

REPORT OF THE EXECUTIVE OFFICER  
State Allocation Board Meeting, December 8, 2004

USE OF "PIGGYBACK" CONTRACTS AND  
BUILDING CODE COMPLIANCE RELATED TO MODULAR SCHOOL FACILITIES

PURPOSE OF REPORT

1. To discuss the use of "piggyback" contracts to acquire and install factory-built modular building components that result in permanent school facilities funded by the School Facility Program (SFP); and,
2. To report on the Division of the State Architect (DSA) inspection requirements and Building Code compliance for factory-built modular building components and the resulting school facilities.

BACKGROUND

At the September 2004 State Allocation Board (SAB) meeting, the Board expressed concern in regard to the delivery method referred to as "piggybacking" and its use to acquire and install factory-built modular building components that result in the assembly of permanent schools thereby bypassing the competitive bidding requirements of the Public Contract Code (PCC). The Board also expressed concern about the safety of the schools purchased with this delivery method indicating that the facilities may lack DSA inspection and may be of substandard construction. The Board requested the Office of Public School Construction to look into the appropriateness and legality of the piggyback delivery method and the safety of the resulting modular school facilities.

AUTHORITY

**Piggyback Contracts**

*PCC Section 20118*

Notwithstanding Sections 20111 (below) and 20112 (general bidding requirements), the governing board of any school district without advertising for bids, if the board has determined it to be in the best interests of the district, may authorize by contract, lease, requisition, or purchase order, any public corporation or agency, including any county, city, town, or district, to lease data-processing equipment, purchase materials, supplies, equipment, automotive vehicles, tractors, and other personal property for the district in the manner in which the public corporation or agency is authorized by law to make the leases or purchases. Upon receipt of any such personal property, provided the property complies with the specifications set forth in the contract, lease, requisition, or purchase order, the school district may draw a warrant in favor of the public corporation or agency for the amount of the approved invoice, including the reasonable costs to the public corporation or agency for furnishing the services incidental to the lease or purchase of the personal property.

*PCC Section 22002*

Public projects are defined as any of the following: construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.

*PCC Section 20111*

School districts are required to competitively bid any contract equal to or greater than:

- \$50,000 for non-public works contracts identified as the purchase or lease of equipment, materials, or supplies; non-construction related services; or repairs or maintenance that would not be considered public contracts
- \$15,000 for public projects (as defined under PCC Section 22002).

The districts with contracts that meet or exceed the above cost parameters are required to let the contract to the lowest responsible bidder, and ensure that the bidder presents a form of security (such as a bonded surety).

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## AUTHORITY (cont.)

### **California Building Code Compliance**

#### *Education Code Section 17280 and Title 24 of the California Code of Regulations*

Education Code Section 17280 requires that the Department of General Services through the DSA ensure California Building Code compliance for all newly constructed school facilities requesting state funding through the SFP. The DSA must supervise the design and construction of any school building or the reconstruction, alteration, or addition to any school building, if not exempted under Section 17295, to ensure that plans and specifications comply with Title 24 of the California Code of Regulations (Building Code), and to ensure that the work of construction has been performed in accordance with the approved plans and specifications, for the protection of life and property.

## DEFINITIONS

### ***Piggyback***

The term “piggyback” is associated with PCC Section 20118, which allows public entities to acquire personal property by participating in an existing contract of another public entity. For example, relocatable classrooms have historically been treated as personal property because they are not typically affixed to the land in a permanent fashion. As a result, relocatable classrooms are commonly acquired by school districts utilizing the piggyback contract provision. By piggybacking onto another district’s existing relocatable classroom contract, a district can take advantage of lower per-building costs realized through economy-of-scale and also avoid the time and expense of the public bid process. In the context of this report, some school districts have interpreted personal property to include modular building components and have utilized the piggyback provision for the acquisition of these components to construct permanent school buildings. Additionally, the provision to piggyback a contract allows for payment of any reasonable cost to the public entity for furnishing services incidental to the purchase of the personal property.

### ***Incidental Services***

“Incidental services” are not clearly defined in law. However, there appears to be at least two interpretations of this term as it applies to PCC Section 20118: 1) administration of the piggyback contract by the original contracting school district (e.g., receive warrant from the piggyback school district, make payment to the manufacturer and other related accounting activities); or 2) various additional services that may be provided for by the manufacturer (e.g., concrete foundations and on-site installation).

### ***Modular***

“Modular” in this context refers to a facility comprised of multiple pre-manufactured building components, such as separate wall and floor systems, that are transported to a site where all components are assembled on a permanent foundation to form a complete building or groups of buildings. This manufacturing method varies substantially from a typical relocatable classroom, for example, which is typically factory-built as two complete building modules that are simply connected on-site and placed on temporary foundations.

## DISCUSSION – PIGGYBACK CONTRACTS

### ***Utilization by Districts***

Staff was able to identify and interview three school districts and one company that utilized or plans to utilize piggyback contracts for the construction of state-funded modular school facility projects. These districts maintain that this alternative is superior to the conventional design-bid-build delivery method. The reasons provided by the districts for selecting this method include a guaranteed maximum price, lower project costs and faster project completion while providing facilities with the appearance and function of a permanent school.

