

CLIENT NEWS BRIEF

The Energy Commission Adopts Proposition 39 Guidelines: Prohibition on “Sole Source” Contracts Creates Confusion

On December 19, 2013 the California Energy Commission unanimously approved the Proposition 39: California Clean Energy Jobs Act – 2013 Program Implementation Guidelines, moving educational agencies one step closer to receiving Proposition 39 funding. Unfortunately, the Guidelines do not resolve growing confusion regarding how contracts with design professionals, energy consultants, contractors and others should be awarded in order to qualify for Proposition 39 funding.

Proposition 39 was approved by the voters in 2012 and requires that a portion of increased corporate tax revenue to the State be allocated to the Clean Energy Job Creation Fund to fund projects that create California clean energy jobs. The Legislature subsequently enacted Senate Bill (SB) 73 in order to implement the requirements of Proposition 39. SB 73 provides in part that while an educational agency “may use the best value criteria” as defined in Public Contract Code section 20133, it “shall not use a sole source process to award (Proposition 39) funds.” (Pub. Resource Code § 26235 (c).)

The Legislature, however, did not define “sole source process” and the Guidelines shed no additional light on this prohibition. The Guidelines merely defer to each educational agency’s own “procurement regulations and procedures, as long as they reflect applicable state and local laws and regulations and are not in conflict with the minimum legal standards specified in (Public Resource Code section 26235).” Therefore, educational agencies are left with uncertainty as to what type of competitive process is sufficient to avoid a violation of this prohibition and to what extent the prohibition applies to contracts with parties not involved in the construction and implementation of Proposition 39 funded projects, such as energy consultants and similar professionals.

Many are anticipating subsequent legislation or guidance on this issue. However, educational agencies have already begun evaluating potential Proposition 39 projects and cannot necessarily wait for additional legislation before entering into Proposition 39-funded contracts. Educational agencies should be aware that it is possible to interpret the “sole source” prohibition as applicable to any contract funded in whole or in part with Proposition 39 funds, including not only construction contracts but also contracts with architects and other design professionals and consultants.

While the scope of the prohibition remains unknown, an educational agency may potentially decrease its risk of an inadvertent violation by increasing the competitive process it utilizes for awarding a Proposition 39 funded contract, to the extent such contracting processes are otherwise legally permissible. Moreover, while financial considerations may preclude this option, an educational agency may avoid the risk of violating this prohibition either by funding such contracts with non-Proposition 39 funds, or by utilizing Proposition 39 funds on contracts awarded to contractors through a competitive process, while funding design professional contracts with non-Proposition 39 funds. An educational agency planning to award Proposition 39 funded contracts should

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carefully review its contract awarding process with legal counsel in order assess the risks created by the “sole source” prohibition, and the application of that prohibition to a particular set of facts.

Lozano Smith will continue to monitor and assess all Proposition 39 related developments. If you have any questions regarding Proposition 39, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).