20104.4, 20104.6, 20104.50, 20107, 20110, 20111, 20111.5, 20116, 20650, 20651, 20651.5, 20657, 20659, and 22300

Business and Professions Code Section 7028.15

Statutes 1976, Chapter 921; Statutes 1977, Chapter 36; Statutes 1977, Chapter 631; Statutes 1980, Chapter 1255; Statutes 1981, Chapter 194; Statutes 1981, Chapter 470; Statutes 1982; Chapter 251; Statutes 1982, Chapter 465; Statutes 1982, Chapter 513; Statutes 1983, Chapter 256; Statutes 1984, Chapter 173; Statutes 1984, Chapter 728; Statutes 1984, Chapter 758; Statutes 1985, Chapter 1073; Statutes 1986, Chapter 886; Statutes 1986, Chapter 1060; Statutes 1987, Chapter 102; Statutes 1988, Chapter 538; Statutes 1988, Chapter 1408; Statutes 1989, Chapter 330; Statutes 1989, Chapter 863; Statutes 1989, Chapter 1163; Statutes 1990, Chapter 321; Statutes 1990, Chapter 694; Statutes 1990, Chapter 808; Statutes 1990, Chapter 1414; Statutes 1991, Chapter 785; Statutes 1991, Chapter 933; Statutes 1992, Chapter 294; Statutes 1992, Chapter 799; Statutes 1992, Chapter 1042; Statutes 1993, Chapter 1032; Statutes 1993, Chapter 1195; Statutes 1994, Chapter 726; Statutes 1995, Chapter 504; Statutes 1995, Chapter 897; Statutes 1997, Chapter 390; Statutes 1997, Chapter 722; Statutes 1998, Chapter 657; Statutes 1998, Chapter 857; Statutes 1999, Chapter 972; Statutes 2000, Chapter 126; Statutes 2000, Chapter 127; Statutes 2000, Chapter 159; Statutes 2000, Chapter 292;

Case No.: 02-TC-35

*Public Contracts (K-14)*

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7

*(Adopted May 25, 2012)*

*(Served June 8, 2012)*

Statutes 2000, Chapter 776; and Statutes 2002, Chapter 455

California Code of Regulations, Title 5, Sections 59500, 59504, 59505, 59506, and 59509

Register 94, Number 6

Clovis Unified School District and
Santa Monica Community College District,
Co-Claimants

## STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on May 25, 2012. Art Palkowitz appeared on behalf of Clovis Unified School District and Santa Monica Community College District. Susan Geanacou and Chris Ferguson appeared on behalf of the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 6-1.

**Summary of the Findings**

This test claim addresses public contract requirements imposed on school districts,[1] county offices of education, and community college districts when they contract for goods, services, and public works projects.

These requirements address a wide range of issues regarding public contracting that include the following: (1) public contracting provisions specifically applicable to school districts and community college districts; (2) the requirement to specify the classification of a contractor's license in the bid proposal; (3) the requirement to notify bidders of a mandatory pre-bid conferences; (4) required contract clauses for public works involving digging trenches or other excavations; (5) requirements associated with retention proceeds; (6) contract provisions regarding antigraffiti technology, abatement, and deterrence; (7) the requirement to retain money from progress payments; (8) use of the Department of General Services (DGS) for the acquisition of information technology goods and services; (9) the general provisions of the Local Agency Construction Act; (10) required contract provisions regarding performance retentions and substitute security; (11) the requirement to verify a bidder's license status; (12) the requirement to return the security of unsuccessful bidders for contracts subject to the State

[1] All references to "school districts" means K-12 school districts, unless otherwise specified.

School Building Aid Law of 1949; and (13) activities taken by districts in regard to promoting minority, women, and disabled business enterprise participation in public contracts.

Because the activities alleged to be required by the test claim statutes and regulations are dependent on whether school districts and community college districts are required to acquire goods or services, undertake public projects, and contract for those goods, services, or public projects, the Commission addresses: (1) what goods and services and public projects school districts and community college districts are required to acquire or undertake; (2) whether the districts are required to contract for those required goods, services, and public projects; (3) whether the test claim statutes impose state-mandated new programs or higher levels of service; and (4) whether the test claim statutes and regulations impose costs mandated by the state within the meaning of Government Code section 17514 and 17556.

The Commission concludes: (1) school districts and community college districts are required by the state to repair and maintain school property, but all other decisions regarding the purchase of goods and services and the undertaking of public works projects are discretionary decisions made by the school district or community college district; (2) school districts and community college districts are required by state law to contract for non-emergency repair or maintenance services or repair and maintenance public works projects subject to specific limitations based on the cost of the repair and maintenance and the hours needed to complete the repair and maintenance; (3) when school districts and community college districts are required to contract for repairs or maintenance some of the test claim statutes and regulations impose reimbursable state-mandated programs on school districts and community college districts within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514 for the activities listed on pages 75 through 80, under section IV of the analysis titled "Conclusion."

Test claim statutes and allegations not specifically approved in this statement of decision do not impose a reimbursable state mandated program subject to article XIII B, section 6 of the California Constitution.

## COMMISSION FINDINGS

**Chronology**

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| 06/24/2003 | Claimants, Clovis Unified School District and Santa Monica Community College District, filed the test claim (02-TC-35) with the Commission[2] |
| 03/24/2004 | California Community Colleges Chancellor's Office (Chancellor's Office) filed comments on the test claim |
| 04/16/2004 | Department of Finance (Finance) filed comments on the test claim |
| 05/07/2004 | Claimants filed a response to Finance's comments and the Chancellor's Office's comments |

[2] Because the test claim was filed in the 2002-2003 fiscal year, the potential period of reimbursement for this test claim begins on July 1, 2001.

10/05/2007 Claimants filed a supplement to the test claim

04/03/2012 Commission staff issued the draft staff analysis

## I. Background

This test claim addresses public contract requirements imposed on school districts (including county offices of education) and community college districts when they contract for goods, services, and public works projects.

In 1981, the Legislature consolidated the law relating to public contracts by enacting the Public Contract Code and repealing the public contracting provisions found in the various areas of the California Code, including the Education Code and Government Code.[3] As a result, the Public Contract Code sets forth public contracting requirements that apply generally to all public agencies and requirements that apply specifically to school districts and community college districts, some of which are derived from prior California Code sections. The test claim statutes pled by the claimants include some of the requirements specific to school district and community college district contracts, and the requirements that apply generally to public agency contracts.

These requirements address a wide range of issues regarding public contracting that include the following: (1) public contracting provisions specifically applicable to school districts and community college districts; (2) the requirement to specify the classification of a contractor's license in the bid proposal; (3) the requirement to notify bidders of mandatory pre-bid conferences; (4) required contract clauses for public works involving digging trenches or other excavations; (5) requirements associated with retention proceeds; (6) contract provisions regarding antigraffiti technology, abatement, and deterrence; (7) the requirement to retain money from progress payments; (8) use of the Department of General Services (DGS) for the acquisition of information technology goods and services; (9) the general provisions of the Local Agency Construction Act; (10) required contract provisions regarding performance retentions and substitute security; (11) the requirement to verify a bidder's license status; (12) the requirement to return the security of unsuccessful bidders for contracts subject to the State School Building Aid Law of 1949; and (13) activities to promote minority, women, and disabled business enterprise participation in public contracts.

Because the activities alleged to be required by the test claim statutes and regulations are dependent on whether school districts and community college districts are required to acquire goods or services, undertake public projects, and contract for those goods, services, or public projects, this analysis will address: (1) what goods and services and public projects school districts and community college districts are required to acquire or undertake; (2) whether the districts are required to contract for those required goods, services, and public projects; (3) whether the test claim statutes impose state-mandated new programs or higher levels of service; and (4) whether the test claim statutes and regulations impose costs mandated by the state within the meaning of Government Code section 17514 and 17556.

[3] Statutes 1981, chapter 306.

## II. Positions of the Parties

### A. Claimants' Position

The claimants contend that the test claim statutes and regulations impose mandated costs reimbursable by the state for school districts, county offices of education, and community college districts to engage in state-mandated new programs or higher levels of service, including:

1. Using standardized questionnaires and financial statements.
2. Maintaining those questionnaires and financial statements confidential and not subject to public inspection.
3. Rating bidders on the basis of those questionnaires and financial statements.
4. Prequalifying bidders.
5. Following required dispute resolution procedures (including meet and confer requirements, attending mediations, and mandatory judicial arbitrations).
6. Detailing specific reasons for changes to plans and specifications.
7. Verifying contractor licensing status.
8. Specifying bid procedures for additive and deductive contract items.
9. Paying interest on certain claims.
10. Receiving and returning bidder's security.
11. Requiring bidders to participate with minority and women business enterprises contracts.
12. Require competitive bidding for certain purchases, services and repairs and complying with the requirements of Minority, Women, and Disabled Veteran Business Enterprise Participation Goals for Community Colleges.

On May 7, 2004, the claimants filed a response to the Chancellor's Office and Finance's comments on the test claim. The claimants make two general arguments regarding: (1) activities alleged to be discretionary by the Chancellor's Office and Finance; and (2) the need to construct schools and apply for state funds for that purpose. Specifically, the claimants assert that legal compulsion is not required for a finding that an activity is mandated by the state, and that school districts are required to construct school buildings.

The claimants did not file any new written comments in response to the draft staff analysis, and continue to disagree with findings denying claims for reimbursement of construction and facility-related activities that are triggered by a district's discretion regarding school construction.

### B. Chancellor's Office

In comments dated March 24, 2004, the Chancellor's Office addresses each activity alleged to create a reimbursable state-mandate by the claimants, and suggests that some of the test claim statutes may impose mandated costs on community college districts. However, the Chancellor's Office argues that a "number of the provisions that are presented as part of this [test claim] do

not represent reimbursable mandates." The Chancellor's Office identifies two primary recurring themes governing the provisions:

1. Numerous provisions are optional. Community college districts are not required to engage in the conduct, but may choose to do so. An optional choice negates the finding of a state mandate.
2. Several Public Contract Code sections supporting this test claim existed prior to January 1, 1975, as Education Code sections. To the extent that any mandates predated January 1, 1975 they are not eligible for reimbursement.

C. Finance

In comments dated April 16, 2004, Finance asserts that the activities and requirements cited in this test claim do not constitute a reimbursable state mandate. Finance's assertion is based on the following reasons:

1. Projects for new construction proposed by school districts and community college districts are discretionary and therefore not reimbursable.
2. The costs incurred by complying with the Local Agency Public Construction Act (which includes some of the test claim statutes) are allowable costs for the use of the modernization and new construction grants provided by the State Allocation Board (school districts) and capital outlay appropriations in the State Budget Act (community college districts). Therefore, funding received from the state would offset any necessary costs of the Local Agency Public Construction Act for modernization and new construction projects should the Commission find that any activities are a reimbursable mandate.

   In addition, participation in the state's new construction and modernization programs, as well as the use of capital outlay funds by community college districts, is a voluntary and discretionary action resulting from a request initiated by the school or community college district.
3. School districts and community college districts receive funding from the state for deferred maintenance projects. Therefore, any projects funded through the State School Deferred Maintenance Program or the Community Colleges Facility Deferred Maintenance and Special Repair Program would have covered the state's share of any necessary costs of the Local Agency Public Construction Act.
4. School districts have the authority to charge development fees to finance construction projects, and as a result, any additional costs to school districts are not reimbursable because the affected districts have the authority to cover those costs through developer fees.

On May 1, 2012, in comments responding to the draft staff analysis, which partially approved the test claim, Finance argues that the whole test claim should be denied. Finance argues that projects for new construction proposed by school districts and community college districts are discretionary, and therefore not reimbursable. In addition, Finance reiterates that the costs

incurred from complying with the Local Agency Public Construction Act are offset with funding available from various existing state grants and programs.[4]

## III. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[5] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[6]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[7]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[8]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[9]

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[4] Finance also argues that "projects for new construction proposed by school districts and community college districts are discretionary," and thus, none of the activities approved by the Commission are mandated. Finance misread the draft staff analysis. The activities found to be mandated by the state *do not* apply to new construction proposed by school districts and community college districts. As analyzed in sections "A. and B." of the analysis, the activities found to be mandated by the state are limited to repair or maintenance services or repair and maintenance public works projects subject to specific limitations based on the cost of the repair and maintenance and the hours needed to complete the repair and maintenance.

[5] *County of San Diego v. State of California* (1997)15 Cal.4th 68, 81.

[6] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[7] *San Diego Unified School Dist. v. Commission on State Mandates*, *supra*, 33 Cal.4th at p. 874.

[8] *San Diego Unified School Dist., supra,* 33 Cal.4th at pgs. 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity. [10]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[11] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[12] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[13]

**Issue 1: Do the Test Claim Statutes and Regulations Impose a State-Mandated New Program or Higher Level of Service on School Districts and Community College Districts within the Meaning of Article XIII B, Section 6?**

The claimants seek reimbursement for the costs incurred by school districts, county offices of education, and community college districts as a result of activities required when a district engages in contracting for public works projects or public projects, and when contracting for the purchase of goods or services.

"Public works contract" is defined as an agreement for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind.[14] "Public project" is defined as the construction, reconstruction, erection, alteration, renovation, improvement, demolition, repair work, and painting or repainting involving any

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[9] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[10] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[11] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[12] *County of San Diego, supra,* 15 Cal.4th 68, 109.

[13] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[14] Public Contract Code section 1101. Civil Code sections 3100 and 3106 define "public work" as any work of improvement contracted for by a public entity including:

> [C]onstruction, alteration, addition to, or repair, in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road, the seeding, sodding, or planting of any lot or tract of land for landscaping purposes, the filling, leveling, or grading of any lot or tract of land, the demolition of buildings, and the removal of buildings.

public owned, leased, or operated facility.[15] "Public project" excludes maintenance work which includes such activities as: (1) routine, recurring, and usual work for the preservation or protection of any public owned or publicly operated facility for its intended purposes; (2) minor painting, and (3) landscape maintenance.

For the purchase of goods and services, Public Contract Code sections 20111 and 20651, which apply specifically to school districts and community college districts, provide that school districts and community college districts are required to contract for goods and services when expending more than $50,000 for any of the following: (1) the purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district; (2) services, not including construction services; and (3) repairs, including maintenance.[16]

school districts, county offices of education, and community college districts maintain broad authority to carry on any activity not prohibited by or in conflict with the law or the purpose for which they were established.[17] As a result, the projects and goods and services that school districts and community college districts are authorized to contract for is very broad. This is further indicated by Public Contract Code sections 20110 and 20650, which establish the scope of applicability for the provisions of the Public Contract Code that are specifically directed at school districts (Pub. Contract Code, §§ 20110-20118.4) and community college districts (Pub. Contract Code, §§ 20650-20662). Sections 20110 and 20650 provide that the Public Contract Code sections apply to a broad range of issues for which school districts and community college districts have the authority to contract for, including interscholastic athletics, property acquisition, and supplementary services.

Because the provisions of the test claim statutes and regulations are only applicable to school districts, county offices of education, and community college districts that enter into contracts for public works projects, or for the purchase or acquisition of goods and services, the analysis must first address whether the *state* requires school districts, county offices of education, or community college districts to engage in any public works projects or to purchase goods or services, or whether they are required by the state to contract out for those projects, goods, or

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[15] Public Contract Code section 22002(c).

[16] Public Contract Code sections 20111(a) and (c), and 20651(a) and (c).

[17] Education Code sections 35160, 35160.2, and 70902(a)(1), authorize school districts and community college districts to initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purpose for which the districts are established. Education Code section 35160.2 provides that "For the purposes of Section 35160, 'school district' shall include county superintendents of schools and county boards of education." Thus, the Legislature specifically extends the broad authority of school districts to county offices of education.

services. Only when the state requires school districts to engage in these triggering activities are the downstream requirements considered mandated by the state and eligible for reimbursement.[18]

### A. School Districts and Community College Districts are Required by the State to Repair and Maintain School Property, but all Other Decisions Regarding the Purchase of Goods and Services and the Undertaking of Public Works Projects are Discretionary Decisions Made by the School District or Community College District.

Education Code section 17593 requires school districts to keep school buildings and property in repair as follows:

> The clerk of each district except a district governed by a city or city and county board of education shall, under the direction of the governing board, keep the schoolhouses in repair during the time school is taught therein, and exercise a general care and supervision over the school premises and property during the vacations of the school.

Education Code section 17565 further requires the governing board of any school district to "repair" school property as follows: "The governing board of any school district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts."

Although, in specific instances the Legislature has expressly included county offices of education within the definition of "school districts," the Legislature has chosen not to do so when imposing the above requirements on school districts. Thus unlike school districts, county offices of education do not face the same statutory requirements to keep schoolhouses in repair. As a result, the Commission finds that county offices of education are not legally required to repair school facilities.

Community college districts are also required to repair school property. Education Code section 81601 states:

> The governing board of a community college district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts. …

The term "repair" is defined as "to restore to sound condition after damage or injury" and "to renew or refresh."[19] Thus, the Commission finds that "repair" includes "maintenance" for purposes of these provisions.

Thus, both school districts and community college districts, but not county offices of education, are required by statute to repair the school property of their districts. Since "property" includes "any external thing over which the rights of possession, use, and enjoyment are exercised,"[20] the requirement to repair includes real property as well as facilities owned by the district.

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[18] *San Diego Unified School Dist., supra*, 33 Cal.4th at p. 880; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 751.

[19] Webster's II, New Collegiate Dictionary, 1999, page 939, column 2.

[20] Black's Law Dictionary, Seventh Edition, 1999, page 1232, column 2.

In addition, because of the use of "repair" in the Education Code sections is broadly defined, the Commission finds that the repair and maintenance required by the Education Code sections include both repair and maintenance activities that are defined as "public projects" by Public Contract Code section 22002(c), and repair and maintenance that are excluded from "public projects" by Public Contract Code sections 22002(d), 20111(a)(3), and 20651(a)(3).

Other than the repair and maintenance of school district and community college district school buildings and property, however, school districts, county offices of education, and community college districts are granted broad authority to engage in a multitude of activities, including the acquisition of goods and services.[21] The state has not specifically required the purchase of equipment, materials, or supplies, or the acquisition of non-construction services, or to contract for such goods and services, *excluding repairs and maintenance*. Thus, except for repair and maintenance, school districts and community college districts are not legally compelled by the state to engage in these other triggering activities.

The claimants argue, however, that goods and services acquired for general school construction, including new construction, is not voluntary.[22] In support of this contention, the claimants cite to *Butt v. State of California*[23] for the proposition that the state has a responsibility to "provide for a system of common schools, by which a school shall be kept up and supported in each district" and that those schools are required to be "free."[24]

It is true, as the claimants state, that courts have consistently held public education to be a matter of statewide rather than a local or municipal concern, and that the Legislature's power over the public school system is plenary.[25] These conclusions are true for every Education Code statute that comes before the Commission on the question of reimbursement under article XIII B, section 6 of the California Constitution. It is also true that the state is the beneficial owner of all school properties and that local school districts hold title as trustee for the state.[26]

Nevertheless, article IX, section 14 of the California Constitution allows the Legislature to authorize the governing boards of all school districts, including community college districts, to initiate and carry on any program or activity, or to act in any manner that is not in conflict with state law. In this respect, it continues to be the legislative policy of the state to strengthen and

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[21] Education Code sections 35160, 35160.2, and 70902(a)(1).

[22] Exhibit D, comments filed by the claimants in response to comments filed by the Chancellor's Office and Finance, dated May 7, 2004, p. 6.

[23] Exhibit D, *Butt v. State of California* (1992) 4 Cal.4th 688.

[24] Exhibit D, comments filed by the claimants in response to comments filed by the Chancellor's Office and Finance, dated May 7, 2004, p. 11.

[25] See, *Hayes, supra*, 11 Cal.App.4th 1564, 1579, fn. 5; *California Teachers Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1524; *Hall v. City of Taft* (1956) 47 Cal.2d 177, 179.

[26] *Hayes, supra*, 11 Cal.App.4th 1564, 1579, fn. 5.

encourage local responsibility for control of public education through local school districts.[27] The governing boards of school districts and community college districts may hold and convey property for the use and benefit of the school district.[28] Governing boards of school districts have also been given broad authority by the Legislature to decide when to build and maintain a schoolhouse and, "when desirable, may establish additional schools in the district."[29] Governing boards of community college districts are required to manage and control all school property within their districts, and have the power to acquire and improve property for school purposes.[30] Thus, under state law, the decision to construct a school facility lies with the governing boards of school districts and community college districts, and is not legally compelled by the state.

