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## LEGAL UPDATE

August 23, 2004

**To: Superintendents, Member School Districts (K-12)**

**From: Stephen L. Hartsell, Associate General Counsel**

**Subject: Emergency Exception to Competitive Bidding**  
**Memo No. 17-2004**

A recent appellate court decision makes it imperative that districts be both cautious when considering whether to award a public works (or other) contract without complying with statutory competitive bidding requirements and careful in documenting that the award is covered by an exception to those requirements.

In *Marshall v. Pasadena Unified School District*,<sup>1</sup> a California appellate court narrowly interpreted the “emergency” exception to competitive bidding of public works contracts found in Public Contract Code Section 20113. The court concluded that an “emergency” is limited to “a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services.”

In the case, the school district terminated a competitively bid public works contract “for convenience” after the project came to a standstill. Two months later, the district’s governing board adopted a resolution authorizing awarding a contract to complete the project on an emergency basis without competitive bidding. The resolution stated that the competitive bidding process would delay completion of the project by 60-90 days, “the inability to utilize the modernized/new classrooms will impact instruction/curriculum, and the unfinished structures, open trenches and materials represent serious safety concerns. . . .” This emergency resolution was subsequently approved by the county superintendent as required by Section 20113. A writ of mandate was soon filed to enjoin the district from making payments under the new contract and to require the district to publicly advertise for bids to complete the project.

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<sup>1</sup> June 29, 2004, B160520, as modified on denial of rehearing July 28, 2004, 119 Cal.App.4th 1241, 15 Cal.Rptr.3d 344, 4 Cal. Daily Op. Serv. 5864, 2004 Daily Journal D.A.R. 7959.

The trial court granted the petition, finding the word “emergency” as used in Section 20113 is to be defined as it is in Public Contract Code Section 1102 and that the district failed to provide substantial evidence of an “emergency” as defined by that section. As to the district’s claim that the unfinished project presented “serious safety concerns,” the trial court asked, “Why didn't the District advertise for public bidding in February or March, after terminating the contract with [the original contractor], knowing it takes 60 to 90 days for the public bidding process?” Although it held that the award of the new contract was illegal, the trial court also ordered the district to pay the contractor for work it had performed under that contract.

On appeal, the appellate court upheld the trial court’s decision. A request for rehearing was denied by the appellate court, and we have been informed that the district does not intend to seek review by the State Supreme Court. The case has been certified for publication, which means that its holding is binding on state trial courts in the future.

This decision is significant for five reasons:

1. It makes it clear that Section 1102’s definition of “emergency” applies to Section 20113.
2. It states that the emergency exception should be strictly construed and restricted to circumstances which truly satisfy both Sections 1102 and 20113.
3. Its “narrow interpretation” of these two sections is based on what it states is the strong public policy favoring competitive bidding. In a footnote it adds that “Now more than ever, with the voters having entrusted school officials with billions of dollars in education bonds, against the backdrop of a towering state deficit, it is crucial that school districts avail themselves of the benefits of public bidding.”
4. It states that a person has standing to file an action challenging an award of a public works contract if it seeks “to protect the public fisc by requiring the [agency] ‘to publicly advertise for bids to complete the work ... and to award a contract for said work to the lowest responsible bidder....’”
5. It states that recently enacted Public Contract Code Section 5110 supersedes the long-standing rule that “In general, under long-standing California law, if a public contract is declared void, a contractor may not be paid for work performed under that contract.”<sup>2</sup>

We do note, however, that the decision does not address other statutory and judicial exceptions to competitive bidding of public works. However, this is due to the simple fact that the district in this case did not, either before the award of the contract or afterwards, identify which, if any, of these possible exceptions applied in this case.

Further information regarding required competitive bidding requirements is available in Legal Update Memo No. 27-2003. If you have any questions, or require assistance and advice in this area, please feel free to contact this office.

SLH:bkd

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<sup>2</sup> The appellate court noted that “In adopting section 5110, the Legislature declared its intent that a contractor ‘may be paid the reasonable cost, specifically excluding profit, of labor, equipment, materials, and services that were rendered under a contract that was competitively bid, but subsequently determined to be invalid, in order to avoid unjust enrichment of the public entity and an unlawful taking of the contractor's property.’”