

# SixTen and Associates

## Mandate Reimbursement Services

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June 20, 2012

Heather Halsey, Executive Director  
Commission on State Mandates  
U.S. Bank Plaza Building  
980 Ninth Street, Suite 300  
Sacramento, California 95814

Re: Test Claim 02-TC-35  
Proposed Parameters and Guidelines  
Public Contracts

Dear Ms. Halsey:

I have received the Commission's Draft Parameters and Guidelines transmitted by your letter dated June 8, 2012, to which I respond on behalf of the test claimant.

### Name of the Mandate

In order to indicate the limited scope fo the mandate, it is proposed that the name of the mandate be changed to "Public Contracts: Repair and Maintenance," or "Repair and Maintenance Contracts."

#### 1. Clarification of Reimbursable Activities (1183.12 (b) (1))

*Regarding the scope of the mandate*, it is limited to non-emergency repair and maintenance projects of specified dollar amounts. A caption is proposed to better distinguish the scope limitation from the approved reimbursable activities. Increased use of italics is proposed to distinguish the relevant types of claimants and projects. The following changes are proposed:

**"IV. REIMBURSABLE ACTIVITIES**

**A. SCOPE OF THE MANDATE**

For each eligible claimant that incurs increased costs, the following activities are reimbursable, 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:
  - a. 4. 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
  - b. 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:
  - a. 4. 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
  - b. 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:

a. 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

b. 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:

a. 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

b. 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."

*Regarding the reimbursable activities*, renumbering is proposed to group similar activities. Captions are proposed to better distinguish the reimbursable activities. Increased use of italics is proposed to distinguish the relevant types of documents and projects. The following changes are proposed:

**“IV. REIMBURSABLE ACTIVITIES**

**B. REIMBURSABLE ACTIVITIES**

For K-12 School Districts and Community College Districts

For K-12 school districts or community college districts, under the circumstances of the foregoing projects, the following activities are reimbursable:

1. Documents Disclosure Language

- a. 1. Contractor's License: 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).)
- b. 2. Trenches and Excavations: 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:
  - (1) (a) That the contractor shall promptly, and before the following conditions are disturbed, notify the local public entity, in writing, of any:
    - (A) (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.
    - (B) (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.
    - (C) (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.

- (2) (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.
- (3) (e) 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))
- c. 3. Resolution of Construction Claims: 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, the procedures for resolution of construction claims pursuant to Article 1.5 (commencing with section 20104) of Chapter 1 of Part 3 of the Public Contract Code, 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).)<sup>2</sup>

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<sup>2</sup> "Claim," as used in activities "~~3. — 6~~ 1 c. and 2.," 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.

- d. ~~9-~~ Contract Payment Process: Require the provisions for contract payments 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).)
- e. ~~10-~~ Provision to Withhold Contract Funds: 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).)

## 2. Resolution of Construction Claims

- a. ~~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).)
- b. ~~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).)
- c. ~~6-~~ Upon demand by a contractor disputing a K-12 school district's or community college district's response to a claim, schedule and conduct a meet and confer conference within 30 days for settlement of the dispute. (Pub. Contract Code, § 20104.2(d) (Stats. 1994, ch. 726).)

## 3. Contractor Payment Process

- a. ~~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).)

- b. ~~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).)

#### 4. Contractor License Verification

- a. ~~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).)
- b. ~~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 contractor was properly licensed at the time that the contract was awarded to the contractor. (Pub. Contract Code, § 20103.5 (Stats. 1990, ch. 1414).)

#### 5. Minority Business Enterprises- For Community College Districts Only

- a. ~~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).)

- b.    ~~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.)
- c.    ~~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.)
- d.    ~~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.)

*Regarding offsetting revenues*, the draft parameters and guidelines includes a statement of findings in Part IV. Reimbursable Activities. It is proposed to delete this statement of findings from Part IV. and move it to VII. Offsetting Revenues and Reimbursements.

2.    Reasonable Methods of Complying (1183.12 (b) (2))

None proposed.

3.    Reasonable Reimbursement Method (1183.12 (b) (3))

The test claimant does not believe the costs incurred for the approved activities are sufficiently related to any workload unit that could support a reasonable statewide reimbursement method for a significant part of the mandate.

4. Offsetting Revenues and Reimbursements (1183.12 (b) (4))

There are no dedicated state or federal funds appropriated to fund reimburse the activities approved for reimbursement for this mandate. However, to the extent the other state funding available for repair and maintenance projects are received and applied to the mandated activities, those funds would be offsetting revenues. It is proposed to move findings language from Part IV. to Part VII. The use of italics is proposed to highlight the need for the funds to be actually received and applied to the mandate activities. It is proposed to delete the footnotes and move the referenced material into the body of the language where they are referenced. The following changes are proposed:

**“VII. OFFSETTING REVENUES AND REIMBURSEMENTS**

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim. 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-deducted as potential offsetting revenue in the parameter and guidelines.

- Funds received by K-12 school districts from the State School Facilities Program modernization grants (Education Code sections 17074.10-17074.30) for non-routine repairs and maintenance.
- Funds received by K-12 school districts from the State School Deferred Maintenance Program. (Education Code sections 17582-17588)
- 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 (Education Code sections 84660) 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.”

Heather Halsey, Executive Director 10

June 20, 2012

5. Offsetting Savings (1183.12 (b) (5))

Offsetting savings are a question of law determined by the test claim adjudication pursuant to Government Code section 17556. The Commission did not identify any offsetting savings for any of the activities approved for reimbursement.

CERTIFICATION

I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this document is true and correct to the best of my own knowledge or information or belief.

Sincerely,



Keith B. Petersen

C: Per COSM distribution/electronic drop box