Additionally, there are no statutes or regulations requiring the governing boards of school districts, county offices of education, and community college districts to construct or reconstruct unsafe buildings. The decision to reconstruct, or even abandon an unsafe building, is a decision left to the discretion of a school district. In *Santa Barbara School District v. Superior Court*, the California Supreme Court addressed a school district's decision to abandon two of its schools that were determined unsafe, instead of reconstructing a new building, as part of its desegregation plan.[31] The court held that absent proof that there were no school facilities to absorb the students, the school district, "in the reasonable exercise of its discretion, could lawfully take this action."[32] The court describes the facts and the district's decision as follows:

> On August 12, 1971, the Board received a report that the Jefferson school was structurally unsafe within the requirements of section 15503 [a former statute with language similar to Education Code sections 17367 and 81162]. The report recommended that a structural engineer be retained to determine whether the school should be repaired or abandoned, since if it cannot be repaired, it must be abandoned pursuant to section 15516. On May 15, 1972, three days before the final meeting of the Board, the superintendent received a report concerning the rehabilitation or replacement costs of the Jefferson school. The report found that it would cost $621,800 to make the existing structure safe and $655,000 to build an entirely new building. Accordingly, in fashioning the Administration Plan, the superintendent made provision therein for closing the Jefferson school. The Board would certainly be properly exercising its discretion in a reasonable manner were it to approve abandoning this building in view of the extreme cost. The determination of the questions whether a new school was needed to replace this structure or

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[27] *California Teachers Assn., supra*, 5 Cal.App.4th 1513, 1523; Education Code section 14000.

[28] Education Code sections 35162 and 70902.

[29] Education Code sections 17340, 17342.

[30] Education Code sections 81600, 81606, 81670 et seq., 81702 et seq.

[31] *Santa Barbara School District v. Superior Court* (1975) 13 Cal.3d 315, 337-338.

[32] *Id.* at page 338.

> whether existing facilities could handle the Jefferson school students due to an expected drop in elementary enrollment, was properly within the Board's discretion.[33]

Therefore, the state has not legally compelled school districts, county offices of education, or community college districts to construct new school facilities or undertake other public works projects that *do not* involve repair or maintenance. Rather, "[w]here, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine."[34]

Absent legal compulsion the claimants bear the burden of providing evidence to support the claimants' allegation that school districts, county offices of education, and community college districts face practical compulsion to construct new school facilities or undertake other public works projects that *do not* involve repair or maintenance.[35] The claimants cite to a study and Proposition 55 ballot language, both of which state a need to build more schools in California. However, the question before the Commission is not whether there is a general need for more school facilities, but whether a school district or community college district faces practical compulsion by the state to build them.

The claimants have not provided evidence that school districts, county offices of education, and community college districts face certain and severe penalties, such as double taxation or other draconian consequences, such that the districts face practical compulsion to construct new school facilities or undertake other public works projects that *do not* involve repair or maintenance. Instead, public works projects that are entered into, other than for repair and maintenance for school districts and community college districts, are discretionary decisions of the districts. As a result, pursuant to *Kern High School Dist.*, any activities required by the test claim statutes resulting from a school district's or community college district's voluntary decision to undertake a public works project, other than for repair and maintenance, or to purchase other goods and services, are not mandated by the state and are not subject to article XIII B, section 6.[36]

Thus, the downstream activities required by the test claim statutes and regulations are considered mandated by the state only when they are triggered by contracts for the repair and maintenance of school district or community college district facilities and property, whether the repair or maintenance is classified as a public work or not. Downstream activities triggered by local decisions are not eligible for reimbursement.

In addition, county offices of education are not required by the state, but are given broad local authority, to undertake public projects or to purchase goods and services, including those for

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[33] *Id*. at page 337.

[34] *People v. Oken, supra,* 159 Cal.App.2d 456, 460.

[35] *Dept of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1366-1369.

[36] *Kern High School Dist., supra,* 30 Cal.4th 727, 751.

repair and maintenance. Therefore, the Commission finds that any activities required by the test claim statutes are not mandated by the state on county offices of education and are not subject to article XIII B, section 6. As a result, county offices of education are not eligible for reimbursement under this test claim.

### B. School Districts and Community College Districts are Required by State Law to Contract for Repair or Maintenance in Specified Circumstances.

The requirements imposed by the test claim statutes are limited to repair and maintenance of school district or community college district facilities and property performed under contract. Thus, it is necessary to determine whether the state requires school districts or community college districts to contract for repair or maintenance of school facilities or property. The test claim statutes and regulations do not apply if a district uses its own forces. As further described below, the state requires districts to contract for repair and maintenance of school facilities and property in specified situations, depending upon project variables and the laws under which the district operates.

The Public Contract Code governs when districts are required to contract with private entities. Sections 20111 and 20651, which were pled as test claim statutes, generally require school districts and community college districts to contract with the lowest responsible bidder for construction, repairs and maintenance.[37] In regard to the repair and maintenance activities found above to be required by the state, sections 20111 and 20651 generally require repair and maintenance, not defined as public projects, to be let for contract when it involves an expenditure of more than $50,000.[38] For repair and maintenance public projects, school districts and community college districts are required to contract for projects involving an expenditure of $15,000 or more.[39]

However, there are exceptions to the general requirements established by section 20111 and 20651. For instance, when emergency repairs are needed for any facility to permit the continuance of existing classes or to avoid danger to life or property, the governing board of a school district or community college district is allowed to use its own forces to make such repairs.[40] In addition, the governing board of a school district or community college district is allowed to use its own forces to make repairs and other improvements under certain labor hour or material cost limits. For school districts, Public Contract Code section 20114 provides the following labor hour or material cost limits:

> (a) In each school district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds,

[37] Public Contract Code sections 20111 and 20651.

[38] Public Contract Code section 20111(a)(3).

[39] Public Contract Code section 20651(a)(3).

[40] Public Contract Code sections 20113 and 20654.

erect new buildings, and perform maintenance as defined in Section 20115[41] by day labor, or by force account, whenever the total number of hours on the job does not exceed 350 hours. Moreover, in any school district having an average daily attendance of 35,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance, as defined in Section 20115, by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours, or when the cost of material does not exceed twenty-one thousand dollars ($21,000).

(b) For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

For community college districts, Public Contract Code section 20655 provides the following labor hour or material cost limits:

(a) In each community college district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20656[42] by day labor, or by force account, whenever the total number of hours on the job does not exceed 350 hours. Moreover, in any district whose number of full-time equivalent students is 15,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance, as defined in Section 20656, by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours, or

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[41] Public Contract Code section 20115 defines "maintenance" in this instance as "routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility for its intended purpose in a safe and continually usable condition for which it was designed, improved, constructed, altered, or repaired." This includes, but is not limited to: "carpentry, electrical, plumbing, glazing, and other craftwork designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually usable condition for which it was intended, including repairs, cleaning, and other operations on machinery and other equipment permanently attached to the building or realty as fixtures." These provisions express the Legislature's intent that maintenance does not include painting, repainting, or decorating other than touchup, but instead those activities are to be controlled directly by the work limits under section 20114.

[42] Public Contract Code section 20656 defines "maintenance" for this purpose in the same manner as Public Contract Code section 20115. Section 20656 expresses the Legislature's intent that maintenance does not include painting, repainting, or decorating other than touchup, but instead those activities are to be controlled directly by the work limits under section 20655.

when the cost of materials does not exceed twenty-one thousand dollars ($21,000).

(b) For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

Notwithstanding the above provisions, a flat dollar threshold for public projects, as defined in Public Contract Code section 22002,[43] is established when a school district or community college district elects to operate under the Uniform Public Construction Cost Accounting Act (UPCCAA).[44] Public Contract Code section 22001 sets forth the following findings and declarations regarding the UPCCAA:

> The Legislature finds and declares that there is a statewide need to promote uniformity of the cost accounting standards and bidding procedures on construction work performed or contracted by public entities in the state. This chapter provides for the development of cost accounting standards and an alternative method for the bidding of public works projects by public entities.

Section 22030 provides that the UPCCAA is only applicable to a district whose governing board has by resolution elected to become subject to its procedures and has notified the State Controller of the election. Currently, there are 262 school districts, including co-claimant Clovis Unified

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[43] Subdivision (c) defines "public project" as:

> (1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and *repair* work involving any publicly owned, leased, or operated facility.[43]
> (2) Painting or repainting of any publicly owned, lease, or operated facility.
> (3) In the case of a publicly owned utility system, "public project" shall include only construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher. (Emphasis added.)

Subdivision (d) states that "public project" does not include "maintenance work" which includes all of the following:

> (1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.
> (2) Minor repainting.
> (3) Resurfacing of streets and highways at less than one inch.
> (4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.
> (5) Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

[44] Public Contract Code sections 22000 et seq.

School District, and 34 community college districts that have elected to become subject to the UPCCAA.[45]

Once the district has elected to become subject to the UPCCAA, in the event of a conflict with any other provision of law relative to bidding procedures, the alternative bidding procedures and cost threshold under the UPCCAA for public projects, as defined, shall apply.[46]

The UPCCAA provides that public projects, which exclude maintenance, of $45,000 or less may be performed by a school district or community college district by its own forces.[47] In cases of emergency when repair or replacements are necessary, the work may be done by a district with its own forces.[48] Thus, for those districts subject to the UPCCAA, when the public project is not an emergency, contracting is required for a public project, as defined, when the cost of such project will exceed $45,000. When the project is for maintenance or other work that does not fall within the definition of public project, districts subject to the UPCCAA *may* use the bidding procedures set forth under the UPCCAA and in that situation would likewise be required to contract when the cost of the project will exceed $45,000.[49] Here, repair or maintenance projects – those that are legally required by Education Code sections 17002, 17565, 17593 and 81601 as noted above – could fall under the UPCCAA definition for public project, or may not. But in either case, for districts subject to the UPCCAA, when the project is not an emergency, contracting is required only when the cost of the project will exceed $45,000.

The Commission notes that prior to prior to January 1, 2007, the dollar limit under the UPCCAA was $25,000. On January 1, 2007 the amount was increased to $30,000,[50] and on January 1, 2012 the amount was increased to the current $45,000 limit.[51] The claimants filed this test claim in June 2003, and thus, the period of reimbursement for any activities approved in this analysis begins on July 1, 2001.[52] As a result, depending on when claimed activities took place, a different dollar threshold is applicable to school districts and community college districts subject to the UPCCAA.

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[45] State Controller's Office, California Uniform Construction Cost Accounting Commission, *Participating Agency List: All Agencies by Agency Type* (February 28, 2012) <http://www.sco.ca.gov/Files-ARD-Local/cuccac_part_ag.pdf> as of March 15, 2012.

[46] Public Contract Code section 22030.

[47] Public Contract Code section 22032.

[48] Public Contract Code section 22035.

[49] Public Contract Code section 22003.

[50] Statutes 2006, chapter 643.

[51] Statutes 2011, chapter 683.

[52] Government Code section 17557(e).

Accordingly, the Commission finds that the state has required school districts and community college districts to repair or maintain their facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, via contract under the following circumstances:

1. For *school districts*, when repairs and maintenance do not constitute a public project as defined by Public Contract Code section 22002(c), and the repairs and maintenance are not an emergency as set forth in Public Contract Code section 20113; and
    a. for repairs, and maintenance as defined by Public Contract Code section 20115, that exceed $50,000; unless
        1. the district has an average daily attendance of less than 35,000, and the total number of hours on the job does not exceed 350 hours; or
        2. the district has an average daily attendance of 35,000 or greater, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.
2. For *school districts*, when repairs and maintenance constitute a public project as defined by Public Contract Code section 22002(c), and the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for repair and maintenance public projects that exceed $15,000; unless
        1. the district has an average daily attendance of less than 35,000, and the total number of hours on the job does not exceed 350 hours; or
        2. the district has an average daily attendance of 35,000 or greater, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.
3. For *community college districts*, when repairs and maintenance do not constitute a public project as defined by Public Contract Code section 22002(c), and the repairs and maintenance are not an emergency as set forth in Public Contract Code section 20654; and
    a. for repairs, and maintenance as defined by Public Contract Code section 20656, that exceed $50,000; unless
        1. the district has full-time equivalent students of fewer than 15,000, and the total number of hours on the job does not exceed 350 hours; or
        2. the district has full-time equivalent students of 15,000 or more, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.
4. For *community college districts*, when repairs and maintenance constitute a public project as defined by Public Contract Code section 22002(c), and the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for repair and maintenance public projects that exceed $15,000; unless

1. the district has full-time equivalent students of fewer than 15,000, and the total number of hours on the job does not exceed 350 hours; or
2. the district has full-time equivalent students of 15,000 or more, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.

5. For any school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and
   a. for contracts entered into between July 1, 2001 and January 1, 2007, the project cost will exceed $25,000;
   b. for contracts entered into between January 1, 2007 and January 1, 2012, the project cost will exceed $30,000; or
   c. for contracts entered into after January 1, 2012, the project cost will exceed $45,000.

Any activities found to constitute state-mandated new programs or higher levels of service in the analysis below will be limited to the above instances in which school districts and community college districts are required by the state to contract for the repair and maintenance of school buildings and property.

**C. When School Districts and Community College Districts are Required to Contract for Repairs or Maintenance Some of the Test Claim Statutes and Regulations Impose State-Mandated New Programs or Higher Levels of Service Subject to Article XIII B, Section 6, of the California Constitution.**

With the limitations discussed above, the following discussion will analyze whether the 33 test claim statutes and five regulations pled by the claimants impose state-mandated new programs or higher levels of service on school districts or community college districts.

**1. Public Contracting Provisions Specifically Applicable to School Districts and Community College Districts (Pub. Contract Code, §§ 20111, 20111.5, 20116, 20651, 20651.5, 20657, and 20659)**

The Public Contract Code sections discussed in this section are the parts of the Local Agency Public Construction Act that are specifically applicable to school districts and community college districts. These sections address: (1) the requirement to let a contract to the lowest bidder, the need to let a contract out for bid, and the requirement for bidder's to provide security; (2) the authority to establish a pre-qualification process; (3) the prohibition against splitting work orders, the retention of records, and the authority to use an informal bidding process; and (4) the requirements associated with making changes or alterations to contracts.

i. Letting Contracts; Necessity of Bids, and Bidder's Security (Pub. Contract Code, §§ 20111 and 20651)

Sections 20111 and 20651 set forth parallel provisions for school districts and community college districts regarding the requirement to contract for purchases of goods and services and for public projects over a specified amount. Portions of these code sections were already discussed above, and create part of the limitations on the remaining test claim statutes and regulations pled in this claim. The discussion below will specifically address whether the remaining provisions of sections 20111 and 20651 impose state-mandated activities, and whether the activities mandated constitute new programs or higher levels of service.

Sections 20111 provides in relevant part:

> (a) The governing board of any school district, in accordance with any requirement established by that governing board pursuant to subdivision (a) of Section 2000, shall let any contracts involving an expenditure of more than fifty thousand dollars ($50,000) for any of the following:
>
> (1) The purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district.
>
> (2) Services, except construction services.
>
> (3) Repairs, including maintenance as defined in Section 20115, that are not a public project as defined in subdivision (c) of Section 22002.
>
> The contract shall be let to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.
>
> (b) The governing board shall let any contract for a public project, as defined in subdivision (c) of Section 22002, involving an expenditure of fifteen thousand dollars ($15,000) or more, to the lowest responsible bidder who shall give security as the board requires, or else reject all bids. All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:
>
> (1) Cash.
>
> (2) A cashier's check made payable to the school district.
>
> (3) A certified check made payable to the school district.
>
> (4) A bidder's bond executed by an admitted surety insurer, made payable to the school district.
>
> Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made.

Section 20651 establishes the same requirements as applicable to community college districts. As discussed above, school districts and community college districts are not mandated to engage

in the purchase of goods or services or engage in public projects, except for repair and maintenance. Thus, as found above, the provisions of sections 20111 and 20651 only mandate the letting of contracts for repairs and maintenance, whether or not classified as a public project, subject to the limitations established earlier in this analysis.

In addition, sections 20111 and 20651 mandate school districts and community college districts to award the contract to the lowest responsible bidder. In regard to public projects, school districts and community college districts are mandated to return the security of an unsuccessful bidder no later than 60 days from the time the contract is awarded to the lowest bidder.

The claimants assert that the provisions that all bids be presented under sealed cover and accompanied by one of four types of bidder's security imposes a mandate on school districts or community college districts.[53] However, these provisions do not impose any activities on the districts. Rather, these provisions impose requirements on *bidders* to present their bids under in a specified manner and accompanied with a bidder's security.

Thus, based on the above discussion, Public Contract Code sections 20111 and 20651 impose the following state-mandated activities on school districts and community college districts, for required repair and maintenance contracts:

1. Contract for repairs, including maintenance, not defined as a public project by Public Contract Code section 22002(c), that exceed $50,000. (Pub. Contract Code, §§ 20111(a)(3) and 20651(a)(3) (Stats. 1995, ch. 897).)
2. Contract for repair and maintenance of public projects involving the expenditure of $15,000 or more. (Pub. Contract Code, §§ 20111(b) and 20651(b) (Stats. 1995, ch. 897).)
3. Let contracts for repairs and maintenance, whether or not defined as a public project, to the lowest bidder. (Pub. Contract Code, §§ 20111(a) and (b); and 20651(a) and (b) (Stats. 1995, ch. 897).)
4. Return the security of an unsuccessful bidder on a repair and maintenance public project no later than 60 days from the time the contract is awarded to the lowest bidder.

However, since 1973, school districts and community college districts have been statutorily required to contract for repairs and maintenance and award the contract to the lowest bidder. In 1973, former Education Code section 15951, from which Public Contract Code sections 20111 and 20651 are derived, provided:

> The governing board of any school district shall let any contracts involving an expenditure of more than five thousand dollars ($5,000) for work to be done or more than eight thousand dollars ($8,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall

[53] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 109-115; See also, Exhibit D, comments filed by the claimants in response to comments filed the Chancellor's Office and Finance, dated May 7, 2004, p. 26.

> give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.[54]

The claimants assert that sections 20111 and 20651 now specifically provide for contracting for repairs and maintenance that are not defined as public projects, and as a result, impose new programs or higher levels of service. The claimants are incorrect. Prior to 1975, districts were required to contract for "work" involving expenditures over a specified amount. The word "work" was not limited by definition in statute, and the plain meaning of "work" is inclusive of repairs and maintenance, whether defined as a public project or not.[55] As a result, immediately prior to the enactment of the test claim statutes school districts and community college districts were already required to engage in the mandated activities to contract for repairs or maintenance, whether or not defined as a public project, that exceed a specific dollar threshold, and to let the contract to the lowest bidder.

Moreover, the requirement to return the security of an unsuccessful bidder after a contract has been awarded, is a clarification of existing law and therefore not a new program or higher level of service.

The purpose of a "bidder's security" is to provide a guarantee to a contracting agency that the bidder execute his or her bid if the contract is awarded to the bidder. This purpose is evident by the statutory scheme provided in the Public Contract Code, which existed prior to 1975, that provides for the forfeiture of a bidder's security in the event that a bidder should fail or refuse to execute his or her bid, and a remedy for bidders seeking return of forfeited securities.[56] Implicit in the fact that a bidder would *forfeit* his or her security if he or she should fail or refuse to execute his or her bid if awarded the contract, is that upon submission of a bid and bidder's security the contracting agency does not obtain ownership of the security. Rather, the contracting agency is obligated to return the bidder's security to bidders that execute on their bids, and to bidders who were not even awarded the contract in the first place. To interpret this any other way would render the bidder's security useless. If the security was not required to be returned, a bidder who refuses or fails to execute on an awarded contract would stand in the same shoes as any other bidder, and as a result, face no consequence for failing to execute.

As a result, the Commission finds that the state-mandated activities imposed by Public Contract Code sections 20111 and 20651 do not constitute a new program or higher level of service.

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[54] Former Education Code section 15951 (Stats. 1973, ch. 321).

[55] Webster's II, New Collegiate Dictionary, 1999, page 1271, column 1, defines "work" as, "Physical or mental effort or activity directed toward the production or accomplishment of something."

