

California Department of Education

Executive Office

SBE-005 (REV. 1/2018)

Other Waiver

# California State Board of Education March 2019 Agenda Item #W-02

## Subject

Request by the **Mammoth Unified School District** to waive California *Education Code* (*EC*) Section 17407.5, which requires that a “skilled and trained workforce” be used in connection with the district’s plan to modernize and construct new school facilities using the lease-leaseback construction delivery method.

## Waiver Number

11-12-2018

## Type of Action

Action

## Summary of the Issues

The Mammoth Unified School District (Mammoth USD) is commencing its Measure B Bond Program which authorizes school facilities construction and improvements throughout the district. The district seeks to utilize the lease-leaseback construction delivery method (*EC* Section 17406, et seq.); however, that method requires that a “skilled and trained workforce” be used.

## Authority for Waiver

California *EC* Section 33050

## Recommendation

* Approval: No
* Approval with conditions: No
* Denial: Yes

The California Department of Education (CDE) recommends that the State Board of Education (SBE) deny Mammoth USD’s request for a waiver of *EC* Section 17407.5 on the grounds that “[p]upil or school personnel protections are jeopardized” [*EC* Section 33051(a)(4)]. As discussed below, the “skilled and trained workforce” requirement is reasonably viewed as “pupil or school personnel protections” that would be jeopardized by the requested waiver in this case.

## Summary of Key Issues

Mammoth USD serves approximately 1,200 students at four campuses—one elementary, one middle, one high, and one continuation high school. On June 5, 2018, the voters passed Measure B, which authorizes the issuance of $63,100,000 in general obligation bonds for the construction, reconstruction, or replacement of school facilities, including the furnishing and equipping of school facilities, or the acquisition or lease of real property for school facilities. The district is commencing its Measure B Bond Program, which consists of work on three of the four campuses. The district seeks to utilize the lease-leaseback construction delivery method for the projects proposed in the bond measure.

As part of the statutorily prescribed lease-leaseback construction delivery method, the district must comply with *EC* sections 17406, et seq., including *EC* Section 17407.5.   
*EC* Section 17406 states, in part, that “the governing board of a school district may let…to a person, firm, or corporation real property that belongs to the school district if the instrument by which this property is let requires the lessee therein to construct on the demised premises, or provide for the construction thereon of, a building or buildings for the use of the school district during the term of the lease, and provides that title to that building shall vest in the school district at the expiration of that term…” *EC* Section 17407.5(a) states that “the governing board of a school district shall not enter into an agreement pursuant to Section 17406…with any entity unless the entity provides to the governing board of the school district an enforceable commitment that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the buildings and construction trades, in accordance with Chapter 2 (commencing with Section 2600) of Part 1 of Division 2 of the *Public Contract Code*.” The referenced chapter of the *Public Contract Code* (*PCC*) applies “when a public entity is required by statute or regulation to obtain an enforceable commitment that a bidder, contractor, or other entity will use a skilled and trained workforce to complete a contract or project” [*PCC* Section 2600(a)].

The full definition of “skilled and trained workforce” is found at *PCC* Section 2601(d), which is reproduced in Attachment 3.Essentially, however, that phrase means that all workers performing work in an apprenticeable occupation in the building and construction trades are either skilled journeypersons or apprentices registered in an apprenticeship program approved by the California Department of Industrial Relations’ Division of Apprenticeship Standards, and that for work performed on or after a particular date, an increasing minimum percentage of the skilled journeypersons employed by the general contractor and each subcontractor are graduates of an apprenticeship program. “Skilled journeyperson” means a worker who has either graduated from an approved apprenticeship program for the applicable occupation or has at least as many hours of “on-the-job experience” in the applicable occupation as would be required to graduate from such a program [*PCC* Section 2601(e)].

A school district’s governing board may request that the SBE waive one or more waivable *EC* sections. The SBE may deny a school district’s waiver request if it specifically finds that one or more of seven conditions enumerated in *EC* Section 33051(a) would exist. As relevant here, one of those conditions is that “[p]upil or school personnel protections are jeopardized” [*EC* Section 33051(a)(4)]. The *EC* does not define “pupil or school personnel protections,” nor does it specify how to analyze whether any such “protection” is “jeopardized.”

Because the “skilled and trained workforce” requirement is reasonably seen as a law tending to, or intended to, increase the safety, adequacy or craftsmanship of classrooms and other school facilities, it can and should be viewed as a “pupil or school personnel protection” within the meaning of *EC* Section 33051(a)(4). Furthermore, because the district’s request would eliminate the protection entirely, the protection is “jeopardized” by the request, regardless of costs or difficulties alleged by the district in complying with the law.