## DISCUSSION – PIGGYBACK CONTRACTS (cont.)

### *Utilization by Districts (cont.)*

Staff was informed that the contracts originally awarded to the manufacturer and subsequently piggybacked onto by other districts were designed in a manner that allowed the districts substantial flexibility in both selection of buildings and services associated with the contract. For example, one original contract that was subsequently piggybacked by other school districts included 76 alternates, which allowed the districts to contract for the desired building components and services. The alternates ranged from individual building components and systems (e.g., wall covering options and choices of cabinetry) to entire school buildings (e.g., various designs of classroom buildings, gymnasiums and other core facilities). This particular contract also clearly called for installation and site-work to be completed by the manufacturer that was awarded the original contract.

Both the company and district legal counsels participating in these contracts agreed that installation of the modular facilities was incidental to the purchase of the building components. However, legal opinion varied among the districts as to what could be construed as incidental. For instance, some of the districts felt the forming and pouring of the foundation was incidental to the purchase of the building components, where as other districts did not. Any items a district's legal counsel opined to be beyond incidental services were then publicly bid by either the district or the district's construction manager, as per PCC Section 20111.

It was determined that the districts interviewed, though piggyback contracting for these products and services through the original contracting school district, were actually issuing warrants directly to the manufacturer which appears to be contrary to the provisions of PCC Section 20118.

### *Staff Comments*

The basic tenet of a piggyback contract is to allow a public entity to take advantage of lower costs realized through economy-of-scale purchasing. Staff has not been able to determine at this time the total number of school districts state-wide that may be utilizing this delivery method; however, three districts and one manufacturer that Staff has interviewed have provided insight into their current use of the piggyback contracting provision to acquire school facilities in this manner. At least one of these districts has piggyback contracted to purchase large quantities of factory-built modular components and systems as personal property, as part of a planned permanent school construction project. These components will be shipped to the school site and assembled on permanent foundations; the foundations and installation being provided without bidding as they are characterized as being incidental to the purchase of the personal property. The end result of these purchases is a permanent facility that would otherwise equate to a public works project. The research has determined that several school districts are utilizing the piggyback process to acquire permanent facilities without further competitive bidding.

### *Legal Analysis*

SAB Legal counsel has opined that although the "piggyback" statute allows for the purchase of personal property without the requirement of further competitive bidding, those statutes would not apply to the construction of a public works project that is otherwise governed by PCC Section 20111, such as is the case in construction of permanent public school facilities. Legal counsel further believes that a court may reasonably conclude that an activity meeting the definition of a public project, as contained in PCC Section 22002, may not be considered an "incidental service" as described in PCC Section 20118. A reasonable interpretation of PCC Section 20118 regarding "services incidental" to the contract may limit its application to only provide for compensation to the lead agency for incidental services that are associated with the administration of the additional "piggyback" orders on the underlying contract. However, counsel advises that these conclusions are matters of first impressions, and that there are no reported California cases that have addressed the interaction of PCC Section 20118 with PCC Sections 20111 and 22002. Furthermore, districts that have relied on PCC Section 20118 have done so with district counsel advising of its legality.

## DISCUSSION - CALIFORNIA BUILDING CODE COMPLIANCE

The DSA has clarified that it requires detailed drawings of all structural elements and that inspection is required of any component that resists lateral or gravity loads in addition to its own weight whether the construction occurs on-site or off-site. Connections within and between the components are inspected as well. The DSA also requires inspection of the on-site installation and connections of manufactured components. The DSA does not issue a Certification of Compliance with the Field Act requirements until all the off-site and on-site inspectors' reports that verify that the construction is in compliance with the approved plans have been received and approved by the DSA staff.

A list of projects utilizing modular construction was compiled by Staff during the interview process noted above. This list was made available to the DSA for purposes of determining whether the projects are being constructed under the supervision of DSA-approved inspectors both off-site and on-site. The DSA has provided correspondence in which it confirms that the inspection of the components constructed off-site for these projects is taking place as required. The DSA also reports that required inspection of the on-site installation and connections of the manufactured components has or will occur.

## SUMMARY

The district contractual arrangements by which projects are constructed using state bond funding are governed by law and are not generally subject to SAB regulation or oversight. However, the integrity of the use of general obligation bonds allocated by the SAB must be above reproach. District contracts that are relying on an interpretation of law that would result in the "construction" of entire school facilities without further competitive bidding may be subject to challenge as violating the competitive bidding requirements of the Public Contract Code for public works projects. However, California courts have not made a definitive ruling on this matter at this time.

Based on the feedback received by the DSA for the identified projects, the assertion that the construction of the modular facilities lack DSA-approved inspection appears to be unfounded. The DSA confirmed that these inspections are required and occur for both off-site and on-site construction and installation of factory-built modular building components.

## RECOMMENDATION

Accept this report.

The State Allocation Board accepted this report on December 8, 2004.