[56] Public Contract Code section 5100 et seq. derived from former Government Code section 4200 et seq. (Stats. 1971, ch. 1584).

ii. Prequalification Process (Pub. Contract Code, §§ 20101, 20111.5 and 20651.5)

Sections 20101, 20111.5, and 20651.5, address the authority to establish a prequalification process for bidding on contracts for public entities, school districts, and community college districts, and the resulting requirements imposed on these entities if they decide to establish a prequalification process.[57]

Sections 20101, 20111.5, and 20651.5 provide school districts and community college districts the authority to require prospective bidders to a contract to complete and submit a standardized questionnaire and financial statement as part of a prequalifying process for contracts.[58] If a school district or community college district requires bidders to complete and submit questionnaires and financial statements, the district is required to adopt and apply a uniform system of rating bidders on the basis of the questionnaires and financial statements to determine the size of contracts that bidders are deemed qualified to bid.[59] In addition, a school district and community college district must furnish prospective bidders in this process with a standardized proposal form that, when completed and executed, shall be submitted as the bidders' bids.[60] Section 20101 also provides that "public entities" that establish a prequalification process must establish a process that allows prospective bidders to dispute the bidders' prequalification ratings.[61] In addition, school districts and community college districts are authorized to use this prequalifying process on a quarterly basis and may authorize that the prequalification to be considered valid for up to one calendar year.[62]

The claimants allege that sections 20101, 20111.5 and 20651.5 require school districts and community college districts to establish the prequalifying process described above and comply with the resulting requirements. This, however, is contrary to the plain language of sections 20101, 20111.5, and 20651.5, which provide, "The governing board of the district [/community college district] *may require* that each prospective bidder for a contract . . . complete and submit to the district a standardized questionnaire and financial statement . . . ."[63] Thus, any activity regarding a prequalification process established by a school district or community college district is predicated on the district voluntarily establishing a prequalification process.

[57] Public Contract Code section 20101 is generally applicable to local public entities; section 20111.5 is applicable to school districts; and section 20651.5 is applicable to community college districts.

[58] Public Contract Code sections 20101(a), 20111.5(a) and 20651.5(a).

[59] Public Contract Code sections 20101(b), 20111.5(b) and 20651.5(b).

[60] Public Contract Code sections 20111.5(c) and 20651.5(c).

[61] Public Contract Code section 20101(d).

[62] Public Contract Code sections 20101(c) and 20111.5(e).

[63] Public Contract Code sections 20111.5(a) and 20651.5(a). (Italics added.)

Despite the plain language of sections 20101, 20111.5, and 20651.5, the claimants repeat the following argument with slight variations:

> Public Contract Code sections 20101, et seq., are part of the Local Agency Public Construction Act, enacted by Chapter 972, Statutes of 1999. Section 1, an uncodified portion of the Act, provides:
>
> > "The Legislature hereby finds and declares that the establishment by public agencies of a uniform system to evaluate the ability, competency, and integrity of bidders on public works projects is in the public interest, will result in the construction of public works projects of the highest quality for the lowest costs, and is in furtherance of the objectives stated in Section 100 of the Public Contract Code." (Quotes in original.)
>
> In view of the findings and declaration of the Legislature that the Act will result in the construction of public works of the highest quality and for the lowest costs, the argument that section 20101[, 20111.5, and 20651.5] is permissive is not well taken.

In response to the Chancellor's Office and Finance's arguments that various activities claimed in this test claim are discretionary and therefore do not impose any state-mandates pursuant to *Kern High School Dist*., the claimants argue that legal compulsion is not necessary for a finding of a mandate.[64] The claimants discuss the cases leading the court in *Kern High School Dist*. to hold open the possibility of practical compulsion as applicable to state mandates, and assert:

> Neither [Finance or the Chancellor's Office] has attempted to apply this test [for practical compulsion] to any portion of the test claim legislation and regulations. Therefore, their arguments lack any foundation when claiming that those statutes and regulations contain no reimbursable mandates because the test claim activities are discretionary.[65]

The claimants' first argument fails to draw a connection between the legislative findings and declarations cited and the ultimate conclusion asserted by the claimants (i.e. that the permissive language of the statute should be read as mandatory). The permissive nature of sections 20101, 20111.5, and 20651.5 is consistent with the findings and declarations cited to by the claimants. Specifically, statutes that require a public agency to utilize a uniform system of rating bidders *if the public agency voluntarily decides* to establish a prequalifying process is consistent with the Legislature's findings and declarations regarding the Local Agency Public Construction Act's purpose of establishing a uniform system to evaluate bidders on public works projects.

In addition, absent legal compulsion the claimants bear the burden of providing evidence to support the claimants' allegation that and community college districts face practical compulsion

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[64] Exhibit D, Comments filed by the claimants in response to comments filed by Chancellor's Office and Finance, dated May 7, 2004, pgs. 2-6, and 24.

[65] *Id.* at p. 6.

to engage in an activity that the districts are not legally compelled to engage in. Absent any evidence of practical compulsion, the Commission cannot make a finding that practical compulsion exists.[66] The claimants have not provided evidence that and community college districts face practical compulsion to establish and require the use of a prequalification process.

Based on the discussion above, the Commission finds that the Public Contract Code sections 20101, 20111.5, and 20651.5 do not impose any state-mandated activities.

iii. Prohibition Against Splitting Work Orders to Avoid Public Contracting; Keeping of Records; and Informal Bidding (Pub. Contract Code, §§ 20116 and 20657)

Sections 20116 and 20657 address the prohibition against splitting work orders to avoid public contracting, the duty to maintain records of public works projects in accordance with the California School Accounting Manual/Community College Budget and Accounting Manual, and requirements associated with informal bidding as applicable to school districts and community college districts.

As relevant to this discussion, the claimants allege reimbursable activities attributable to: (1) the duty to maintain records; and (2) the requirements associated with informal bidding. The following discussion will address each allegation in that order.

a. The Duty to Maintain Records of Public Works Projects in Accordance with the California School Accounting Manual/Community College Budget and Accounting Manual is not a New Program or Higher Level of Service

Sections 20116 and 20657 provide in relevant part:

> The district shall maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California School Accounting Manual[/Community College Budget and Accounting Manual] for a period of not less than three years after completion of the project.

Prior to 1975, both school districts and community college districts were required to, "[k]eep an accurate account of the receipts and expenditures of district moneys."[67] Additionally, the requirement to comply with the standardized procedures of the California School Accounting Manual/Community College Budget and Accounting Manual predates 1975 and the 1982

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[66] *Kern High School Dist., supra,* 30 Cal.4th at p. 751; and *POBRA*, *supra*, 170 Cal.App.4th 1355, 1366-1369.

[67] For school districts see Education Code section 35250, added by Statutes 1976, chapter 1010; derived from former Education Code 1959 section 1031, last amended by Statutes 1969, chapter 371. For community college districts see former Education Code section 72600, added by Statutes 1976, chapter 1010; derived from former Education Code 1959 section 1031, last amended by Statutes 1969, chapter 371. Former Education Code section 72600 was repealed by Statutes 1990, chapter 1372, after the enactment of Public Contract Code section 20657 in 1983, thus there was no break in the requirement.

enactment of Public Contract Code sections 20116 and 20657.[68] In 1973, former Education Code 1959 section 17199 required the accounting system used to record the financial affairs of school districts and community college districts to be in accordance with the California School Accounting Manual.[69] This requirement was renumbered to current Education Code sections 41010 and 84030. The Commission notes, that Education Code section 84030 was the subject of a previous test claim in which the Commission denied reimbursement, finding that Education Code section 84030 did not impose a new program or higher level of service.[70]

Moreover, the duty to maintain records for a period of not less than three years after the completion of the project is not new. Before to the enactment of Public Contract Code sections 20116 and 20657, districts were required to maintain all detail records relating to land, building, and equipment indefinitely. Immediately before the enactment of Public Contract Code sections 20116 and 20657, whenever the destruction of records of a district was not otherwise authorized or provided for by law, the governing board of the district was authorized to destroy the records in accordance with the regulations adopted by the Superintendent of Public Instruction/Board of Governors.[71] The regulations adopted by the Superintendent of Public Instruction and by the

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[68] Education Code sections 41010 and 84030, as added by Statutes 1976, chapter 1010; both of derived from former Education Code 1959 section 17199, provide in relevant part:

> The accounting system including the uniform fund structure used to record the financial affairs of any community college district shall be in accordance with the definitions, instructions, and procedures published in the California Community Colleges Budget and Accounting Manual as approved by the board of governors and furnished by the board of governors.

[69] Former Education Code 1959 section 17199, as amended by Statutes 1973, chapter 434; made applicable to community college districts by former Education Code 1959 section 25422.5 (Stats. 1970, ch. 102), which provided, "Except as otherwise provided in this code, the powers *and duties* of community colleges are such as are assigned to high school boards." (Italics added.)

[70] *Budget & Financial Reports* (97-TC-10), *Fiscal Management Reports* (97-TC-11), and *Financial & Compliance Audits* (97-TC-12) consolidated test claim, pgs. 5-6, at <http://www.csm.ca.gov/sodscan/022312.pdf> as of February 23, 2012. As relevant to this discussion, the Commission found:

> [C]ommunity college districts, whether part of the K-12 school district system or as a separately governed entity, were required to follow a standardized accounting system as expressed in a state-published accounting manual under prior law. Therefore, the Commission finds that required use of the budget and accounting definitions, instructions, and procedures published in the community college Budget and Accounting Manual as described in Education Code section 84030 does not constitute a new program or higher level of service.

[71] Education Code section 35253 and former Education Code section 72603, as added by Statutes 1976, chapter 1010; derived from former Education Code 1959 section 1034, as added by Statutes 1963, chapter 629.

Board of Governors classified "property records," which includes all detail records relating to land, buildings, and equipment, as "permanent records."[72] Pursuant to the regulations, "permanent records" are required to be "retained indefinitely." As a result, the maintenance of the records for "not less than three years after the completion of the project" is not a new program or higher level of service as compared to retaining the records indefinitely.

Thus, the Commission finds that maintaining job orders or similar records indicating the total cost expended on each project in accordance with the procedures established by the most recent edition of the California School Accounting Manual or Community College Budget and Accounting Manual for a period of not less than three years after the completion of the project does not constitute a new program or higher level of service.

b. The Requirements Associated with Informal Bidding do not Constitute State-Mandated Activities

In regard to the requirements associated with informal bidding, sections 20116 and 20657 provide:

> Informal bidding may be used on work, projects, services, or purchases that cost up to the limits set forth in this article. For the purpose of securing informal bids, the board shall publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects, in any manner as the district deems appropriate.

Based on the plain language of sections 20116 and 20657, "[i]nformal bidding *may* be used" by school districts and community college districts. Any requirements contained in the subsequent provisions of sections 20116 and 20657 are only triggered by a district's discretionary decision to use the informal bidding process. Based on the analysis in *Kern High School Dist*., school districts and community college districts are not legally compelled to comply with the informal bidding requirements contained in sections 20116 and 20657. Absent legal compulsion, the claimants bear the burden of providing evidence in the record sufficient to find that school districts and community college districts face practical compulsion to engage in informal bidding. The claimants have not provided any evidence for this purpose.

As a result, the Commission finds that Public Contract Code sections 20116 and 20657 do not require school districts or community college districts to engage in any state-mandated activities.

iv. Changes or Alterations of Contracts (Pub. Contract Code, §§ 20659)

Section 20659 addresses the steps that a community college district must take if any change or alteration of a contract is ordered by the district, and the authority of a district to authorize a

[72] California Code of Regulations, title 5, sections 16023 and 59023.

contractor to proceed with the change without the formality of securing a bid if the costs do not exceed a specified amount.

Under Article XIII B, section 6 of the California Constitution, districts are not entitled to reimbursement for mandates enacted prior to January 1, 1975. In addition, Government Code section 17514 defines "costs mandated by the state" as any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of section 6 of Article XIII B of the California Constitution.

Any requirement in section 20659 predates January 1, 1975, and therefore, does not impose reimbursable costs mandated by the state pursuant to article XIII B, section 6 of the California Constitution Government Code section 17514. Specifically, in 1961 former Education Code section 15963 imposed the same requirements on community college districts.[73] In 1976, former Education Code section 15963 was renumbered to former Education Code section 81658, and in 1983 the requirement was carried over into the Public Contract Code as section 20659 without any break in the requirement.[74]

As a result, the Commission finds that Public Contract Code section 20659 does not mandate a new program or higher level of services and is therefore, not subject to reimbursement under Article XIII B, section 6 of the California Constitution.

2. **Specification of Classification of Contractor's License on Plans and Notices Inviting Bids (Pub. Contract Code, § 3300)**

Section 3300 requires school districts and community college districts to specify the classification of the contractor's license that a contractor must possess at the time a contract is awarded, on the plans and notices inviting bids for public projects. Specifically, section 3300 provides:

> (a) Any public entity, as defined in Section 1100, the University of California, and the California State University shall specify the classification of the contractor's license which a contractor shall possess at the time a contract is awarded. The specification shall be included in any plans prepared for a public project and in any notice inviting bids required pursuant to this code.
>
> This requirement shall apply only with respect to contractors who contract directly with the public entity.
>
> (b) A contractor who is not awarded a public contract because of the failure of an entity, as defined in subdivision (a), to comply with that subdivision shall not receive damages for the loss of the contract.

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[73] Former Education Code section 15963 (Stats. 1961, ch. 1831).

[74] Former Education Code section 81658 (Stats. 1976, ch. 1010); recodified as Public Contract Code section 20659 (Stats. 1983, ch. 256).

Public Contract Code section 1100 defines "public entity" to mean, "the state, county, city, city and county, district, public authority, public agency, municipal corporation, or any other political subdivision or public corporation in the state." As political subdivisions in the state, school districts and community college districts are subject to the provisions of section 3300. The plain language of section 3300 mandates school districts and community college districts to specify the classification of the contractor's license which a contractor shall possess at the time the contract is awarded in any plans prepared for a public project and in any notice inviting bids required pursuant to the Public Contract Code.

Although, as pointed out by the Chancellor's Office, the licensing of contractors is highly regulated, the requirement to specify the classification of the contractor's license required for a project in any plans prepared for a public project and in any notice inviting bids is unique to public entities, including school districts and community college districts. By specifying the required classification of contractor's license a local agency implements the state policy behind the competitive bidding process. Specifically, it aids in guarding against favoritism, improvidence, extravagance, fraud, and corruption by specifying all of the requirements needed to be awarded a contract prior to the award of the contract. Thus, the mandated activity constitutes a "program."

In addition, the claimants have pled section 3300 as added in 1985.[75] Immediately prior to 1985, school districts and community college districts were not required to engage in the activity mandated by section 3300. As a result, the Commission finds that section 3300 requires school districts and community college districts to engage in the following state-mandated new program or higher level of service:

> Specify the classification of the contractor's license, which a contractor shall possess at the time a contract for repair or maintenance is awarded, in any plans prepared for a repair or maintenance public project and in any notice inviting bids required pursuant to the Public Contract Code. (Pub. Contract Code, § 3300(a) (Stats. 1985, ch. 1073).)[76]

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[75] Exhibit A, test claim filed by claimants, dated June 24, 2003, pgs. 15-16, citing to Statutes 1985, chapter 1073.

[76] On May 1, 2012, in response to the draft staff analysis Finance argues that Public Contract Code section 3300(a) does not impose a state-mandated activity on the basis that "projects for new construction proposed by school districts and community college districts are discretionary." Finance misread the draft staff analysis. The state-mandated activity imposed by section 3300 *does not* apply to new construction proposed by school districts and community college districts. As analyzed in sections "A. and B." of the analysis, the activities found to be mandated by the state are limited to repair or maintenance services or repair and maintenance public works projects subject to specific limitations based on the cost of the repair and maintenance and the hours needed to complete the repair and maintenance.

3. **Notification of Mandatory Prebid Conferences (Pub. Contract Code, § 6610)**

Section 6610 requires public agencies to include specified information regarding any mandatory prebid site visits, conferences, or other meetings set by the public agencies when inviting formal bids on public works contracts. Section 6610 was adopted to address the problem of contractors not receiving adequate notice of mandatory prebid site visits set by public agencies.[77]

Section 6610 provides:

> Notice inviting formal bids for projects by a public agency that include a requirement for any type of mandatory prebid conference, site visit, or meeting shall include the time, date, and location of the mandatory prebid site visit, conference or meeting, and when and where project documents, including final plans and specifications are available. Any mandatory prebid site visit, conference or meeting shall not occur within a minimum of five calendar days of the publication of the initial notice. This provision shall not apply to the Regents of the University of California.

Based on the plain language of section 6610, the requirements to include in a notice inviting formal bids the time, date, and location of a mandatory prebid site visit, conference, or meeting, and when and where project documents are available, are triggered by a public agency's decision to require a mandatory prebid conference as part of the bid process. The Commission has not found any statute or regulation, nor have the claimants provided any evidence in the record, that school districts or community college districts are legally or practically compelled to require a mandatory prebid site visit, conference, or other meeting for projects by the districts. Thus, under *Kern High School Dist*., the Commission finds that Public Contract Code section 6610 does not impose a state-mandated new program or higher level of service.

4. **Contract Clause for Public Works Involving Digging Trenches or Other Excavations (Pub. Contract Code, § 7104)**

Section 7104 addresses the inclusion of a differing site conditions clause in local public entities' public works contracts involving digging trenches or other excavations that extend deeper than four feet below the surface. This clause details the rights and duties of the contractor and local public entity in the event that the site conditions are different than indicated by information about the site prior to the bid submission deadline.

i. Public Contract Code Section 7104 Imposes a State-Mandated Activity on School Districts and Community College Districts

The plain language of section 7104 requires that any public works contract of a local public entity, including a school district and community college district, which involves digging trenches or other excavations that extend deeper than four feet below the surface, contain a differing site conditions clause. Section 7104 requires the clause to provide the following:

[77] Assembly Committee on Appropriations, Analysis of Senate Bill Number 266 (1999-2000 Reg. Sess.) as amended July 15, 1999.

> (a) That the contractor shall promptly, and before the following conditions are disturbed, notify the local public entity, in writing, of any:
>
> (1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.
>
> (2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids.
>
> (3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.
>
> (b) That the local public entity shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.
>
> (c) That, in the event that a dispute arises between the local public entity and the contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.

The Commission finds that the school districts and community college districts are mandated to include the above clause in any public works contract which involves digging trenches or other excavations that extend deeper than four feet below the surface. As discussed above, school districts and community college districts are given broad discretion on what public works projects the districts' undertake except for repair or maintenance described above, which the districts are required by the state to undertake. Because, there is no evidence in the record to indicate that school districts and community college districts are required to undertake public works projects in any other situation, the above mandated activity is limited to repair and maintenance contracts that involve digging trenches or other excavations that extend deeper than four feet below surface, and exceed the dollar amounts and project hours specified in subheading "B" of this analysis.

ii. <u>The State-Mandated Activity Imposed by Public Contract Code Section 7104 Constitutes a New Program or Higher Level of Service</u>

The mandated activity to include a differing site conditions clause in contracts for digging trenches or other excavations that extend deeper than four feet below surface is unique to local

agencies. In addition, the activity shifts the risk of differing site conditions on school districts and community college districts instead of bidding contractors, who then do not need to add contingencies to their bids to cover the possible risks. The result is the government benefits from more accurate bidding, without inflation for risks which may not come about, implementing the state policy to have public works projects of the highest quality for the lowest costs.[78] Thus, the Commission finds that the state-mandated activity constitutes a "program."

In addition, the claimants have pled section 7104 as added in 1989.[79] Immediately prior to 1989, school districts and community college districts were not required to engage in the activity mandated by section 7104. As a result, the Commission finds that section 7104 requires school districts and community college districts to engage in the following state-mandated new program or higher level of service for contracts for repair and maintenance that exceed the dollar amounts and project hours specified in subheading "B" of this analysis:

> Include in any public works contract for repair and maintenance, which involves digging trenches or other excavations that extend deeper than four feet below the surface, a clause that provides the following:
>
> (a) That the contractor shall promptly, and before the following conditions are disturbed, notify the local public entity, in writing, of any:
>
> (1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.
>
> (2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids.
>
> (3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.
>
> (b) That the local public entity shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.
>
> (c) That, in the event that a dispute arises between the local public entity and the contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for,

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[78] Statutes 1999, chapter 972, section 1.

[79] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 20, citing to Statutes 1989, chapter 330.

performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties. (Pub. Contract Code, § 7104 (Stats. 1989, ch. 330).)

5. **Retention Proceeds (Pub. Contract Code, § 7107)**

Section 7107 addresses the disbursement of retention proceeds, the withholding of retention proceeds in the event of a dispute, and the consequences of improperly withholding retention proceeds by a public entity contracting with an original contractor, and by the original contractor contracting with a subcontractor. Retention proceeds are a portion of the money earned by an original contractor or subcontractor that is retained by an owner, public agency, or original contractor pursuant to the terms of the contract to guarantee performance by the contractor or subcontractor.