The district has conveyed to CDE that complying with the “skilled and trained workforce” requirement would pose difficulties for it; however, the district’s assertions in that regard have been general and unsupported (e.g., “there are simply not enough of those workers for the subcontractors in and around the district” and “there are no active or applicable apprenticeship programs available to the district’s contractors or its subcontractors”). The district also noted that the Building & Construction Trades Council for Kern, Inyo, and Mono Counties (Trades Council) is “based in Bakersfield, which is 260 miles from Mammoth Lakes.” While CDE believes, for the reasons discussed above, that pupil and school personnel protections are jeopardized regardless of such asserted difficulties, CDE contacted the Trades Council to get its perspective on the district’s assertions. The Trades Council advised CDE that: (1) the district did not contact the Trades Council or the Trades Council’s affiliated unions or contractor associations about this project or issue; (2) the Trades Council and its affiliated unions and contractor associations have been involved with projects in Mammoth Lakes; (3) reaching out to the Trades Council would have attracted bids from qualified contractors in California and in Reno, Nevada; (4) the Trades Council represents 6,000 skilled men and women in the construction trades, including 1,000 active apprentices (according to the Division of Apprenticeship Standards) throughout the three counties in its jurisdiction; (5) the Trades Council’s affiliated unions have skilled and trained workers that reside in the towns of Mammoth Lakes, Bishop, and Bridgeport; and (6) significant travel to and from project sites is not unusual for construction workers. This information calls into question the district’s conclusion that it cannot comply with the law.

The CDE also notes that several weeks after the district submitted its waiver request, the district confirmed to CDE that it had recently contracted with a general contractor for its planned project. Moreover, a copy of the contract provided by the district appears to contain a “skilled and trained workforce” obligation on the contractor’s part, as required by *EC* Section 17407.5. This further calls into question the district’s asserted difficulties regarding compliance.

For the reasons stated above, the CDE recommends that the SBE find that the requested waiver jeopardizes pupil or school personnel protections, and that the SBE deny the waiver.

**Demographic Information**

Mammoth USD has a student population of 1,200 and is located in a rural area of Mono County.

**Because this is a general waiver, if the SBE decides to deny the waiver, it must cite one of the seven reasons in *EC* Section 33051(a), available at** <https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=EDC&sectionNum=33051.>

## CDE Recommendation

The CDE recommends that the SBE deny Mammoth USD’s request for waiver of   
*EC* Section 17407.5 on the ground that “[p]upil or school personnel protections are jeopardized” [*EC* Section 33051(a)(4)].

## Summary of Previous State Board of Education Discussion and Action

The SBE has neither received, nor approved, any previous waivers regarding the “skilled and trained workforce” requirement.

## Fiscal Analysis (as appropriate)

There is no statewide fiscal impact of waiver denial.

## Attachments

* **Attachment 1:** Summary Table (1 page)
* **Attachment 2:**  Mammoth Unified School District General Waiver Request  
  11-12-2018 (4 pages). (Original waiver request is signed and on file in the Waiver Office.)
* **Attachment 3:** *Public Contract Code* Section 2601 (3 pages)

# Attachment 1: Summary Table

California *Education Code* (*EC*) Section 17407.5

| **Waiver Number** | **District** | **Period of Request** | **Bargaining Unit Representatives** | **Local Board, Public Hearing, and Advisory Committee Approval** |
| --- | --- | --- | --- | --- |
| 11-12-2018 | Mammoth Unified School District | **Requested:**  March 14, 2019 to March 14, 2021  **Recommended:**  Not applicable | California Schools Employee Association  Victor Garcia and Phil DeSoto, Representatives 11/8/2018 **Neutral**  Mammoth Education Association Michelle Quirsfeld, President 11/7/2018 **Neutral**  Mammoth Education Support Personnel Jan Miller and Adriana Madrigal Representatives/Members 11/1/2018 **Neutral** | Local Board Approval Date: 12/6/2018  Public Hearing Date: 12/6/2018  Public Hearing Advertised: Newspaper (Mammoth Times); Posted at each District school site and District office; Posted on District website  Advisory Committee: School Site Council 1/16/2019 **No Objections** |

Created by the California Department of Education

January 4, 2019

# Attachment 2: **Mammoth Unified School District General** **Waiver Request 11-12-2018**

**California Department of Education**

**WAIVER SUBMISSION – General**

CD Code: 2673692

Waiver Number: 11-12-2018

Active Year: 2018

Date In: 12/19/2018 4:03:08 PM

Local Education Agency: Mammoth Unified

District Address: 461 Sierra Park Rd. / PO Box 3509

Mammoth Lakes, CA 93546

Start: 3/14/2019

End: 3/14/2021

Waiver Renewal: No

Waiver Topic: Other Waivers

*Ed Code* Title: Other Waivers

*Ed Code* Section: 17407.5 - Use of skilled and trained workforce to perform project or contract work

*Ed Code* Authority: 33050 - Request for waiver of code provisions

*Education Code* or *CCR* to Waive: [17407.5. Use of skilled and trained workforce to perform project or contract work:

(a) The governing board of a school district shall not enter into an agreement pursuant to Section 17406 or 17407 with any entity unless the entity provides to the governing board of the school district an enforceable commitment that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades, in accordance with Chapter 2.9 (commencing with Section 2600) of Part 1 of Division 2 of the Public Contract Code.

