



DATE: October 8, 2009
TO: Stuart Markey, Executive Director 2008 Capital Improvement Bond
FROM: Sandra T.M. Chong, Assistant General Counsel *STMC*
SUBJECT: ICOC Performance Audit Requirements – For Distribution to ICOC

Issues:

The Proposition S Independent Citizens Oversight Committee (ICOC) Audit Committee has requested a legal opinion pertaining to the performance audit. Under Proposition 39 requirements of the Education Code, who (independent contractor or district auditor) does the performance audit and who (District or ICOC) hires the auditor?

Answers:

Under Education Code section 15278 and the language of Proposition S, an independent contractor must conduct the performance audit and the District, through the Board of Education (“Board”), hires the auditor.

Analysis:

The Proposition S ballot measure clearly states that the Board “shall conduct” the annual performance audit. Under the heading of “Accountability Measures” of the bond, the language is as follows:

“Annual Performance Audits. The Board of Education shall conduct an annual, independent performance audit to ensure that the bond proceeds have been expended only on the school facilities projects listed in the Bond Project List.” (See page PR-32-D0 of Proposition S ballot, as passed by voters on November 4, 2009).¹

The above is consistent with Education Code section 15278 (part of Proposition 39), which lists the permissible activities of the ICOC. That statute states, in relevant part, “In furtherance of its purpose, the citizens’ oversight committee may engage in any of the following activities: . . . Receiving and reviewing copies of the annual, independent performance audit required by subparagraph (C) of paragraph (3) of subdivision (b) of Section 1 of Article XIA of the California Constitution.” (See Cal. Educ. Code, §15278(c)(1).) Notably, the statute does not

¹ For your information, the language of Proposition S also states clearly that the Board shall conduct the annual financial audits: “Annual Financial Audits. The Board of Education shall conduct an annual, independent financial audit of the bond proceeds until all of those proceeds have been spent for the school facilities projects listed in the Bond Project List.” (See page PR-32-D0 of Proposition S ballot, as passed by voters on November 4, 2009)

authorize the ICOC to “conduct” the annual performance audit, but rather to receive and review same.²

With respect to who conducts the annual performance audit, both the language of the Proposition S ballot and Education Code section 15278 require that the audit be “independent.”

The term independent means “1 : not dependent: as *a* (1) : not subject to control by others : self-governing 2) : not affiliated with a larger controlling unit <an independent bookstore> *b* (1) : not requiring or relying on something else : not contingent <an independent conclusion> (2) : not looking to others for one's opinions or for guidance in conduct. (See Merriam-Webster's online dictionary found at <http://www.merriam-webster.com/dictionary/independent>)

The above means that the District may not use District employees to conduct the annual performance audit, but hire a consultant as an independent contractor to do so. Under Government Code section 53060, the District may directly contract for specialized services such as auditing, without any advertising or competitive process. That statute states, in relevant part as follows:

“The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.” (See Cal. Gov. Code, §53060)

Conclusion:

Under Education Code section 15278 and the language of Proposition S, the District, through its governing board, must hire a consultant to perform the annual performance audit.

STMC:bcr

c: Mark Bresee, Chuck Brown, James Masias, George Harris

² Similar language applies with respect to the annual financial audit. One of the permissible activities of the ICOC include “Receiving and reviewing copies of the annual, independent financial audit required by subparagraph (C) of paragraph (3) of subdivision (b) of Section 1 of Article XIII A of the California Constitution.” (See Cal. Educ. Code, §15278(c)(2).)