Under section 7107, absent a dispute, a public entity is required to release retention proceeds within 60 days after the date of completion of the work of improvement. Additionally, within seven days of receiving all or a portion of the retention proceeds, the original contractor is required to pay each of its subcontractors, from whom retention has been withheld, each subcontractor's share of the retention proceeds.[80] If there is a dispute between the public entity and original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount.[81] Likewise, if there is a dispute between the original contractor and subcontractor, the original contractor may also withhold 150 percent of the disputed amount.[82] If the retention payments are not made within the time periods required by section 7107, the public entity or original contractor withholding the unpaid amounts shall be subject to a charge of two percent per month on the improperly withheld amount, in lieu of any interest otherwise due.[83] Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney's fees and costs.[84]

The claimants allege that section 7107 imposes the following reimbursable state-mandated new program or higher level of service:

> Pursuant to Public Contract Code Section 7107, subdivision (c), releasing retentions withheld within 60 days after the completion of the work, and in the event of a dispute, withholding an amount not to exceed 150 percent of the disputed amount from the final payment. Pursuant to subdivision (f), paying a

[80] Public Contract Code section 7107(c) and (d).

[81] Public Contract Code section 7107(c).

[82] Public Contract Code section 7107(e).

[83] Public Contract Code section 7107(f).

[84] *Ibid*.

> charge of 2 percent per month on any improperly withheld amounts and, in the event of litigation paying the contract's attorney's fees and costs should he or she prevail.[85]

For the reasons below, the Commission finds that these activities do not constitute a "program" subject to article XIII B, section 6 of the California Constitution.

In order to be a reimbursable state-mandate, the required activity or task must constitute a "program" subject to article XIII B, section 6 of the California Constitution. Courts have defined "program" as one that carries out the governmental function of providing a service to the public, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, and does not apply generally to all residents and entities in the state.[86] Under this definition, the California Supreme Court in *City of Sacramento v. State of California* found that a statute requiring local governments to provide unemployment protection to their employees under the state's unemployment insurance program, protections that most private employers were already required to provide, did not constitute a "service to the public" nor was the state imposing a state policy "uniquely" on local governments.[87] Rather the court found that the extension of unemployment protection to local government employees by a statute applicable only to local agencies, "merely makes the local agencies 'indistinguishable in this respect from private employers.'"[88]

Similarly here, the activities alleged by the claimants do not carry out a governmental function of providing a service to the public nor are they unique requirements on local agencies as evidenced by the fact that the activities applicable to public entities are also applicable to original contractors, which are *private entities*. The activity of disbursing retention proceeds applies to both public entities contracting with original contractors (public/private interaction) *and* original contractors contracting with subcontractors (private/private interactions). Likewise, the ability to withhold 150 percent of the disputed amount from a final payment applies equally to public entities and original contractors, as do the consequences for improperly withholding retention proceeds.

That the activities alleged by the claimants do not constitute a governmental function of providing a service to the public and are not unique requirements on local government is further shown by the fact that Civil Code section 3260 sets forth provisions applicable to contracts between private entities that are substantially similar to those set forth in Public Contract Code

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[85] Exhibit A, Test Claim filed by claimants, dated June 24, 2003, p. 95.

[86] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835; and *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 66-70.)

[87] *City of Sacramento v. State of California*, *supra*, 50 Cal.3d 51, 66-70.

[88] *Ibid*.

section 7107.[89] Specifically, Civil Code section 3260 provides for the release of retention proceeds withheld from any payment by an owner from the original contractor within a specified period of time;[90] the ability to withhold an amount not to exceed 150 percent of a disputed amount between the owner and contractor;[91] the owner being subject to a charge of two percent per month on improperly withheld amounts, in lieu of any interest otherwise due;[92] and in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney's fees and costs.[93]

Thus, disbursing retention proceeds, withholding retention proceeds, and the cost of improperly withholding retention proceeds are not a governmental function of providing a service to the public, nor are they unique requirements on local government. Rather, these activities are terms of contracting between contracting parties, both public and private, that affect the contracting parties. The application of these activities to school districts and community college districts as contracting parties makes the districts indistinguishable from private contracting parties.

Based on the above discussion, section 7107 does not constitute a "program" subject to article XIII B, section 6 of the California Constitution. Therefore, the Commission finds that Public Contract Code section 7107 does not impose a state-mandated new program or higher level of service.

6. **Antigraffiti Technology, Abatement, and Deterrence (Pub. Contract Code, § 7109)**

Section 7109 authorizes a public entity to engage in specific graffiti abatement or deterrence activities if the entity determines that a public works project may be vulnerable to graffiti. Specifically, section 7109 provides in relevant part:

> If a public entity determines that a project may be vulnerable to graffiti and the public entity will be awarding a public works contract after January 1, 1996, for that project, it is the intent of the Legislature that the public entity *may* do one or more of the following:
>
> (1) Include a provision in the public works contract that specifies requirements for antigraffiti technology in the plans and specifications for the project.

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[89] As of July 1, 2012, the provisions Civil Code section 3260 will be repealed, renumbered and reorganized as Civil Code section 8810 et seq., pursuant to Statutes 2010, chapter 697, section 16.

[90] Civil Code section 3260(c).

[91] *Ibid.*

[92] Civil Code section 3260(g).

[93] *Ibid.*

(2) Establish a method to finance a graffiti abatement program.

(3) Establish a program to deter graffiti.[94]

The claimants allege that section 7109 mandates school districts and community college districts to undertake one or more of the actions listed above.[95] In response to the Chancellor's Office and Finance's comments asserting that section 7109 does not impose any state-mandated activities, the claimants argue:

> Public Contract Code section 7109 provides that, after a determination that a project may be vulnerable to graffiti, it is the intent of the Legislature that districts take preventative measures.
>
> [The Chancellor's Office] argues that the provision is discretionary as being only the "intent of the Legislature." [Finance] concurs. It is to be noted that the "intent" language appears only after the district has already made a determination that a project may be vulnerable to graffiti. It is implausible for the [Chancellor's Office] to argue that it is [*sic*] discretionary decision after that determination is made.[96] (Underline in original.)

Even assuming legislative intent language can impose requirements on school districts and community college districts the plain language of section 7109 provides that "it is the intent of the Legislature that the public entity *may* do one or more of the following." Thus, the intent of the Legislature is to *authorize* a district to engage in specified activities to deter or abate graffiti if a district makes a determination that a project may be vulnerable to graffiti. Section 7109 grants authority to school districts and community college districts. The grant of authority does not impose a requirement on school districts or community college districts to utilize the authority.

Additionally, the language of section 7109 does not impose a duty on school districts or community college districts to make the initial determination necessary to attain the authority in the first place. Rather, the authority to engage in one of the above graffiti abatement or deterrent activities is a result of a school district or community college district's initial determination that the project is vulnerable to graffiti. Thus, the Commission finds that the plain language of section 7109 does not impose any activities on school districts or community college districts.

7. **Retention of Money from Progress Payments (Pub. Contract Code, § 9203)**

Section 9203 addresses the retention of money from progress payments made to a contractor. Section 9203 provides in relevant part:

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[94] Public Contract Code section 7109(b). (Italics added.)

[95] Exhibit A, Test Claim filed by claimants, dated June 24, 2003, pgs. 95-96.

[96] Exhibit D, Comments filed by the claimants in response to comments filed by Chancellor's Office and Finance, dated May 7, 2004, p. 14.

> Payment on any contract with a local agency for the creation, construction, alteration, repair, or improvement of any public structure, building, road, or other improvement, of any kind which will exceed in cost a total of five thousand dollars ($5,000), shall be made as the legislative body prescribes upon estimates approved by the legislative body, but progress payments shall not be made in excess of 95 percent of the percentage of actual work completed plus a like percentage of the value of material delivered on the ground or stored subject to, or under the control of, the local agency, and unused. The local agency shall withhold not less than 5 percent of the contract price until final completion and acceptance of the project. However, at any time after 50 percent of the work has been completed, if the legislative body finds that satisfactory progress is being made, it may make any of the remaining progress payments in full for actual work completed.

Since 1969, local agencies have been subject to the requirements set forth in section 9203. The requirements were set forth in former Government Code section 53067.[97] In 1984, the requirements were recodified as former Public Contract Code section 20103.[98] In 1990, former Public Contract Code section 20103 was renumbered to current Public Contract Code section 9203.[99]

Because the requirements set forth in Public Contract Code section 9203 existed prior to 1975, the Commission finds that Public Contract Code section 20659 does not impose a mandated new program or higher level of service under Article XIII B, section 6 of the California Constitution.[100]

8. **Use of the Department of General Services for the Acquisition of Information Technology Goods and Services (Pub. Contract Code, §§ 10299 and 12109)**

Sections 10299 and 12109 address the use of services provided by the Department of General Services (DGS) in order to increase buying power and for the acquisition of information technology (IT) goods and services.

i. <u>Consolidation of the IT Needs of Multiple State Agencies in Order to Increase Buying Power (Pub. Contract Code, § 10299)</u>

Section 10299 addresses the consolidation of needs of multiple state agencies in order to increase each agency's buying power. Under section 10299(a), DGS may consolidate the needs of multiple state agencies for IT goods and services and establish contracts, master agreements, multiple award schedules, cooperative agreements, and other types of agreements that leverage the state's buying power. State agencies and local agencies may contract with suppliers awarded

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[97] Former Government Code section 53067, as amended by Statutes 1969, chapter 1439.

[98] Former Public Contract Code section 20103, as added by Statutes 1984, chapter 885.

[99] Public Contract Code section 9203, as added by Statutes 1990, chapter 694.

[100] See Government Code section 17514.

the contracts without further competitive bidding. Section 10299(b) specifically allows the director of DGS to make the services of DGS available to school districts, "upon the terms and conditions agreed upon [by DGS and the districts], to any school district empowered to expend public funds." School districts that utilize DGS's services may utilize the contracts established by DGS without further competitive bidding.

The plain language of section 10299 does not impose any activities on school districts. Instead, it authorizes DGS, a state agency, to allow school districts to utilize DGS's services to school districts benefit. In turn, school districts are *authorized* to utilize DGS's services. Section 10299 does not contain any requirement for school districts to use this authority to utilize DGS's services. Therefore the Commission finds that section 10299 does not impose a state-mandated program on school districts or community college districts.

ii. Authority of DGS to Make its Services Available to School Districts for the Acquisition of IT Goods and Services (Pub. Contract Code, § 12109)

Section 12109 addresses the authority of DGS to make its services available to any tax-supported public agency for assisting the agency in the acquisition of IT goods or services. Specifically, Section 12109 provides:

> The Director of General Services may make the services of the department under this chapter available, upon the terms and conditions that may be deemed satisfactory, to any tax-supported public agency in the state, including a school district, for assisting the agency in the acquisition of information technology goods or services.

The claimants assert that the language above requires school districts and community college districts to comply with the director of DGS's terms and conditions. In response to the Chancellor's Office and Finance's comments asserting that section 12109 does not impose any mandated activities on districts, the claimants assert:

> [The Chancellor's Office] ignores section 12100 which requires that all contracts for the acquisition of information technology goods or services, whether by lease or purchase, be made by, or under the supervision of, the Department of General Services.
>
> [The Chancellor's Office] also ignores the findings of the Legislature in section 12100 that the unique aspects of information technology, and its importance to state programs warrant a separate acquisition authority and that this separate authority should enable the timely acquisition of information technology goods and services in order to meet the state's needs in the most value-effective manner.
>
> In view of these findings, the argument that using these services is discretionary is specious.[101]

[101] Exhibit D, Comments filed by the claimants in response to comments filed by Chancellor's Office and Finance, dated May 7, 2004, p. 14.

The Chancellor's Office correctly ignored Public Contract Code section 12100 when interpreting whether section 12109 imposes state-mandated activities on school districts or community college districts. Sections 12100 and 12109 are part of a statutory scheme addressing contracting by *state* agencies. The legislative findings and directive regarding all contracts for the acquisition of IT goods or services is in reference to the acquisition of IT goods and services by *state* agencies.

In addition, regardless of the language of section 12100, the plain language of section 12109 does not impose *any* activities on school districts or community college districts. Instead the language of section 12109 *only* provides that DGS, a state agency, has the authority to make its services for state agencies available to any tax-supported public agency in the state, including a school district. The Commission finds that section 12109 does not impose a state-mandated new program or higher level of service.[102]

9. **General Provisions of the Local Agency Public Construction Act (Pub. Contract Code, §§ 20100, 20102, 20103.6, 20103.8, 20104, 20104.2, 20104.4, 20104.6, and 20104.50)**

Public Contract Code sections 20100, 20102, 20103.6, 20103.8, 20104, 20104.4, 20104.6, and 20104.50 are all part of the Local Agency Public Construction Act.[103] These sections address: (1) the performance of work by day's labor; (2) the disclosure of indemnity provisions in contracts for architectural services; (3) the addition and deduction of items from a contract; (4) the resolution process of construction claims; and (5) the prompt payment of progress payments.

i. Performance of Work by Day's Labor (Pub. Contract Code, § 20102)

Section 20102 addresses the requirements associated with a public agency's decision to perform work by day's labor instead of putting a project out for bid after the agency has already prepared plans and specifications. Specifically, section 20102 provides:

> Notwithstanding any other provision of this part to the contrary, where plans and specifications have been prepared by a public agency, whose activities are subject to this part, in order for a public project to be put out for formal or informal bid, and, subsequently, the public agency elects to perform the work by day's labor, the public agency shall perform the work in strict accordance with these same plans and specifications.
>
> Revisions of the plans and specifications may be made once a justification detailing the specific reasons for the change or changes has been approved by the public agency or its project director and a copy of the change and its justification is placed in the project file.

[102] *In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1011.

[103] Public Contract Code section 20100, "This chapter [(consisting of Pub. Contract Code, §§ 20100-21641)] may be cited as the Local Agency Public Construction Act."

The reference to "day's labor" includes maintenance personnel employed by school districts and community college districts on a permanent or temporary basis. Public Contract Code sections 20114 and 20655 authorizes school districts and community college districts to make repairs and perform maintenance using their own maintenance personnel in limited circumstances, and therefore avoiding the competitive bidding process for public contracts. Read together with section 20102, any activity required by section 20102 is triggered by: (1) a district's voluntary decision to not use its own maintenance personnel for a project; (2) a district's voluntary decision to engage in the public contracting process and prepare plans and specifications for competitive bidding; and (3) a district's voluntary decision to change its mind and subsequently elect to use its own maintenance personnel for the project and avoid the competitive bidding process. Thus, the requirements imposed by section 20102 are triggered by the local decisions of a school district or community college district and are not legally compelled by section 20102.

The claimants argue that legal compulsion is not necessary for a finding of a mandate.[104] The claimants discuss the cases leading the court in *Kern High School Dist*. to hold open the possibility of practical compulsion as applicable to state mandates, and assert:

> Neither [Finance or the Chancellor's Office] has attempted to apply this test [for practical compulsion] to any portion of the test claim legislation and regulations. Therefore, their arguments lack any foundation when claiming that those statutes and regulations contain no reimbursable mandates because the test claim activities are discretionary.[105]

The claimants' assertion is incorrect. Although courts have held open the possibility of practical compulsion as applied to state mandates, courts have also found that a finding of practical compulsion requires a concrete showing in the record that a failure to engage in the activity at issue will result in certain and severe penalties.[106] Thus, no presumption of practical compulsion exists. Instead, the claimants bear the burden of providing evidence to support the claimants' allegation that school districts and community college districts face practical compulsion to engage in an activity that the districts are not legally compelled to engage in.

Absent any evidence of practical compulsion, the Commission cannot make a finding that practical compulsion exists. The claimants have not provided evidence that school districts and community college districts face practical compulsion to: (1) not use its own maintenance personnel for a project; (2) engage in the public contracting process and prepare plans and specifications for competitive bidding; and (3) subsequently elect to use its own maintenance personnel for the project and avoid the competitive bidding process.

Based on the discussion above, the Commission finds that the Public Contract Code section 20102 does not impose any state-mandated activities.

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[104] Exhibit D, Comments filed by the claimants in response to comments filed by Chancellor's Office and Finance, dated May 7, 2004, pgs. 2-6, and 17.

[105] *Id.* at p. 6.

[106] *POBRA*, *supra*, 170 Cal.App.4th at pgs. 1366-1369.

ii. <u>Disclosure of Indemnity Provisions in Request for Proposals for Architectural Design Services (Pub. Contract Code, § 20103.6)</u>

Section 20103.6 requires school districts and community college districts to disclose any indemnity provisions contained in contracts for architectural design services on requests for proposals or invitations to bid. Specifically, section 20103.6 provides:

> (a) (1) Any local agency subject to this chapter shall, in the procurement of architectural design services requiring an expenditure in excess of ten thousand dollars ($10,000), include in any request for proposals for those services or invitations to bid from a prequalified list for a specific project a disclosure of any contract provision that would require the contracting architect to indemnify and hold harmless the local agency against any and all liability, whether or not caused by the activity of the contracting architect.
>
> (2) The disclosure statement shall be prominently set forth in bold type.
>
> (b) In the event a local agency fails to comply with paragraph (1) of subdivision (a), that local agency shall (1) be precluded from requiring the selected architect to agree to any contract provision requiring the selected architect to indemnify or hold harmless the local agency against any and all liability not caused by the activity of the selected architect, (2) cease discussions with the selected architect and reopen the request for proposals or invitations to bid from a qualification list, or (3) mutually agree to an indemnity clause acceptable to both parties.
>
> (c) This section shall become operative on July 1, 1998.

The Chancellor's Office argues that there is no requirement that an indemnification provision be included in architectural design services contracts. Thus, the requirement to include notice of such a provision in a request for proposals is not mandated by the state pursuant to *Kern High School Dist*. because it is triggered by a district's decision to include the provision. In response, the claimants argue that, "[a]ny suggestion by [the Chancellor's Office] that seeking indemnification is optional ignores the real life financial disasters which can result when an accident or catastrophe, through no fault of a district, occurs and the district is subjected to multi-million dollar claims."

Although it may be wise to include an indemnification clause in a contract for architectural design services by shifting some of the risk of liability away from a district, doing so would be a business decision made by a school district or community college district and not a decision mandated by the state. School districts and community college districts have the ability, but are not legally required by the state, to include such provisions in contracts for architectural design services. After weighing the pros and cons of including an indemnity provision in a contract for architectural services, a district can choose not to include such a provision in the contract. In addition, the claimants have not provided evidence that school districts or community college districts face practical compulsion to include an indemnity provision in architectural service contracts. Rather, the claimants only generally assert "real life financial disasters" which could

result when an accident or catastrophe occurs. Absent evidence of practical compulsion, the Commission cannot make a finding that practical compulsion exists.

Thus, based on the analysis in *Kern High School Dist*., because the requirement to provide notice of an indemnity provision in a request for proposals or invitation to bid is triggered by a school district's or community college district's decision to include such a provision in a contract for architectural services, the Commission finds that section 20103.6 does not impose any state-mandated activities.

iii. Items That May be Added to or Deducted From the Scope of Work in the Contract (Pub. Contract Code, § 20103.8)

Section 20103.8 addresses the use of additive and deductive items by public agencies in public works contracts. Additive and deductive items in a public works contract are items priced separately from the base bid for a public works contract, which a public agency can add or remove from the contract. In contrast, the base bid is the part of a bid covering most of the project.

Section 20103.8 provides that "[a] local agency may require bids for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted." If a local agency uses this authority, the local agency must specify in the bid solicitation which method, out of the following four methods, will be used to determine the lowest bid for purposes of awarding the contract: (1) the lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items; (2) the lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purposes of determining the lowest bid price; (3) the lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that when taken in order from a specifically identified list of those items in the solicitation, and added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the local agency before the first bid is opened; or (4) the lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined. If no method is specified in the bid solicitation, the first method described must be used.

Based on the plain language of section 20103.8, the requirement to specify the method used to determine the lowest bid in a bid solicitation requiring the inclusion of additive or deductive items is triggered by a local agency's discretionary decision to utilize the authority provided by section 20103.8.

Despite the language of section 20103.8, the claimants argue:

> Public Contract Code sections 20101, et seq., set forth the Local Agency Public Construction Act, enacted by Chapter 972, Statutes of 1999. Section 1, an uncodified portion of the Act, provides:

> "The Legislature hereby finds and declares that the establishment by public agencies of a uniform system to evaluate the ability, competency, and integrity of bidders on public works projects is in the public interest, will result in the construction of public works projects of the highest quality for the lowest costs, and is in furtherance of the objectives stated in Section 100 of the Public Contract Code."
>
> In view of the findings and declaration of the Legislature that the Act will result in the construction of public works of the highest quality and for the lowest costs, the argument that section 23108.8 [*sic*] is permissive is not well taken.

