




DATE: October 29, 2009

TO: Stuart Markey, Executive Director, Capitol Improvements
Gil Johnson, Chair Pro-tem, Proposition S ICOC

FROM: Andra Donovan, Deputy General Counsel 

SUBJECT: Use of Proposition S Funds for Proposition 39 Mandated Annual Independent Financial and Performance Audits

Issue Presented

Proposition 39 amended the California Constitution to provide that a school district may issue general obligation bonds upon the approval of 55 percent of its electorate, provided that certain accountability requirements are met. (Cal. Const., art. XVI, §18, subd. (b).) These include performance of annual independent financial and performance audits. (Ibid.; Cal. Const., art. XIII A, §1, subd. (b)(3).) Further, bond funds may only be expended for “the construction, reconstruction, rehabilitation or replacement of school facilities”, and not for any other purpose. (Cal. Const., art. XIII A, §1, subd. (b)(3)(A).) The issue addressed here is whether The San Diego Unified School District may use Proposition S bond funds to pay for the cost of consultants hired to perform the mandatory annual financial and performance audits.

Brief Answer

Proposition S bond funds may be used to pay for the cost of the annual independent financial and performance audits mandated under Proposition 39. The annual audits are an integral part of the construction process, such that such expenditures are properly considered within the types of expenses authorized under Proposition 39 to be paid for with bond funds.

Legal Analysis

In 2008, the voters of the San Diego Unified School District passed Proposition S (“Prop S”), which provided for the issuance of \$2.1 billion in general obligation bonds to be used for school facilities projects. Prop S was approved under subdivision (b) of section 18 of article XVI of the California Constitution, which provides that a school district may adopt a proposition authorizing the district to incur indebtedness in the form of general obligation bonds upon the approval of 55 percent of the voters, provided that the accountability requirements of subdivision (b)(3) of section 1 of Article XIII A are met. (Cal. Const., art. XVI, §18, subd. (b).) The latter requires, *inter alia*, that the

school district conduct an annual independent performance audit to assure the funds have been expended only on the projects listed in the bond and an annual independent financial audit of the proceeds of the bonds. (Cal. Const., art. XIII A, §1, subd. (b)(3).)

The issue of whether funds generated by the sale of bonds under Prop S may be used to pay consultants retained by a school district to perform the mandated audits was addressed in a 2004 opinion by the California Attorney General ("AG Opinion"), in which the Attorney General ("AG") considered the related issue of whether funds generated from the sale of bonds authorized under Proposition 39 could be used to pay for the salaries of district employees who perform administrative oversight work on construction projects. (87 Ops. Cal. Atty. Gen. 157 (2004).) In that opinion, the AG noted that Proposition 39 specifies that bond proceeds may be expended only for "the construction, reconstruction, rehabilitation or replacement of school facilities", and not for any other purpose. (*Id.* at p. 163; quoting Cal. Const., art. XIII A, §1, subd. (b)(3)(A).) However, the AG concluded that the cost of work required to administer the bond-funded projects – "whether (performed) by private consultants under contract with the school district or by school district employees" - is properly considered part of the cost for which bond funds may be expended. (*Id.*)

The AG specifically included the required annual performance and financial audits as among the administrative work for which bond funds may be used, noting these are expressly required by Proposition 39 as a condition of qualifying for the 55 percent voter approval requirement. (*Id.* at p. 160.) Thus, the AG concluded that the cost of these audits, "because they relate directly to the bond projects and are an integral part of the construction process", are properly included within the types of expenses authorized to be paid for with bond funds. (*Id.*)

While not binding authority, the opinions of the California Attorney General are considered persuasive and are given deference by the courts. This particular opinion was cited with approval in *Monette-Shaw v. San Francisco Board of Supervisors* (2006) 139 Cal.App.4th 1356, 1401, in which the court ruled on a challenge to the expenditure of bond funds for administrative costs incurred in connection with a bond-funded school facilities program. Citing the AG Opinion, the court in *Monette* agreed that permissible administrative costs include amounts paid to outside contractors or in-house personnel to oversee the bond program. (*Id.*)

Thus, we conclude that the cost of outside consultants paid to perform the Proposition 39-mandated financial and performance audit may be properly paid with funds generated by the sale of bonds authorized under Prop S.

AD:dmh