In response to the Chancellor's Office and Finance's arguments that various activities claimed in this test claim are discretionary and therefore do not impose any state-mandates pursuant to *Kern High School Dist*., claimants argue that legal compulsion is not necessary for a finding of a mandate.[107] The claimants discuss the cases leading the court in *Kern High School Dist*. to hold open the possibility of practical compulsion as applicable to state mandates, and assert:

> Neither [Finance or the Chancellor's Office] has attempted to apply this test [for practical compulsion] to any portion of the test claim legislation and regulations. Therefore, their arguments lack any foundation when claiming that those statutes and regulations contain no reimbursable mandates because the test claim activities are discretionary.[108]

The claimants' first argument fails to draw a connection between the legislative findings and declarations cited and the ultimate conclusion asserted by the claimants (i.e. that reading Pub. Contract Code, § 20103.8 as discretionary is inconsistent with the Legislature's findings and declarations). The permissive nature of section 20103.8 is *consistent* with the findings and declarations. Specifically, a statute that requires a public agency to specify which *uniform method* will be used to determine the lowest bid *if the public agency voluntarily decides* to require additive or deductive items in bids for a public works contract, is consistent with the Legislature's findings and declarations regarding the Local Agency Public Construction Act's purpose of establishing a uniform system to evaluate bidders on public works projects.

The claimants bear the burden of providing evidence to support the claimants' allegation that school district and community college districts face practical compulsion to engage in an activity that the districts are not legally compelled to engage in. Absent any evidence of practical compulsion, the Commission cannot make a finding that practical compulsion exists. The claimants have not provided evidence that K-12 school district and community college districts face practical compulsion to require additive or deductive items.

Based on the above discussion, the Commission finds that Public Contract Code section 20103.8 does not impose a state-mandated program on school districts or community college districts.

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[107] Exhibit D, Comments filed by the claimants in response to comments filed by Chancellor's Office and Finance, dated May 7, 2004, pgs. 2-6, and 24.

[108] *Id.* at p. 6.

iv. Resolution of Construction Claims (Pub. Contract Code, §§ 20104, 20104.2, 20104.4, and 20104.6)

Sections 20104, 20104.2, 20104.4, and 20104.6 establish a resolution process for public works claims which arise between a contractor and a local agency, including school districts and community college districts. "Claim" is defined by section 20104 as a separate demand by the contractor for: (1) a time extension; (2) payment of money or damages arising from work done by, or on behalf of, the contractor pursuant to the contract for a public work and payment of which is not otherwise expressly provided for or the claimant is not otherwise entitled to; or (3) an amount the payment of which is disputed by the local agency.[109]

The process consists of a pre-litigation dispute resolution process under which the local contracting agency receives and responds to claims and the claiming contractor has the ability to appeal the local agency's decisions. In the event that the pre-litigation dispute resolution process does not resolve the contractor's dispute and files a civil action against the local agency, the code sections provide for mediation and judicial arbitration in an attempt to settle the dispute before going to trial.

Prior to the enactment of sections 20104-20104.6, no *pre-litigation* dispute resolution process existed to resolve construction contract claims brought by contractors. Instead, school districts and community college districts could *choose* to resolve claims through arbitration pursuant to Public Contract Code section 10240 et seq., or the parties could go directly to court to resolve the dispute. As a result, districts were not required to attempt to resolve claims arising from public projects outside of court.

These code sections were enacted to provide adequate incentive for local agencies to resolve construction contract claims. According to the sponsor:

> When disputes arise between contractors and local agencies over public works contracts, there is no requirement for local agencies to resolve them. State and local agencies can submit disputes to arbitration under the State Contract Act, but this authority is simply permissive. In many, cases, local agencies withhold payment of the entire contract price until the dispute is resolved.
>
> Many contractors have experienced delays of two years or more in resolving disputes over what the contract or claims and what the local agency thinks the costs should be. Until agreement is reached, the contractor is unable to recover his or her costs or bid on any other jobs. The Engineering and Utility Contractors Association desires a fair and timely process in law for resolving disputes.[110]

In effect, the code sections level the playing field in the resolution of construction contract disputes by encouraging the settlement of claims between contractors and local agencies. The

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[109] Public Contract Code section 20104(b)(2).

[110] Senate Committee on Judiciary, Analysis of AB 4165 (1989-1990 Reg. Sess.) as amended August 14, 1990.

following discussion will address whether dispute resolution processes established by sections 20104, 20104.2, 20104.4, and 20104.6, impose state-mandated new programs or higher levels of service on school districts or community college districts.

a. Inclusion of the Dispute Resolution Provisions in Plans or Specifications (Pub. Contract Code, § 20104)

Section 20104 defines the terms used in sections 20104-20104.6 and establishes the scope of their applicability as described above. In addition, section 20104 requires school districts and community college districts to set forth the provisions, or a summary thereof, of Article 1. 5, Chapter 1, Part 3, Division 2, of the Public Contract Code (Pub. Contract Code, §§ 20104, 20104.2, 20104.4, and 20104.6) in the plans or specifications for any public works which may give rise to a claim of $375,000 or less.

Based on the plain language of section 20104, the provisions of sections 20104, 20104.2, 20104.4, and 20104.6, apply only to claims of $375,000 or less, and are inapplicable to contracts in which the public agency has elected to resolve any disputes by arbitration pursuant to Public Contract Code section 10240 et seq. The Chancellor's Office argues, and Finance concurs, that based on the analysis in *Kern High School Dist*., school districts and community college districts are not mandated to comply with section 20104 et seq. because school districts and community college districts can choose to resolve disputes by arbitration pursuant to section 10240 et seq. The Chancellor's Office and Finance are incorrect, as *Kern High School Dist*. is distinguishable from this situation.

In *Kern High School Dist*., school districts faced the option to participate in a voluntary program to receive funding triggering associated requirements on the districts or to not participate in the voluntary program and not have to engage in any activities. Here, the districts must engage in the dispute resolution process set forth in Public Contract Code section 20104 et seq., *or* 10240 et seq. Thus, a finding that sections 20104-20104.6 impose state-mandated activities is not precluded by the *Kern High School Dist*. decision.

The Commission notes, however, that Public Contract Code section 10240 et seq. was not pled as part of this test claim. As a result, the Commission makes no independent findings regarding section 10240 et seq. In addition, school districts and community college districts that do not utilize section 20104 et seq. have not incurred any costs mandated by section 20104 et seq., and thus, cannot claim for any activities found to be mandated by the sections. However, where school districts and community college districts have not elected to resolve disputes by arbitration pursuant to Public Contract Code section 10240 et seq., the Commission finds that section 20104 mandates school districts and community college districts to set forth the provisions, or a summary thereof, of Public Contract Code sections 20104-20104.6 in the plans or specifications for any public works projects which may give rise to a claim of $375,000 or less.

Next, it must be determined whether the mandated activity to set forth the provisions, or a summary thereof, of Public Contract Code sections 20104, 20104.2, 20104.4, and 20104.6 in the plans or specifications for any public works which may give rise to a claim of $375,000 or less, constitutes a new program or higher level of service.

The mandate to include the provisions, or a summary, of Public Contract Code section 20104 et seq. is a unique requirement on school districts and community college districts and does not apply generally to all residents and entities in the state. Additionally, by setting forth the terms of the dispute resolution process in the plans or specifications for public works projects, contractors are provided reassurance that they are able to recover their costs and bid on other jobs. Thus, this mandated activity implements the state policy to provide all qualified bidders with a fair opportunity to enter the bidding process, and thereby stimulating competition in a manner conducive to sound fiscal practices.[111]

In addition, the claimants pled section 20104 as added in 1990.[112] Immediately prior to the enactment of section 20104, school districts and community college districts were not required to set forth the dispute resolution process set forth in sections 20104-20104.6. As a result, the Commission finds that section 20104 mandates school districts and community college districts to engage in the following new program or higher level of service:

> Set forth in the plans or specifications for any public work for repair and maintenance which may give rise to a claim of $375,000 or less which arise between a contractor and a school district or community college district, excluding those districts that elect to resolve claims pursuant to Article 7.1 (commencing with section 10240) of Chapter 1 of Part 2 of the Public Contract Code.
>
> "Claim" is defined as a separate demand by the contractor for (A) a time extension, (B) a payment of money or damages arising from work done by, or on behalf of, the contractor pursuant to the contract for a public work and payment of which is not otherwise expressly provided for or the claimant is not otherwise entitled to, or (C) an amount the payment of which is disputed by the school district or community college district. (Pub. Contract Code, § 20104(c) (Stats. 1994, ch. 726).)

b. Pre-Litigation Claims Procedures (Pub. Contract Code, § 20104.2)

Public Contract Code section 20104.2 sets forth the pre-litigation process school districts and community college districts must engage in to resolve claims filed by a contractor. For claims of less than $50,000 a district is mandated to respond in writing to any written claim within 45 days of receipt of the claim.[113] For claims of over $50,000 and less than or equal to $375,000 the school district or community college district is mandated to respond in writing to all written claims within 60 days of receipt of the claim.[114] If the contractor-claimant disputes the school district's or community college district's response and requests an informal conference to meet and confer for settlement of the issues in dispute, the school district or community college

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[111] Public Contract Code section 100(c).

[112] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 26, citing to States 1990, chapter 1414.

[113] Public Contract Code section 20104.2(b)(1).

[114] Public Contract Code section 20104.2(c)(1).

district is mandated to schedule a meet and confer conference within 30 days for settlement of the dispute.[115]

Section 20104.4(e) provides that, if after the informal conference, the claim or any portion remains in dispute, the contractor-claimant is authorized to file a claim as provided in Government Code, Title 1, Division 3.6, Part 3, Chapter 1 (commencing with Government Code section 900) and Chapter 2 (commencing with Government 910).[116] These provisions of the Government Code set forth a process in which individuals seeking to bring a suit against a public agency must first submit a claim with the local agency, the purpose of which is to provide governmental agencies with notice of the claims against them and provide them sufficient information to investigate and settle claims, if appropriate, without the expense of litigation.[117]

The claimants assert that this authorization requires school districts and community college districts to file responsive pleadings and appear and defend any civil action brought by a claimant.[118] However, section 20104.4(e) does not impose any mandated activities on school districts or community college districts. Instead, it only provides that the a contractor-claimant may file a claim with the district governing boards pursuant to Government Code, Title 1, Division 3.6, Part 3, Chapters 1 and 2. As a result, the Commission finds that section 20104.4(e) does not impose any state-mandated activities on school districts or community college districts.

The mandated activities described above are unique activities imposed on school districts and community college districts. In addition, by providing a fair and timely process for resolving disputes, the requirements implement the state policy to provide all qualified bidders with a fair opportunity to enter the bidding process, and thereby stimulating competition in a manner conducive to sound fiscal practices.[119]

Additionally, the claimants pled section 20104.2 as added in 1990.[120] Immediately prior to the enactment of section 20104, school districts and community college districts were not required to engage in the pre-litigation dispute resolution process set forth in section 20104.2. As a result, the Commission finds that section 20104.2 mandates school districts and community college districts to engage in the following new programs or higher level of services:

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[115] Public Contract Code section 20104.4(d).

[116] Public Contract Code section 20104.4(e).

[117] *Goleta Union Elementary School Dist. v. Ordway* (C.D.Cal. 2002) 248 F.Supp.2d 936, 940.

[118] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 101, citing to Public Contract Code section 20104.4(e).

[119] Public Contract Code section 100(c).

[120] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 26, citing to States 1990, chapter 1414.

1. For claims of less than $50,000 resulting from a public works contract for repair or maintenance, respond in writing to any written claim within 45 days of receipt of the claim. (Pub. Contract Code, § 20104.2(b)(1) (Stats. 1994, ch. 726).)
2. For claims of more than $50,000 and less than or equal to $375,000 resulting from a public works contract for repair or maintenance, respond in writing to any written claim within 60 days of receipt of the claim. (Pub. Contract Code, § 20104.2(c)(1) (Stats. 1994, ch. 726).)
3. Upon demand by a contractor disputing a school district's or community college district's response to a claim, schedule a meet and confer conference within 30 days for settlement of the dispute. (Pub. Contract Code, § 20104.2(d) (Stats. 1994, ch. 726).)

As used in these activities, "claim" is defined by Public Contract Code section 20104(b)(2) (Stats. 1994, chapter 726).

c. Litigation Claims Procedures (Pub. Contract Code, § 20104.4)

Section 20104.4 establishes procedures for all civil actions filed by a contractor to resolve public works claims of $375,000 or less that were not successfully resolved pursuant to the pre-litigation dispute resolution procedures in section 20104.2. Section 20104.4(a) requires a court to submit the matter to nonbinding mediation unless waived by mutual stipulation by both parties. If the matter remains in dispute after mediation, section 20104.4(b)(1) provides that a court is required to submit the matter to judicial arbitration as set forth in Code of Civil Procedure, Part 3, Title 3, Chapter 2.5 (commencing with section 1141.10).[121] Also, section 20104.4(b)(1) provides that the Civil Discovery Act of 1986 (commencing with Code of Civil Procedure section 2016) applies to any proceedings brought under this section.

The language of section 20104.4 does not impose any required activities on school districts or community college districts. Instead, as described above, the language requires the *court* to engage in specific activities, specifically, submit the matter to mediation and judicial arbitration. Additionally, any resulting requirement on school districts and community college districts to comply with a court's order is not new. Courts have fundamental inherent equity, supervisory, and administrative powers, as well as, inherent power to control litigation before them.[122] Thus, to the extent that school districts and community college districts are engaged in litigation, compliance with a court's order, whether it is to engage in mediation, judicial arbitration, or any other order, is not new. The Commission finds that section 20104.4(a) and (b)(1) does not impose a state-mandated new program or higher level of service on school districts or community college districts.

In addition to the above provisions, section 20104.4 addresses the payment of the arbitrators compensation. Specifically, section 20104.4(b)(2) provides:

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[121] Public Contract Code section 20104.4(b)(1).

[122] *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.

> Notwithstanding any other provision of law, upon stipulation of the parties, arbitrators appointed for purposes of this article [(Pub. Contract Code, §§ 20104-20104.6)] shall be experienced in construction law, and, upon stipulation of the parties, mediators and arbitrators shall be paid necessary and reasonable hourly rates of pay not to exceed their customary rate, and such fees and expenses shall be paid equally by the parties, except in the case of arbitration where the arbitrator, for good cause, determines a different division. In no event shall these fees or expenses be paid by state or county funds.

The claimants assert that the above language mandates school districts and community college districts to pay one-half of the necessary and reasonable fees of the arbitrator.[123] The Commission disagrees with the claimants.

The plain language of section 20104.4(b)(2) provides that payment of the necessary and reasonable hourly rates of arbitrators by the parties occurs by stipulation of the parties, which would require a school district or community college district to voluntarily agree to this provision. This interpretation of section 20104.4 is consistent with the statutory provisions regarding judicial arbitration (Civ. Code of Procedure, §§ 1141.10-1141.31) which provide for the payment of all administrative costs of judicial arbitration, including the compensation of arbitrators, by the court in which the arbitration costs are incurred.[124] Only when the parties voluntarily agree to participate in judicial arbitration, does the Code of Civil Procedure provide that the parties pay the compensation of the arbitrators in equal shares.[125] Therefore, consistent with the analysis in *Kern High School Dist*., the Commission finds that section 20104.4(b)(2) does not impose a state-mandated activity on school districts or community college districts.

In addition to the payment of the arbitrator's compensation, section 20104.4 provides for the payment of costs, fees, and attorney fees if a party who receives an award under judicial arbitration requests a trial de novo but does not obtain a more favorable award. Section 20104.4(b)(3) provides:

> In addition to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, any party who after receiving an arbitration award requests a trial de novo but does not obtain a more favorable judgment shall, in addition to payment of costs and fees under that chapter, pay the attorney's fees of the other party arising out of the trial de novo.

The claimants allege that section 20104.4(b)(3) mandates school districts and community college districts to pay costs, fees, and attorney's fees of the contractor-claimant when a more favorable result is not obtained after request a trial de novo. The claimants are incorrect.

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[123] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 102.

[124] Civil Code of Procedure section 1141.28(a).

[125] Civil Code of Procedure section 1141.28(b).

The payment of costs, fees, and attorney's fees by school districts or community college districts under section 20104.4(b)(3) is triggered only when a district voluntarily requests a trial de novo and does not obtain a more favorable judgment. The claimants face no legal or practical compulsion to request a trial de novo. Although from a business or policy perspective a district may find it desirable to request a trial de novo, the state does not mandate this decision. As a result, the Commission finds that section 20104.4(b)(3) does not impose a state-mandated activity on school districts or community college districts.

Based on the above discussion, the Commission finds that Public Contract Code section 20104.4 does not impose a state-mandated new program or higher level of service on school districts or community college districts.

d. Payment of Interest on Arbitration Awards or Judgments (Pub. Contract Code, § 20104.6)

Section 20104.6 prohibits a local agency from failing to pay money as to any portion of a claim which is undisputed. In addition, section 20104.6 provides:

> In any suit filed under Section 20104.4, the local agency shall pay interest at the legal rate on any arbitration award or judgment. The interest shall begin to accrue on the date the suit is filed in a court of law.[126]

The claimants assert that this provision imposes a state-mandated new program on school districts and community college districts to pay interest at the legal rate on any arbitration award or judgment arising out of a suit filed pursuant to section 20104.4.[127] However, the payment of interest on an arbitration award or judgment is not a mandated program or service provided to the public.

Judicial arbitration awards and judgments issued by a court must be based on law and fact.[128] Because of this a judicial arbitration award or judgment in favor of a contractor is in essence a finding by the arbitrator or judge that based on the facts and law that the school district or community college district is and was obligated to pay the awarded amount to the contractor. Thus, the payment of the award is not the result of a state mandate, rather it is the result of a school district's or community college district's decision to not pay an amount the district was obligated to pay the contractor. Similarly, the payment of interest of such an award is a result of this decision.

Based on the above discussion, the Commission finds that section 20104.6 does not impose a state-mandated activity on school districts or community college districts.

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[126] Public Contract Code section 20104.6(b).

[127] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 102.

[128] *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 345, noting that arbitrators in judicial arbitration, unlike contractual arbitration, must decide the law and facts of the case and make an award accordingly.

v. Prompt Payment (Pub. Contract Code, § 20104.50)

Section 20104.50 sets forth the review and response procedures local agencies must take for the timely payment of progress payments by local agencies to a contractor after the receipt of an undisputed payment request from the contractor. Timely payment of an undisputed and properly submitted payment request is established at 37 days.[129] This includes seven days for review of the claim, and 30 days to make the payment.

a. Public Contract Code Section 20104.50 Imposes State-Mandated Activities on School Districts and Community College Districts

The plain language of section 20104.50 mandates local agencies, including school districts and community college districts, to review each payment request as soon as practicable after receipt for the purpose of determining that the payment request is a proper payment request.[130] Also, local agencies are mandated to return to the contractor any payment request determined not to be a proper payment request suitable for payment not later than seven days after receipt.[131] A returned request must be accompanied by a document setting forth in writing the reasons why the payment request is not proper.[132] In addition, local agencies are mandated to set forth in the terms of any contract public works contract the provisions of Public Contract Code section 20104.50, or a summary thereof.[133]

If a local agency fails to make a payment of an undisputed and properly submitted payment request within 37 days after receipt of the request section 20104.50(b) imposes a penalty on the local agency in the form of interest equivalent to the legal rate set forth in subdivision (a) of Section 685.010 of the Code of Civil Procedure.[134] The claimants allege that section 20104.50(b) mandates school districts and community college districts to pay interest to the contractor "when the district fails to make any progress payment within 30 days after receipt of an undisputed and properly submitted payment request . . . ."[135] The claimants are incorrect.

Under *Kern High School Dist.*, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally

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[129] Public Contract Code section 20104.50(b) and (c).

[130] Public Contract Code section 20104.50(c)(1).

[131] Public Contract Code section 20104.50(c)(2).

[132] *Ibid.*

[133] Public Contract Code section 20104.50(f).

[134] Code of Civil Procedure section 685.010(a) provides that, "Interest accrues at the rate of 10 percent per annum on the principle amount of any money judgment remaining unsatisfied."

[135] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 102; Exhibit D, comments filed by the claimants in response to comments filed by the Chancellor's Office and Finance, dated May 7, 2004, pgs. 21-22.

compelled.[136] Here, the requirement to pay interest is triggered by a school district's or community college district's discretionary decision to not make a progress payment of "an *undisputed* and *properly submitted* payment request" within the 37 day period described above. Districts face no legal compulsion to *not* make a payment of an undisputed and properly submitted payment request. Nor have the claimants provided evidence to support a finding that school districts and community college districts face practical compulsion to *not* pay undisputed and properly submitted payment requests. Thus, the Commission finds that the payment of interest, triggered by a school district's or community college district's failure to make a payment on an undisputed and properly submitted payment request, is not a state-mandated activity.

b. The Activities Mandated by Public Contract Code Section 20104.50 Constitute New Programs or Higher Levels of Service

Although private entities face prompt payment requirements which require the prompt payment of progress payments within 30 days to contractors where there is no good faith dispute between parties,[137] the activities mandated by section 20104.50 imposes unique requirements on school districts and community college districts. Specifically, private entities are not required to engage in the review and response process as specified in Public Contract Code section 20104.50. In addition, private entities are not required to include the provisions of section 20104.50 or similar provisions in any construction contract between private parties. Therefore, Public Contract Code section 20104.50 imposes unique requirements on school districts and community college districts to implement the state policy regarding prompt payment of undisputed and properly submitted payment requests for public projects.[138] Additionally, the prompt payment of undisputed amounts allows qualified contractors to pay its subcontractors and to enter bids for other public projects, thereby stimulating competition, lowering costs, and increasing the quality of public projects, and thus, providing a service to the public.

The claimants have pled section 20104.50 as added in 1992.[139] Immediately prior to 1992, school districts and community college districts were not required to engage in the activities mandated by section 20104.50. As a result, the Commission finds that the following activities constitute state-mandated new programs or higher levels of service:

1. Review each payment request from a contractor for repair and maintenance as soon as practicable after the receipt of the request to determine if the payment request is a proper payment request. "As soon as practicable" is limited by the seven day period in the

[136] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

[137] Civil Code section 3260.1, which will be repealed and replaced with Civil Code section 8800 on July 1, 2012, pursuant to Statutes 2010, chapter 697, section 16.

[138] Public Contract Code section 20104.50(a).

[139] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 37, citing to Statutes 1992, chapter 799.

activity mandated by Public Contract Code section 20104.50(c)(2). (Pub. Contract Code, § 20104.50(c)(1) (Stats. 1992, ch. 799).)

2. Return to the contractor for repair and maintenance any payment request determined not to be a proper payment request suitable for payment as soon as practicable, but no later than seven days after receipt of the request.

   A returned request shall be accompanied by a document setting forth in writing the reasons why the payment request is not proper. (Pub. Contract Code, § 20104.50(c)(2) (Stats. 1992, ch. 799).)

3. Require the provisions of Article 1.7, Chapter 1, Part 3, Division 2 of the Public Contract Code (Pub. Contract Code, § 20104.50), or a summary thereof, to be set forth in the terms of any repair and maintenance contract. (Pub. Contract Code, § 20104.50(f) (Stats. 1992, ch. 799).)

10. **Contract Provisions Regarding Performance Retentions and Substitute Security (Pub. Contract Code, § 22300)**

i. <u>Public Contract Code Section 22300 Mandates School Districts and Community College Districts to Include Substitution of Securities Provisions in any Invitation for Bid and in any Contract Documents</u>

The plain language of section 22300(a) requires the inclusion in any invitation for bid and in any contract documents of provisions to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract. The requirement to include the substitution of securities provision does not apply to contracts in which there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. Sec. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities.

The remaining portion of section 22300 describes the options a contractor has in regard to substitution of securities and payment of retentions earned, all of which occur at the request and at the expense of the contractor.

Based on the plain language of section 22300(a), the Commission finds that school districts are mandated to include in any invitation for bid and in any contract documents for provisions to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract, except where there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. Sec. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities.

ii. <u>The Inclusion of Substitution of Securities Provisions in any Invitation for Bid and in any Contract Documents Constitutes a New Program or Higher Level of Service</u>

Unlike any private contracting parties, school districts and community college districts are mandated to include substitution of securities provisions in any invitation for bid and in any

contract documents. This unique requirement, which does not apply generally to all residents and entities in the state, implements a state policy to encourage full participation by contractors and subcontractors in public contract procedures.[140] In addition, the claimants have pled Public Contract Code section 22300 as added in 1988 and last amended in 1998.[141] Immediately prior to 1988, school districts and community college districts were not required to include the substitution of securities provision in repair and maintenance contract documents. Thus, the Commission finds that section 22300 requires school districts and community college districts to engage in the following state-mandated new program or higher level of service:

> In any invitation for bid and in any repair and maintenance contract documents, include provisions to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract. This excludes invitations for bid and contract documents for projects where there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. Sec. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities. (Pub. Contract Code, § 22300(a) (Stats. 1988, ch. 1408).)

11. **Verification of Bidder's License Status (Bus. & Prof. Code, § 7028.15 and Pub. Contract Code, § 20103.5)**

Business and Professions Code section 7028.15 makes it a misdemeanor for any person to submit a bid to a public agency without having a license to perform the proposed work, but excludes local agency projects where federal funds are involved. Where federal funds are involved, Public Contract Code section 20103.5 requires a contractor to be properly licensed at the time the contract is awarded.

i. Business and Professions Code Section 7028.15 and Public Contract Code Section 20103.5 Mandate School Districts and Community College Districts to Verify Whether a Contractor Awarded a Contract is Properly Licensed

As relevant to school districts and community college districts, Business and Professions Code section 7028.15 requires a public agency, before awarding a contract or purchase order, to verify with the Contractors' State License Board (CSLB) that the contractor was properly licensed when the contractor submitted the bid. Where federal funds are involved, Public Contract Code section 20103.5 requires a public agency, before making the first payment for work or material under a contract, to verify with the CSLB that the contractor was licensed when the contract was awarded.

Public Contract Code section 20103.5 also provides that public agencies shall include a statement in the standard form of prequalification questionnaire and financial statement, that any bidder or contractor not licensed at the time a contract is awarded shall be subject to all legal

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[140] Public Contract Code section 22300(e)

[141] Exhibit A, test claim filed by claimants, dated June 24, 2003, pgs. 16 and 43, citing to Statutes 1988, chapter 1408; and Statutes 1998, chapter 857.

penalties imposed by law, including, but not limited to, any appropriate disciplinary action by the CSLB. However, this requirement must be read in context of Public Contract Code sections 20101, 20111.5, and 20651.5, which provide public agencies, school districts, and community college districts, with the authority to require the use of a standard form of prequalification questionnaire and financial statement.

As discussed with Public Contract code sections 20101, 20111.5, and 20651.5, although school districts and community college districts have the authority to require the use of a prequalification process, districts are not required to utilize this authority. Absent this use of authority by school districts and community college districts, districts would not be required to include a statement into contracts for projects involving federal funds regarding the penalties that a bidder or contract may be subject to. As discussed above for Public Contract Code sections 20101, 20111.5, and 20651.5, absent legal compulsion, the claimants bear the burden to provide sufficient evidence that districts face practical compulsion. The claimants have not provided evidence that and community college districts face practical compulsion to establish and require the use of a prequalification process. Thus, under *Kern High School Dist*., school districts and community college districts are not mandated by the state to include this statement into contracts for projects involving federal funds.

Based on the above discussion, the Commission finds that school districts and community college districts are mandated to verify with the CSLB whether a contractor was properly licensed when the contractor submitted the bid (for projects not involving federal funds), and when the contractor was awarded the bid (for projects involving federal funds).

ii. The Mandate to Verify Whether a Contractor was Properly Licensed Constitutes a New Program or Higher Level of Service

The mandate to verify a contractor's license carries out a governmental function of prohibiting unlicensed contracting, which prevents "a threat to the health, welfare, and safety of the people of the State of California."[142] The claimants have pled Business and Professions Code section 7028.15 as amended in 1990 and Public Contract Code section 20103.5 as added in 1990.[143] Immediately prior to 1990, school districts and community college districts were not required to verify whether a contractor was licensed at the time the contractor placed the bid or when the bid was awarded. Thus, the Commission finds that the following state-mandated activities constitute a new program or higher level service:

1. Before awarding repair and maintenance contract to a contractor for a project that *is not* governed by Public Contract Code section 20103.5 (which addresses projects that involve federal funds), verify with the Contractors' State Licensing Board that the contractor was properly licensed when the contractor submitted the bid. (Bus. & Prof. Code, § 7028.15(e) (Stats. 1990, ch. 321).)

[142] Business and Professions Code section 145 and

[143] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 23, 24, and 26, citing to Statutes 1990, chapter321; and Statutes 1990, chapters 321 and 1414..

2. Before making the first payment for work or material to a contractor under any repair and maintenance contract for a project where federal funds are involved, verify with the Contractors' State Licensing Board that the contract was properly licensed at the time that the contract was awarded to the contractor. (Pub. Contract Code, § 20103.5 (Stats. 1990, ch. 1414).)

12. **Bidder's Security for Contracts subject to the State School Building Aid Law of 1949 (Pub. Contract Code, § 20107)**

Public Contract Code section 20107 sets forth the requirements imposed on bidders to a school project subject to the State School Building Aid Law of 1949 must be presented under sealed cover and accompanied by a bidder's security. Upon award to the lowest bidder, districts are required to return the security of unsuccessful bidders in a reasonable time. However, Public Contract Code section 20107 is *only* applicable to contracts subject to the State School Building Aid Law of 1949 (Ed. Code, §§ 15700-15795), and participation in the State School Building Aid Law of 1949 is discretionary.[144]

The State School Building Aid Law of 1949, which was not pled as part of this test claim, is a program established by the Legislature to provide funding to aid school districts in the purchase and improvement of school sites; the purchase of desks, tables, chairs, and built-in or fixed equipment; and the planning and construction, reconstruction, alteration of, and addition to, school buildings.[145] Under the State School Building Aid Law of 1949, if a school district wants funding pursuant to the State School Building Aid Law the district must apply to the State Allocation Board for funding.[146] However, from the plain language of the State School Building Aid Law, districts are not legally required to apply for funding under this law. Any activity contained in Public Contract Code section 20107 is triggered by a school district's discretionary decision to apply for funding under the State School Building Aid Law of 1949. In other words, school districts do not face legal compulsion to apply for funding under the State School Building Aid Law of 1949.

As discussed above, absent legal compulsion, the courts have held open the possibility of practical compulsion as applied to state-mandates. Courts have also found that a finding of practical compulsion requires a concrete showing in the record that a failure to engage in the activity at issue will result in certain and severe penalties.[147] The initial burden to make a concrete showing of practical compulsion lies with the claimants. The Commission finds that the claimants have failed to meet this burden.

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[144] Public Contract Code section 20105 provides that Public Contract Code sections 20105-20106 "shall apply to contracts subject to the State School Building Aid Law of 1949" provided for in Education Code sections 15700-15795.

[145] Education Code section 15706.

[146] Education Code section 15713.

[147] *POBRA*, *supra*, 170 Cal.App.4$^{th}$ at pgs. 1366-1369.

In response to the Chancellor's Office and Finance's comments that school districts are not required to participate in the State School Building Aid Law of 1949, and therefore, not mandated to comply with Public Contract Code section 20107, the claimants cite to their general argument that school construction is not voluntary. In support of this argument the claimants summarize the various Education Code provisions that provide school districts with bond authority and conclude that the ability to borrow is limited.[148] In addition, the claimants rely on a study and Proposition 55 ballot language, both of which state a need to build more schools in California, to conclude that the state's ability to fully fund needed school facilities is limited and subsequent actions by voters have note abated the need for school facilities.[149] From this general argument the claimants assert that school districts are mandated to participate in the various school facilities funding programs referred to in the test claim legislation.[150]

The State School Building Aid Law of 1949 is the only facilities funding program related to this test claim. In this general argument the claimants do not specifically address the State School Building Aid Law of 1949, nor do the claimants state why participation in the State School Building Aid Law of 1949 is practically compelled. Instead this general argument is the same argument made by the claimants in the *School Facilities Funding Requirements* (02-TC-30, 02-TC-43, and 09-TC-01) test claim.[151] As noted by the Commission in its decision, the question before the Commission is not whether additional school facilities are needed as suggested by the claimants, but whether school districts are legally or practically compelled to build them *and* to utilize various state grant programs for that purpose.[152] The Commission found that school districts are not mandated by the state to undertake discretionary projects and participate in the voluntary funding programs pled in the test claim, which would subject them to SFFRs.[153]

In the Commission's decision, the Commission noted that there are school districts that do not participate in the voluntary funding programs, and found that there is no evidence of "draconian" consequences for failing to participate in the programs. Rather, the district will simply forgo the

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[148] Exhibit D, comments filed by the claimants in response to comments filed by the Chancellor's Office and Finance, dated May 7, 2004, pgs. 6-7.

[149] *Id*. at pgs. 8-12, citing "School Facility Financing-A History of the Role of the State Allocation Board and Options for the Distribution of Proposition 1A Funds" (Cohen, Joel, February 1999.) and Proposition 55 Ballot Pamphlet from 2004, which identified a need to construct schools to house one million pupils and modernize schools for an additional 1.1 million students.

[150] Exhibit D, comments filed by the claimants in response to comments filed by the Chancellor's Office and Finance, dated May 7, 2004, pgs. 6-12, and 22.

[151] *School Facilities funding Requirements* (02-TC-30, 02-TC-43, and 09-TC-01) test claim, at <http://www.csm.ca.gov/sodscan/033011a.pdf> as of February 17, 2012.

[152] *Id.* at p. 49.

[153] *Ibid.*

state matching funds for new construction and will need to figure out another way to house its students.[154] In addition, the Commission found that the claimant failed to show that reliance on any of the alternatives to acquiring new school sites, building new school facilities or modernizing existing schools and accepting state school facilities funding would result in certain and severe penalties. Some of the alternatives that the Commission noted include transferring students to other schools, double session kindergarten classes, district boundary changes, multi-track year round scheduling, busing, and reopening closed school sites in the district.[155]

As in the *School Facilities Funding Requirements* (02-TC-30, 02-TC-43, and 09-TC-01) test claim, the claimants have not provided evidence in the record in this test claim to support a finding that districts are practically compelled to participate in the State School Building Aid Law of 1949. Here, the claimants have not provided evidence of certain or severe penalties resulting from a districts decision to not receive funding pursuant to the State School Building Aid Law of 1949.

Thus, based on the analysis in *Kern High School Dist.*, the Commission finds that Public Contract Code section 20107 does not impose any state-mandated activities.

13. **Minority, Women, and Disabled Business Enterprise Participation in Public Contracts (Pub. Contract Code, §§ 2000 and 2001; and Cal. Code Regs., tit. 5, §§ 59500, 59504, 59505, 59506, and 59509)**

The test claim statutes and regulations analyzed in this section address the actions that school districts and community college districts are authorized to take in order to aid in the participation in school district and community college district contracts by minority business enterprises (MBE), women business enterprises (WBE), and disabled veteran business enterprises (DVBE).

In general, for any contract over a specified amount school districts and community college districts are required to award the contract to the lowest responsible bidder.[156] However, Public Contract Code sections 2000 and 2001 authorizes "local agencies"[157] to award a contract to the lowest responsible bidder that also meets, or makes a good faith effort to meet, goals and requirements "established by the local agency" relating to participation in the contract by MBEs, WBEs, and DVBEs. Similarly, California Code of Regulations, title 5, sections 59500, 59504, 59505, 59506, and 59509, authorize a community college district to award a contract to the

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[154] *Id.* at pgs. 48 and 50.

[155] *School Facilities funding Requirements* (02-TC-30, 02-TC-43, and 09-TC-01) test claim, at <http://www.csm.ca.gov/sodscan/033011a.pdf> as of February 17, 2012, pgs. 50-51.

[156] Public Contract Code sections 20111 and 20651.

[157] "Local agency" is defined for purposes of Public Contract Code sections 2000 and 2001 as, "a county or city, whether general law or chartered, city and county, school district

lowest responsible bidder that meets the objective established by the district to meet the system-wide MBE/WBE/DVBE participation that districts are expected to contribute to achieving.[158]

The following discussion will first address whether the Public Contract Code sections applicable to local agencies impose state-mandated new programs or higher levels of service on school and community college districts. The discussion will then address whether the title 5 sections applicable to community college districts impose state-mandated new programs or higher levels of service on community college districts.

i. Public Contract Code Sections do not Impose State-Mandated New Programs or Higher Levels of Service on School and Community College Districts

Public Contract Code section 2000 authorizes a "local agency" to require bidders to a contract to meet or make a good faith effort to meet the local agency's goals and requirements regarding MBE and WBE participation in the contract. Public Contract Code section 2001 requires a "local agency" that requires bidders to meet or make a good faith effort with the local agency's goals and requirements for MBE, WBE, or DVBE participation in contracts to require in the general conditions und which bids will be received specified information related to the MBE, WBE, or DVBE participation in the contract.

The claimants and the Chancellor's Office disagree as to whether community college districts fall within the definition of a "local agency" subject to Public Contract Code sections 2000 and 2001.[159] However, for purposes of this test claim it is unnecessary to resolve this dispute. Even assuming that community college districts are included in the definition of "local agency," as further discussed below, the plain language of the code sections provide for a discretionary program and there is no evidence in the record that indicates that the claimants face practical compulsion to participate in the program.

The California Supreme Court held in *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) that when analyzing state mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[160] The court also held open the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion, where "'certain and severe … penalties' such as 'double … taxation' and other 'draconian' consequences,'"[161] would

[158] The claimants included in the test claim filing California Code of Regulations, title 5, sections 59500, 59504, 59505, 59506, and 59509, as added by Register 94, number 6 (January 1, 1994).

[159] Public Contract Code section 2000(d) defines "local agency as "a county or city, whether general law or chartered, city and county, school district, or other district." The dispute arises over the definition of "school district" and "other district" as used in these sections. From the plain language of the Public Contract Code sections 2000 and 2001 it is unclear if the Legislature intended "school district" or "other district" to include community college districts.

[160] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

[161] *Id*. at p. 751.

result if the local entity did not comply with the program, such that the local entity faces practical compulsion to participate. The court in *Dept of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, explained further that a finding of "practical compulsion" requires a concrete showing in the record that a failure to engage in the activity at issue will result in certain and severe penalties.[162]

Public Contract Code section 2000 provides in relevant part, "[A]ny local agency *may* require that a contract be awarded to the lowest responsible bidder who also . . . [¶] [m]eets goals and requirements *established by the local agency* relating to participation in the contract by minority business enterprises and women business enterprises."[163] If the bidder does not meet the goals and requirements established by the local agency, the contract can be awarded to the bidder if the bidder made a good faith effort to comply with the goals and requirements.[164] The remaining language of section 2000 relates to criteria used to determine if a bidder made a good faith effort to comply with the locally established goals and requirements.

Public Contract Code section 2001 provides that "[a]ny *local agency . . . that requires* that contracts be awarded to the lowest responsible bidder meeting, or making a good faith effort to meet, participation goals for minority, women, or disabled veteran business enterprises . . ." shall include specific provisions in the general conditions under which the bids will be received that require specific information from the bidders.

As indicated by the language of sections 2000 and 2001, local agencies are authorized to require bidders to meet locally established goals and requirements regarding MBE, WBE, and DVBE participation. However, local agencies are not legally compelled to impose these requirements. In addition, absent legal compulsion the claimants bear the burden of providing evidence to support the claimants' allegation that school districts and community college districts face practical compulsion to engage in an activity that the districts are not legally compelled to engage in. Absent any evidence of practical compulsion, the Commission cannot make a finding that practical compulsion exists. The claimants have not provided evidence that school districts and community college districts face practical compulsion to require bidders to meet locally established goals and requirements regarding MBE, WBE, and DVBE participation.

Based on the above discussion, the Commission finds that Public Contract Code sections 2000 and 2001 do not impose any reimbursable state-mandated activities on school districts or community college districts.

ii. Some of the Title 5 Sections Impose State-Mandated New Programs or Higher Levels of Service on Community College Districts

Title 5 sections 59500, 59504, 59505, 59506, and 59509, apply *only* to community college districts. The Title 5 sections set forth: (1) the Board of Governors intent to reach a statewide

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[162] *POBRA*, *supra*, 170 Cal.App.4th at pgs. 1366-1369.

[163] Public Contract Code section 2000(a)(1).

[164] Public Contract Code section 2000(a)(2).

goal for MBEs, WBEs, and DVBEs participation in community college district contracts; (2) requirements of bidders if a district elects to apply MBEs, WBEs, or DVBEs goals to any contract; and (3) monitoring and reporting of district participation in the Board of Governors statewide goal for MBEs, WBEs, and DVBEs participation in community college district contracts.

The statutory provisions that are the source of the goals in the title 5 sections were the subject of litigation that ultimately resulted in courts finding that the statutory provisions were unconstitutional. In 2005 and 2006, the title 5 sections were substantively amended.

Because of the history surrounding the use of MBE, WBE, and DVBE goals, in order to analyze whether title 5 sections 59500, 59504, 59505, 59506, and 59509, impose state-mandated new programs or higher levels of service, it is necessary to discuss: (1) the legal context in which these regulations were adopted; (2) whether the title 5 sections mandate community college districts to engage in activities; (3) whether the mandated activities constitute a new program or higher level of service; and (4) the effect of court decisions and executive orders issued after the adoption of these regulations, and the subsequent amendments to the regulations.

a. Legal Context

The title 5 sections were adopted in order to implement Education Code section 71028, which requires the Board of Governors to adopt regulations to ensure that the California Community Colleges, as a system, establish and apply the statewide participation goals for contracting with MBEs and WBEs specified in Public Contract Code section 10115. Public Contract Code section 10115, which has been found to be unconstitutional,[165] provides that state agencies, departments, officers, or other state governmental entities awarding contracts shall have statewide participation goals of not less than 15 percent for MBEs, 5 percent for WBEs, and 3 percent for DVBEs.

In addition, the title 5 sections were adopted within the constraints of the Equal Protection Clause of the federal and state constitutions. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall … deny to any person within its jurisdiction the equal protection of the laws."[166]

Under the Equal Protection Clause, the United States Supreme Court has found that gender based government action must be justified by an exceedingly persuasive justification.[167] This burden is met only by a showing that the classification serves important governmental objectives, and that the means employed are substantially related to the achievement of those objectives.[168] In regard to racial classifications, the Supreme Court has found that racial classifications are inherently "suspect" and must meet strict scrutiny in order to be constitutional. In the context of affirmative

[165] *Monterey Mechanical Co. v. Wilson* (9th Cir. 1997) 125 F.3d 702.

[166] U.S. Constitution, 14th Amendment, section 1.

[167] *Mississippi University for Women v. Hogan* (1982) 458 U.S. 718, 723-724.

[168] *Ibid.*

action, in order to meet strict scrutiny, the classifications must be a narrowly tailored remedy for past discrimination, active or passive, by the governmental entity making the classification.[169]

Like the United States Constitution, the California Constitution provides that, "A person may not be . . . denied equal protection of the laws."[170] In addition, under the California Constitution, classifications based on race were found to be inherently suspect and subject to strict scrutiny.[171] Unlike the Equal Protection Clause of the United States Constitution, under California law, a classification based on gender is considered "suspect" for purposes of an equal protection analysis, and therefore, must also meet strict scrutiny.[172]

Within this constitutional framework, federal and state courts have examined gender and racial classifications, and have found affirmative action programs setting up rigid quotas violative of the Equal Protection clauses of the United States and California Constitution.[173]

b. The Title 5 Sections Mandate Community College Districts to Engage in Appropriate Efforts to Provide Participation Opportunities, and Monitoring and Reporting Activities

It is within the constraints of the Equal Protection Clause of both the United States and the California Constitutions and the court cases interpreting these clauses that the title 5 sections were adopted by the Board of Governors. The result is a regulatory scheme with language strongly indicating the Board of Governors' *desire* to achieve a statewide goal of a specific percent of MBE, WBE, and DVBE participation in district contracts, but also a regulatory scheme careful not to *actually* require individual districts to impose the MBE, WBE, and DVBE participation goals so as to avoid a requirement that possibly violates federal and state constitutional law.

Title 5 section 59500 provides:

> (a) The California Community Colleges shall provide opportunities for minority, women, and disabled veteran business enterprise participation in the award of district contracts consistent with this Subchapter [Cal. Code Regs., tit. 5, §§ 59500-59509]. The statewide goal for such participation is not less than 15 percent minority business enterprise participation, not less than 5 percent women business enterprise participation, and not less than 3 percent disabled veteran business participation of the dollar amount expended by all districts each year for

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[169] *Wygant v. Jackson Board of Education* (1986) 476 U.S. 267, 280-283.

[170] California Constitution, article 1, section 7.

[171] *Hiatt v. City of Berkeley* (1982) 130 Cal.App.3d 298, 309-310.

[172] *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17-20. Also *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37.

[173] *Regents of University of California v. Bakke* (1978) 438 U.S. 265; and *Hiatt v. City of Berkeley*, *supra*, 130 Cal.App.3d 298.

> construction, professional services, materials, supplies, equipment, alteration, repair, or improvement. However, each district shall have flexibility to determine whether or not to seek participation by minority, women, and disabled veteran business enterprises for any given contract.
>
> (b) Nothing in this Subchapter authorizes any district to discriminate in awarding contracts on the basis of ethnic group identification, ancestry, religion, age, sex, race, color, or physical or mental disability.[174]

Focusing on the language "The California Community Colleges shall provide opportunities... ," the claimants argue that this means that "colleges *shall* provide these opportunities."[175] Additionally, the claimants argue that the above language:

> [C]learly indicate[s] that community college districts are required to provide opportunities for minority, women and disabled veteran business enterprise participation in the award of district contracts, in a minimum amount measured in percentages of dollar amounts awarded, and that a district shall have flexibility in deciding which contracts will be used as a vehicle of compliance.[176]

The claimants misinterpret the language section 59500(a). Section 59500(a) sets forth intent language of the Board of Governors in regard to a *statewide* goal for the "California Community Colleges" as a statewide *system*. Section 59500(a) does not impose a mandatory duty upon individual community college districts to attain MBE, WBE, and DVBE participation in a "minimum amount." Instead it indicates an intent, expectation, and authorization for districts to apply MBE, WBE, and DVBE goals, but stops short of *requiring* districts to apply the MBE, WBE, and DVBE goals to any district contracts.

To interpret section 59500(a), or any of the title 5 sections, as requiring community college districts to provide opportunities to MBEs, WBEs, and DVBEs to participate in district contracts in a specified minimum percentage, as suggested by the claimants, would be inconsistent with the remaining regulatory scheme. In defining "goal" as used in the title 5 sections, section 59502 provides "Goals *are not* quotas, set-asides, or rigid proportions."[177] Rather, "goal" as defined in the title 5 sections is a "numerically expressed objective for *systemwide* MBE/WBE/DVBE participation that districts are *expected* to contribute to achieving."[178] Also, section 59504 provides that community college districts are to undertake efforts to contribute to the systemwide goal "as the *district may deem* appropriate pursuant to Section 59505." Section 59505 provides

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[174] Register 94, number 6.

[175] Exhibit D, Comments filed by the claimants in response to comments filed by Chancellor's Office and Finance, dated May 7, 2004, p. 28-29. (Original emphasis.)

[176] *Ibid.*

[177] California Code of Regulations, title 5, section 59502(f) (Register 94, No. 6) (Emphasis added). This section was not pled by the claimants.

[178] *Ibid.* (Emphasis added.)

that, "*If a district elects to apply* MBE/WBE/DVBE goals to any contract ..." then the community college district is required to include a statement in its bidding notice that certain conditions must be met in order for a bidder to be considered a responsive bidder.[179] In addition to conflicting with the regulatory scheme, requiring community college districts to provide opportunities for MBEs and WBEs in a specified minimum amount would be violative of the constitutional constraints described above. Thus, the title 5 sections provide community college districts the discretion to apply MBE/WBE/DVBE goals to district contracts, but do not require districts to actually do so.

Although community college districts are not required to apply MBE/WBE/DVBE goals to district contracts, title 5 section 59504 mandates community college districts to undertake "appropriate efforts" to provide participation opportunities for MBEs/WBEs/DVBEs in district contracts. Section 59504 provides in relevant part:

> Each district shall undertake appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts. Appropriate efforts may include vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of this [Cal. Code Regs., tit. 5, § 59500 et seq.], developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers, or such other activities they [*sic*] may assist interested parties in being considered for participation in district contracts.[180]

Based on the plain language of the section 59504, community college districts are mandated to undertake appropriate efforts as described in the section. It is important to note the distinction between the "appropriate efforts" required by section 59504, and the goals for MBE, WBE, and DVBE participation that community college districts can elect to apply. The "appropriate efforts" mandated by section 59504 relate to activities independent of any individual contract (e.g. orientation programs, and developing a list of MBEs, WBEs, and DVBEs). Thus, this activity excludes the application of MBE, WBE, and DVBE goals to district contracts.

In addition to taking "appropriate efforts," community college districts are mandated to engage in monitoring MBE, WBE, and DVBE participation in district contracts and to report the level of participation to the Chancellor of the California Community Colleges. Title 5 section 59509 provides:

> Each district shall monitor its participation as specified in [Cal. Code Regs., tit. 5, §§ 59500-59509]. Beginning October 15, 1994, and by each October 15 thereafter, each district shall report to the Chancellor the level of participation by minority, women, and disabled veteran business enterprises pursuant to [Cal. Code Regs., tit. 5, §§ 59500-59509] for the previously completed fiscal year.

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[179] California Code of Regulations, title 5, section 59505(a) (Register 94, No. 6).

[180] Register 94, number 6.

> Even if a district elects not to apply minority, women, and disabled veteran business enterprise goals to one or more particular contract(s), all such contracts shall be reported to the Chancellor and shall be taken into account in determining whether the community college system as a whole has achieved the goals set forth in Section 59500.
>
> The Chancellor shall prescribe forms to be used by the districts in making their yearly reports.[181]

Title 5 sections 59505(d) and 59506(a) provide the specification referred to in section 59509. Title 5 section 59505(d) directs districts to:

> [A]ssess the status of each of its contractors and, if the contractor is a certified or self-certified minority, women, and disabled veteran business enterprise subcontractors and/or suppliers to the satisfaction of the district, the district may include the actual dollar amount attributable to minority, women, and disabled veteran business enterprise participation in reporting its participation activity pursuant to Section 59509.[182]

Section 59506 provides:

> (a) Each district shall establish a process to collect and retain certification information by a business enterprise claiming minority, women, and disabled veteran business enterprise status.
>
> (b) The process described in subsection (a) shall include notification to responsive bidders subject to Section 59505(a) of the requirements for qualification as a responsive bidder.[183]

Based on the language of title 5 sections 59505(d), 59506(a), and 59509, even if a community college district does not apply MBE, WBE, and DVBE participation *goals* to its contracts, the district is mandated to monitor and report MBE, WBE, and DVBE participation levels in community college district contracts to the Chancellor as specified in the title 5 sections.

Although section 59506(b) provides that the process to collect and retain certification information described in 59506(a) is to include notification of the requirements for qualification as a responsive bidder, this requirement is limited to "responsive bidders *subject* to Section 59505(a)." As discussed above, section 59505(a) provides that community college districts can *elect* to apply MBE, WBE, and DVBE goals to district contracts. Thus, the requirement to include notification of the requirements for qualification as a responsive bidder in the process to collect and retain certification information is triggered by an underlying discretionary decision

[181] Register 94, number 6.

[182] *Ibid.*

[183] *Ibid.*

made by a community college district, and therefore, not mandated by the state under *Kern High School Dist*.

Thus, based on the above discussion title 5 sections 59504, 59505(d), 59506(a), and 59509, *community college districts* are mandated to engage in the following activities:

1. Undertake appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts for repair and maintenance. Appropriate efforts may include: (1) vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of California Code of Regulations, title 5, section 59500 et seq.; (2) developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers; or (3) such other activities that may assist interested parties in being considered for participation in district contracts.

   Appropriate activity does not include the application of the systemwide goals established in California Code of Regulations, title 5, section 59500 to district contracts. (Cal. Code Regs., tit. 5, § 59504 (Register 94, No. 6).)

2. Assess the status of each of its contractors regarding whether a contractor is a certified or self-certified minority, women, and disabled veteran business enterprise subcontractor and/or supplier. (Cal. Code Regs., tit. 5, §§ 59505(d) and 59509 (Register 94, No. 6).)

3. Establish a process to collect and retain certification information by a business enterprise claiming minority, women, and disabled veteran business enterprise status. (Cal. Code Regs., tit. 5, §§ 59506(a) and 59509 (Register 94, No. 6).)

4. Each October 15, report to the Chancellor the level of participation by minority, women, and disabled veteran business enterprises in community college district contracts for repair and maintenance for the previously completed fiscal year. (Cal. Code Regs., tit. 5, § 59509 (Register 94, No. 6).)

c. <u>The Activities Mandated by the Title 5 Sections Constitute a New Program or Higher Level of Service</u>

The activities mandated by the title 5 sections constitute a "program" by imposing unique requirements on community college districts to implement the following state policy:

> [T]o aid the interests of minority, women, and disabled veteran business enterprises in order to preserve reasonable and just prices and a free competitive enterprise, to ensure that a fair proportion of the total number of contracts or subcontracts for commodities, supplies, technology, property, and services are awarded to minority, women, and disabled veteran business enterprises, and to maintain and strengthen the overall economy of the state.[184]

[184] Public Contract Code section 10115 (Stats. 1992, ch. 1329). Public Contract Code section 10115 sets forth the MBE, WBE, and DVBE goals used in the title 5 sections.

In addition, the claimants have pled the title 5 regulations as filed on December 29, 1993, and operative on January 28, 1994.[185] Immediately prior to 1994, community college districts were not required to engage in the mandated activities. As a result, the Commission finds that the activities mandated by the title 5 sections constitute a state-mandated new program or higher level of service for community college districts.

d. Court Decisions and Executive Orders Issued After the Adoption of the Title 5 Sections

On January 28, 1994 the title 5 sections became operative. In 1997, the statutory scheme that laid out the statewide participation goals that were to be included in the title 5 sections was held violative of the Equal Protection Clause of the United States Constitution by a federal court of appeals.[186] In 1998, Governor Pete Wilson issued an executive order directing the California Community Colleges to take all necessary action to comply with the intent and the requirements of the executive order which directed all state agencies to cease enforcement of the MBE and WBE participation goals and good faith effort requirements of Public Contract Code section 10115 et seq.[187] In 2001, a California Court of Appeals recognized the statutory scheme as unconstitutional, but found the requirement on state agencies to report MBE, WBE, and DVBE participation levels in state contracts to the Legislature to be constitutional and severable.[188] In 2005 and 2006, the title 5 sections were substantively amended.[189]

The title 5 sections did not contain the same requirements imposed by Public Contract Code sections 10115 et seq. found to be unconstitutional by the decisions described above. In addition, because the title 5 regulations were not placed in issue in any of the decisions finding Public Contract Code section 10115 et seq. unconstitutional, the provisions of the title 5 regulations are presumed to be constitutional. As a result, the title 5 regulations remained in effect and unchanged until the 2005 and 2006 amendments.

In 2005, the Board of Governors repealed the reporting requirement found in title 5 section 59509.[190] This amendment became operative on April 1, 2005. In 2006, the Board of Governors amended the regulations to make discretionary all monitoring requirements of the 1994 version of the title 5 sections.[191] This amendment became operative on April 14, 2006.

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[185] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 85. This coincides with the regulations as added in Register 94, number 6, operative January 28, 1994.

[186] *Monterey Mechanical Co. v. Wilson* (9th Cir. 1997) 125 F.3d 702.

[187] Governor Pete Wilson's Executive Order No. W-172-98, issued March 10, 1998.

[188] *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16.

[189] Register 2005, number 10 (March 2, 2005); and Register 2006, number 17 (March 15, 2006).

[190] Register 2005, number 10.

[191] Register 2006, number 17.

Thus, the only mandated activity which remains in effect is the mandate to undertake appropriate efforts to provide participation opportunities.

Based on the above discussion, the Commission finds that the title 5 sections require community college districts to engage in the following state-mandated new programs or higher levels of service for contracts for repair and maintenance that exceed the dollar amounts and project hours specified in subheading “B” of this analysis:

1. Undertake appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts for repair and maintenance. Appropriate efforts may include: (1) vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of California Code of Regulations, title 5, section 59500 et seq.; (2) developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers; or (3) such other activities that may assist interested parties in being considered for participation in district contracts.

   Appropriate activity does not include the application of the systemwide goals established in California Code of Regulations, title 5, section 59500 to district contracts. (Cal. Code Regs., tit. 5, § 59504 (Register 94, No. 6).)

2. Assess the status of each of its contractors regarding whether a contractor is a certified or self-certified minority, women, and disabled veteran business enterprise subcontractor and/or supplier. (Cal. Code Regs., tit. 5, §§ 59505(d) and 59509 (Register 94, No. 6), beginning July 1, 2001 through April 13, 2006.)

3. Establish a process to collect and retain certification information by a business enterprise claiming minority, women, and disabled veteran business enterprise status. (Cal. Code Regs., tit. 5, §§ 59506(a) and 59509 (Register 94, No. 6), beginning July 1, 2001 through April 13, 2006.)

4. Each October 15, report to the Chancellor the level of participation by minority, women, and disabled veteran business enterprises in community college district contracts for repair and maintenance for the previously completed fiscal year. (Cal. Code Regs., tit. 5, § 59509 (Register 94, No. 6), beginning July 1, 2001 through March 31, 2005.)

**Issue 2: The Test Claim Statutes and Regulations Impose Costs Mandated by the State within the Meaning of Government Code Sections 17514 and 17556**

The final issue is whether the state-mandated new programs or higher levels of service impose costs mandated by the state,[192] and whether any statutory exceptions listed in Government Code section 17556 apply to the claim. Government Code section 17514 defines “cost mandated by the state” as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or

[192] *Lucia Mar*, *supra*, 44 Cal.3d 830, 835; Government Code section 17514.

> any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

"Any increased costs" for which claimants may seek reimbursement include both direct and indirect costs.[193] Government Code section 17556 sets forth a number of exceptions under which the Commission is prohibited from finding costs mandated by the state as defined by section 17514. Most relevant to the arguments raised in this claim, is Government Code section 17556(d) and (e). Subdivision (d) states that the Commission shall not find costs mandated by the state when a school district has the authority to levy a fee sufficient to pay for the mandated program or increased level of service. Subdivision (e) provides that the Commission shall not find costs mandated by the state when the statute, executive order, or an appropriation in a Budget Act or other bill includes additional revenue that is specifically intended to fund the costs of the state mandate in an amount sufficient to fund the costs of the state mandate.

Government Code section 17564 states that no test claim or reimbursement claim shall be made, nor shall any payment be made, unless claims exceed $1,000. The claimants estimate that the costs to carry out the program exceed $1,000 per year.[194] Thus, the claimants have met the minimum burden of showing costs necessary to file a test claim pursuant to Government Code section 17564.

However, Finance argues that school districts and community college districts receive, or can receive, funding through various existing state grants and programs, such that any costs incurred as a result of the activities found to constitute state-mandated new programs or higher levels of service are offset, and thus, not reimbursable under Government Code section 17556(e).[195] In addition, Finance argues that school districts are authorized to levy fees against any construction within its district boundaries for the purpose of funding school construction, and thus, under Government Code section 17556(d) the Commission cannot find a reimbursable mandate because the district has fee authority sufficient to pay for the mandated program.[196] The following discussion will address Finance's arguments in order.

### A. There are no Appropriations in the Budget Act or Other Bill that Include Additional Revenue that are Specifically Intended to Fund the Costs of the State Mandates Found in this Test Claim, and thus, Government Code Section 17556(e) Does Not Apply to Deny this Claim.

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[193] Government Code section 17564.

[194] Exhibit A, test claim filed by claimants, dated June 24, 2003, Exhibit 1 "Declaration of William McGuire" p. 20; and "Declaration of Cheryl Miller" p. 23.

[195] Exhibit C, comments filed by the Finance, dated April 16, 2004, p. 2; and Exhibit H, comments filed by the Finance, dated May 1, 2012.

[196] *Ibid*.

Government Code section 17556(e) provides that the Commission shall not find costs mandated by the state when the statute, executive order, or an appropriation in a Budget Act or other bill includes additional revenue that is specifically intended to fund the costs of the state mandate in an amount sufficient to fund the costs of the state mandate. As will be discussed further below, there are no appropriations in the Budget Act or other bill, including the programs cited to by Finance, that includes additional revenue that is *specifically* intended to fund the costs of the state mandates in an amount sufficient to fund the costs of the state mandates. As a result, section 17556(e) does not apply to deny this claim.

Finance cites to the State School Facilities Program (SFP),[197] the State School Deferred Maintenance Program (DMP),[198] the Community Colleges Deferred Maintenance and Special Repair Program (DMSRP),[199] the Emergency Repair Program (ERP),[200] and a "Routine Restricted Maintenance Fund"[201] from which, Finance argues, the cost of the state-mandated new programs or higher levels of service found in this test claim should be completely offset.

The state-mandated new programs or higher levels of service found in this test claim require activities associated with the *contracting* process for non-emergency repair and maintenance projects. The grant programs cited to by Finance provide funding for educational facilities construction projects, including repair and maintenance.

The SFP is a voluntary program that provides partial funding grants for school districts to acquire school sites, construct new school facilities, or modernize existing school facilities. There are a number of requirements that school districts must meet in order to receive state funding under the SFP including the requirement to establish a "Routine Restricted Maintenance Fund" in the district's general fund in order to pay for ongoing and major maintenance of school buildings. A portion of the money placed into the "Routine Restricted Maintenance Fund" can count toward the amount of funds required to be contributed by a district in order to voluntarily participate in the DMP, which provides matching dollars for the purpose of major repairs and other items of maintenance. The ERP is another voluntary grant program that provides grants to school districts for the purpose of addressing "emergency facilities needs." The DMSRP is a voluntary grant program that provides community college districts matching dollars for the purpose of unusual, nonrecurring work to restore a facility to a safe and continually useable condition for which it was intended.

As discussed above, the state-mandated new programs or higher levels of service found in this test claim are limited to apply *only* to *non-emergency* repair or maintenance services or *non-emergency* repair and maintenance public works projects subject to specific limitations based on

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[197] Education Code section 17070.10 et seq.

[198] Education Code section 17582-17588.

[199] Education Code section 84660.

[200] Education Code section 17592.70 et seq.

[201] Education Code section 17070.75.

the cost of the repair and maintenance and the hours needed to complete the repair and maintenance. Thus, the grants received under the SFP and the ERP that are for the purpose of new construction, non-repair, non-maintenance, and emergency projects, cannot be used as offsets for the purpose of the state-mandated new programs or higher levels of service found in this test claim.

In addition, the requirement to engage in the new state-mandated activities found in this test claim is not is not triggered by a district's participation in any of the above funding programs, nor is the available funding specifically intended to fund the costs of the state-mandated activities. Also, because the above programs are voluntary programs, at any given time a school district or community college district that chooses not to participate in the SFP, the DMP, or the DMSRP, would not have *any* additional revenue to fund the costs of the state-mandated new programs or higher levels of service found in this test claim. Thus, Government Code section 17556(e) does not apply to deny this claim.

However, as described below, to the extent that a school district or community college district receives funds made available through the programs, those funds may be used to offset some of the costs of the state-mandated new programs or higher levels of service found in this test claim, which consist of activities associated with the *contracting process* for repairs and maintenance services and projects.

**1. Modernization Grants from the SFP can be Identified as Potential Offsetting Revenue in the Parameters and Guidelines for School Districts**

The SFP grants for modernization must be used for an improvement to extend the useful life of, or to enhance the physical environment of, the school, but cannot be used for *routine* maintenance or repair.[202] For grant applications filed before April 29, 2002, the funding provided was on a 80/20 state and local match basis.[203] After April 29, 2002, the funding provided is on a 60/40 state basis. If a school district is unable to meet its match and can meet the financial hardship assistance provisions of Education Code section 17075.10 et seq. and its implementing regulations, the district may be eligible for additional state funding of up to 100 percent of the local share of cost.[204]

Because the repair and maintenance services and projects that are subject to the state-mandated new programs or higher levels of service found in this test claim are broadly defined, they include repairs and maintenance that are *not* routine and that extend the useful life of, or enhance the physical environment of, the school. Thus, the SFP modernization grants can be used for some repair and maintenance services and projects that are subject to this claim. In addition, an allowable use of the SFP modernization grant is for "construction management" of the project. Although the term "construction management" is not defined in the Education Code, the

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[202] Education Code section 17074.25(a).

[203] Education Code sections 17074.15 and 17074.16.

[204] Education Code section 17075.10 et seq., and California Code of Regulations, title 5, section 1859.80 et seq.

Business and Professions Code describes "construction project management" as including, but not limited to:

> . . . construction project design review and evaluation, construction mobilization and supervision, bid evaluation, project scheduling, cost-benefit analysis, claims review and negotiation, and general management and administration of a construction project.[205]

As described in the Business and Professions Code, construction management can include activities associated with the contracting process, including bidding. Thus, funds received from a modernization grant from the SFP for non-routine repair and maintenance projects can be used by school districts for the costs of the state-mandated new programs or higher levels of service. However, a school district is not required to use these funds for the costs of the state-mandated new programs or higher levels of service associated with a non-routine repair and maintenance project, unless the district receives financial hardship assistance of 100 percent of the project, in which case a district would not have any reimbursable costs.

If a school district does not receive financial hardship assistance of 100 percent of a non-routine repair and maintenance project, the Commission finds that modernization grant funds from the SFP for that project constitute potential offsetting revenue *if* the school district uses the funding for the state-mandated new programs or higher levels of service found in this test claim. Modernization funds from the SFP will be identified as potential offsetting revenue in the parameters and guidelines.

**2. Funds Received from the DMP can be Identified as Potential Offsetting Revenue in the Parameters and Guidelines for School Districts**

Funds received by school districts from the DMP can also be used for the costs of the state-mandated new programs or higher levels of service found in this test claim. Funds from the DMP are provided on a dollar for dollar match and must be used for the purpose of:

> . . . major repair or replacement of plumbing, heating, air conditioning, electrical, roofing, and floor systems, the exterior and interior painting of school buildings, the inspection, sampling, and analysis of building materials to determine the presence of asbestos-containing materials, the encapsulation or removal of asbestos-containing materials, the inspection, identification, sampling, and analysis of building materials to determine the presence of lead-containing materials, the control, management, and removal of lead-containing materials, and any other items of maintenance approved by the State Allocation Board.[206]

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[205] Business and Professions Code section 6731.3, which provides that a registered civil engineer may also practice or offer to practice, either in a public or private capacity, construction project management services.

[206] Education Code section 17582.

These uses can fall within the type of repairs and maintenance services and projects that are subject to new state-mandated activities in this test claim.

In addition, although the DMP does not expressly state that the cost of repair and maintenance services and projects includes the cost of *contracting* for the repair and maintenance, the DMP does not expressly state that it does not. In construing a statute, it is a fundamental rule that a statute must be given a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity.[207] The apparent purpose of lawmakers in enacting the DMP is to provide state matching aid for the purpose of maintaining school facilities. As discussed in this analysis, a necessary consequence of engaging in some repairs and maintenance projects is the public contracting process including the reimbursable state-mandated programs or higher levels of service found in this test claim. A practical interpretation of the allowable use of the DMP funds is that the *contracting process* for a repair and maintenance service or project, when necessary, is part and parcel of the repair and maintenance service or project itself. As a result, funds received from the DMP can be used by school districts for the costs of the state-mandated new program or higher level of service.

However, the state does not pay for the full costs of maintenance under the DMP. In addition, the DMP does not *require* the state funds from the DMP be used for the costs of the state-mandated new programs or higher levels of service found in this test claim. Thus, the Commission finds that if a school district receives funds under the DMP, those funds constitute potential offsetting revenue *if* the district uses those funds for the state-mandated new programs or higher levels of service found in this test claim. Funds received from the DMP will be identified in the parameters and guidelines as potential offsetting revenue.

**3. Funds Received from the DMSRP can be Identified as Potential Offsetting Revenue in the Parameters and Guidelines for Community College Districts**

Funds under the DMSRP are made available on a dollar for dollar match basis to community college districts for deferred maintenance and special repair, which is defined as "unusual, nonrecurring work to restore a facility to a safe and continually usable condition for which it was intended."[208] In addition, the DMSRP, like the DMP, is silent as to the use of funds from the DMSRP for the cost of *contracting* for the repair and maintenance services and projects allowable under the DMSRP. However, for the same reasons discussed for the DMP, the Commission finds that a practical interpretation of the allowable use of the DMSRP funds is that the *contracting process* for a repair and maintenance service or project, when necessary, is part and parcel of the repair and maintenance service or project itself. Thus, DMSRP funds can be used for the state-mandated new programs or higher levels of service found in this test claim.

In addition, like the DMP, the DMSRP does not pay for the full costs of maintenance, and does not require the DMSRP funds to be used for the state-mandated new programs or higher levels of

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[207] *Welch v. Oakland Unified School Dist.* (2001) 91 Cal.App.4th 1421, 1428.

[208] Education Code section 84660.

service. As a result, the Commission finds that if a community college district receives funds under the DMSRP, those funds constitute potential offsetting revenue *if* the district uses those funds for the state-mandated new programs or higher levels of service found in this test claim. Funds received from the DMSRP will be identified in the parameters and guidelines as potential offsetting revenue.

**B. School Districts do not have the Authority to Levy Service Charges, Fees, or Assessments Sufficient to Pay for the Mandated Program or Increased Level of Service, and thus, Government Code Section 17556(d) Does Not Apply to Deny this Claim.**

Finance argues that Education Code sections 17620-17626 authorizes school districts to levy fees against any construction within its district boundaries for the purpose of funding school construction, and as a result, the Commission cannot find costs mandated by the state pursuant to Government Code section 17556(d).[209] Under Government Code section 17556(d), the Commission is prohibited from finding costs mandated by the state where a school district has "the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

Education Code section 17620 authorizes the governing board of school districts to levy a fee against any construction within the boundaries of the district, "for the purpose of funding construction or reconstruction of school facilities." The fee authority provided to school districts by Education Code section 17620 is limited by Government Code section 65995. Government Code section 65995, limits the fee that districts can charge to $1.93 per square foot of assessable space in the case of residential construction, and $0.31 per square foot of chargeable covered and enclosed space in the case of any commercial or industrial construction.

In addition, "construction or reconstruction of school facilities" is defined by section 17620(a)(3) to *exclude* any item of expenditure for any of the following: (1) the regular maintenance or routine repair of school buildings and facilities; (2) the inspection, sampling, analysis, encapsulation, or removal of asbestos-containing materials, except where incidental to school facilities construction or reconstruction for which the expenditure of fees or other consideration collected pursuant to this section is not prohibited; and (3) the purposes of deferred maintenance described in Education Code section 17582.

The new state-mandated activities found in this test claim apply only to non-emergency repair and maintenance subject to specific limitations based on the cost of the repair and maintenance and the hours needed to complete the repair and maintenance. This *can* include regular maintenance or routine maintenance and deferred maintenance as described in Education Code section 17582, for which a district cannot levy a fee. Thus, the fee authority cannot be considered sufficient to pay for the mandated program or increased level of service. As a result, Government Code section 17556(d) does not apply to deny this claim.

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[209] Exhibit C, comments filed by the Finance, dated April 16, 2004, p. 2; and Exhibit H, comments filed by the Finance, dated May 1, 2012.

However, to the extent that a school district receives revenue from the fee authority pursuant to Education Code section 17620 that can be applied to the repair and maintenance projects subject to the reimbursable activities in this test claim, the fee authority constitutes a potential offset to the costs imposed by those activities. Revenue resulting from this fee authority will be identified as potential offsetting revenue in the parameters and guidelines.

Based on the above discussion, the Commission finds that the state-mandated new programs or higher levels of service impose costs mandated by the state within the meaning of article XIII B, section 6, and Government Code sections 17514 and 17556.

## IV. Conclusion

For the reasons discussed above, the Commission finds that the following activities constitute a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, but only when those activities are triggered by repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593, and 81601, and when the repair and maintenance must be let to contract under the following circumstances:

1. For *K-12 school districts*, when repairs and maintenance do not constitute a public project as defined by Public Contract Code section 22002(c), and the repairs and maintenance are not an emergency as set forth in Public Contract Code section 20113; and
    a. for repairs, and maintenance as defined by Public Contract Code section 20115, that exceed $50,000; unless
        1. the district has an average daily attendance of less than 35,000, and the total number of hours on the job does not exceed 350 hours; or
        2. the district has an average daily attendance of 35,000 or greater, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.
2. For *K-12 school districts*, when repairs and maintenance constitute a public project as defined by Public Contract Code section 22002(c), and the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for repair and maintenance public projects that exceed $15,000; unless
        1. the district has an average daily attendance of less than 35,000, and the total number of hours on the job does not exceed 350 hours; or
        2. the district has an average daily attendance of 35,000 or greater, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.
3. For *community college districts*, when repairs and maintenance do not constitute a public project as defined by Public Contract Code section 22002(c), and the repairs and maintenance are not an emergency as set forth in Public Contract Code section 20654; and

  a. for repairs, and maintenance as defined by Public Contract Code section 20656, that exceed $50,000; unless
     1. the district has full-time equivalent students of fewer than 15,000, and the total number of hours on the job does not exceed 350 hours; or
     2. the district has full-time equivalent students of 15,000 or more, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.

4. For *community college districts*, when repairs and maintenance constitute a public project as defined by Public Contract Code section 22002(c), and the project is not an emergency as set forth in Public Contract Code section 20654; and
   a. for repair and maintenance public projects that exceed $15,000; unless
      1. the district has full-time equivalent students of fewer than 15,000, and the total number of hours on the job does not exceed 350 hours; or
      2. the district has full-time equivalent students of 15,000 or more, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.
5. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and
   a. for contracts entered into between July 1, 2001 and January 1, 2007, the project cost will exceed $25,000;
   b. for contracts entered into between January 1, 2007 and January 1, 2012, the project cost will exceed $30,000; or
   c. for contracts entered into after January 1, 2012, the project cost will exceed $45,000.

Under the circumstances of the foregoing projects, the following activities are reimbursable:

<u>For K-12 School Districts and Community College Districts</u>

1. Specify the classification of the contractor's license, which a contractor shall possess at the time a contract for repair or maintenance is awarded, in any plans prepared for a repair or maintenance public project and in any notice inviting bids required pursuant to the Public Contract Code. (Pub. Contract Code, § 3300(a) (Stats. 1985, ch. 1073).)
2. Include in any public works contract for repair and maintenance, which involves digging trenches or other excavations that extend deeper than four feet below the surface, a clause that provides the following:

   (a) That the contractor shall promptly, and before the following conditions are disturbed, notify the local public entity, in writing, of any:

> (1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.
>
> (2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids.
>
> (3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.
>
> (b) That the local public entity shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.
>
> (c) That, in the event that a dispute arises between the local public entity and the contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.

(Pub. Contract Code, § 7104 (Stats. 1989, ch. 330).)

3. Set forth in the plans or specifications for any public work for repair and maintenance which may give rise to a claim of $375,000 or less which arise between a contractor and a K-12 school district or community college district, excluding those districts that elect to resolve claims pursuant to Article 7.1 (commencing with section 10240) of Chapter 1 of Part 2 of the Public Contract Code. (Pub. Contract Code, § 20104(c) (Stats. 1994, ch. 726).)[210]

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[210] "Claim," as used in activities "3. – 6.," is defined by Public Contract Code section 20104(b)(2) is defined as:

> [A] separate demand by the contractor for (A) a time extension, (B) payment of money or damages arising from work done by, or on behalf of, the contractor pursuant to the contract for a public work and payment of which is not otherwise expressly provided for or the claimant is not otherwise entitled to, or (C) an amount the payment of which is disputed by the local agency.

4. For claims of less than $50,000 resulting from a public works contract for repair or maintenance, respond in writing to any written claim within 45 days of receipt of the claim. (Pub. Contract Code, § 20104.2(b)(1) (Stats. 1994, ch. 726).)
5. For claims of more than $50,000 and less than or equal to $375,000 resulting from a public works contract for repair or maintenance, respond in writing to any written claim within 60 days of receipt of the claim. (Pub. Contract Code, § 20104.2(c)(1) (Stats. 1994, ch. 726).)
6. Upon demand by a contractor disputing a K-12 school district's or community college district's response to a claim, schedule a meet and confer conference within 30 days for settlement of the dispute. (Pub. Contract Code, § 20104.2(d) (Stats. 1994, ch. 726).)
7. Review each payment request from a contractor for repair and maintenance as soon as practicable after the receipt of the request to determine if the payment request is a proper payment request. "As soon as practicable" is limited by the seven day period in the activity mandated by Public Contract Code section 20104.50(c)(2). (Pub. Contract Code, § 20104.50(c)(1) (Stats. 1992, ch. 799).)
8. Return to the contractor for repair and maintenance any payment request determined not to be a proper payment request suitable for payment as soon as practicable, but no later than seven days after receipt of the request.

   A returned request shall be accompanied by a document setting forth in writing the reasons why the payment request is not proper. (Pub. Contract Code, § 20104.50(c)(2) (Stats. 1992, ch. 799).)
9. Require the provisions of Article 1.7, Chapter 1, Part 3, Division 2 of the Public Contract Code (Pub. Contract Code, § 20104.50), or a summary thereof, to be set forth in the terms of any repair and maintenance contract. (Pub. Contract Code, § 20104.50(f) (Stats. 1992, ch. 799).)
10. In any invitation for bid and in any repair and maintenance contract documents, include provisions to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract. This excludes invitations for bid and contract documents for projects where there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. Sec. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities. (Pub. Contract Code, § 22300(a) (Stats. 1988, ch. 1408).)
11. Before awarding a repair and maintenance contract to a contractor for a project that *is not* governed by Public Contract Code section 20103.5 (which addresses projects that involve federal funds), verify with the Contractors' State Licensing Board that the contractor was properly licensed when the contractor submitted the bid. (Bus. & Prof. Code, § 7028.15(e) (Stats. 1990, ch. 321).)

12. Before making the first payment for work or material to a contractor under any repair and maintenance contract for a project where federal funds are involved, verify with the Contractors' State Licensing Board that the contract was properly licensed at the time that the contract was awarded to the contractor. (Pub. Contract Code, § 20103.5 (Stats. 1990, ch. 1414).)

For Community College Districts Only

1. Undertake appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts for repair and maintenance. Appropriate efforts may include: (1) vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of California Code of Regulations, title 5, section 59500 et seq.; (2) developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers; or (3) such other activities that may assist interested parties in being considered for participation in district contracts.

   Appropriate activity does not include the application of the systemwide goals established in California Code of Regulations, title 5, section 59500 to district contracts. (Cal. Code Regs., tit. 5, § 59504 (Register 94, No. 6).)

2. Assess the status of each of its contractors regarding whether a contractor is a certified or self-certified minority, women, and disabled veteran business enterprise subcontractor and/or supplier. (Cal. Code Regs., tit. 5, §§ 59505(d) and 59509 (Register 94, No. 6), beginning July 1, 2001 through April 13, 2006.)

3. Establish a process to collect and retain certification information by a business enterprise claiming minority, women, and disabled veteran business enterprise status. (Cal. Code Regs., tit. 5, §§ 59506(a) and 59509 (Register 94, No. 6), beginning July 1, 2001 through April 13, 2006.)

4. Each October 15, report to the Chancellor the level of participation by minority, women, and disabled veteran business enterprises in community college district contracts for repair and maintenance for the previously completed fiscal year. (Cal. Code Regs., tit. 5, § 59509 (Register 94, No. 6), beginning July 1, 2001 through March 31, 2005.)

In addition, the Commission finds that any funds received and applied to the reimbursable activities by a school district or community college district from the following grant and fee programs be identified as potential offsetting revenue in the parameter and guidelines:

- Funds received by K-12 school districts from the State School Facilities Program modernization grants[211] for non-routine repairs and maintenance.
- Funds received by K-12 school districts from the State School Deferred Maintenance Program.[212]

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[211] Education Code section 17074.10-17074.30.

- Fee revenue received by K-12 schools district pursuant to Education Code section 17620, that can be used for the repair and maintenance projects subject to the reimbursable activities in this test claim.
- Funds received from the Community Colleges Deferred Maintenance and Special Repair Program[213] by a community college district for repairs and maintenance that are unusual and nonrecurring work to restore a facility to a safe and continually usable condition for which it was intended.

Finally, any other test claim statutes and allegations not specifically approved above, do not impose a reimbursable state mandated program subject to article XIII B, section 6 of the California Constitution.

[212] Education Code section 17582-17588.

[213] Education Code section 84660.

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

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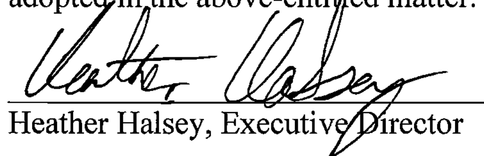
RE: **Adopted Statement of Decision**

*Public Contracts (K-14),* 02-TC-35
Public Contract Code Sections 2000, et al.
Statutes 1976, Chapter 921; et al.
Clovis Unified School District and
Santa Monica Community College District, Co-Claimants

On May 25, 2012, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.



Heather Halsey, Executive Director

Dated: June 8, 2012