(b) Subdivision (a) shall not apply if any of the following requirements are met:

(1) The governing board of the school district has entered into a project labor agreement that will bind all contractors and subcontractors performing work on the project or contract to use a skilled and trained workforce and the entity agrees to be bound by that project labor agreement.

(2) The project or contract is being performed under the extension or renewal of a project labor agreement that was entered into by the school district prior to January 1, 2017.

(3) The entity has entered into a project labor agreement that will bind the entity and all its subcontractors at every tier performing the project or contract to use a skilled and trained workforce.

(c) For purposes of this section, “project labor agreement” has the same meaning as in paragraph (1) of subdivision (b) of Section 2500 of the *Public Contract Code*.]

Outcome Rationale: Please see Exhibit "1" attached below.

Student Population: 1200

City Type: Rural

Public Hearing Date: 12/6/2018

Public Hearing Advertised: Newspaper (Mammoth Times); Posted at each District school site and District office; Posted on District website

Local Board Approval Date: 12/6/2018

Community Council Reviewed By: Public hearing held on December 6, 2018; No appropriate council, committee regarding waiver

Community Council Reviewed Date: 12/6/2018

Community Council Objection: No

Community Council Objection Explanation:

Audit Penalty Yes or No: No

Categorical Program Monitoring: No

Submitted by: Ms. Lois Klein

Position: Superintendent

E-mail: [lklein@mammothusd.org](mailto:lklein@mammothusd.org?subject=E-mail%20address%20for%20Lois%20Klein)

Telephone: 760-934-6802 x511

Fax: 760-934-6803

Bargaining Unit Date: 11/08/2018

Name: California Schools Employee Association

Representative: Victor Garcia Phil DeSoto

Title: Representatives

Position: Neutral

Bargaining Unit Date: 11/07/2018

Name: Mammoth Education Association

Representative: Michelle Quirsfeld

Title: President

Position: Neutral

Bargaining Unit Date: 11/01/2018

Name: Mammoth Education Support Personnel

Representative: Jan Miller Adriana Madrigal

Title: Representatives/Members

Position: Neutral

**Mammoth Unified School District**

**General Waiver Request - *Education Code*§ 17407.5**

**EXHIBIT "1"**

The Mammoth Unified School District ("District") is located in Mammoth Lakes in the County of Mono, a small, rural community in a remote mountain location. The District is in the process of commencing its Measure B Bond Program, which consists of the Renovation, Modernization and Expansion of Existing School Facilities for the Elementary School, Middle School and High School and District facilities ("Projects"). These Projects will provide much needed upgrades for the District's students and employees.

The District believes the most suitable construction delivery method for all or a portion of the Projects is the lease-leaseback construction delivery method pursuant to *Education Code* sections 17406, et seq. As part of the statutorily prescribed lease-leaseback contracting method, the District must comply with *Education Code* sections 17406, et seq., including Section 17407.5.

*Education Code* Section 17407.5 would require the District's Contractor and subcontractors to use a "skilled and trained workforce" to perform work on the project or contract that falls within an apprenticeable occupation in the building and construction trades. As a result of the District's remote, mountain location, the District believes it will be extraordinarily difficult or impossible to meet the "skilled and trained workforce" requirements of *Education Code* Section 17407. 5. Specifically, because of the District's location, the majority of the community's labor force would not meet the "skilled and trained workforce" criteria mandated by Section 17407.5. The District and the community as a whole struggle with higher construction costs due to extreme weather building conditions and both higher workforce housing costs and a shortage of workforce housing.

Based on the District's rural location, the District does not have availability to the type of "skilled" labor required pursuant to Education Code section 17407.5, especially when compared to a district located in a more densely populated and centrally located area. In the absence of this requested general waiver of Education Code section 17407.5, the District will be in a position where it could be denied the ability to use the lease-leaseback construction delivery method, which is a delivery method available to other districts throughout the state.

On December 6, 2018, the District held a public hearing, in accordance with the Brown Act, solely to address any public questions or concerns on the issue of the District's intent to submit a general waiver of *Education Code* Section 17407.5 to the California Department of Education. The District's Board of Trustees also passed a resolution supporting this waiver. In a further effort to keep the local community informed, the District discussed its intent to submit a general waiver of *Education Code* Section 17407. 5 with both the local Mammoth Lakes Chamber of Commerce and the Mammoth Lakes Contractor's Association. The District received positive comments regarding this waiver from both organizations. The District and the local community support the District's efforts to waive *Education Code* Section 17407.5.

# Attachment 3: ***Public Contract Code* Section 2601**

***Public Contract Code* Section 2601**

For purposes of this chapter:

(a) “Apprenticeable occupation” means an occupation for which the Chief of the Division of Apprenticeship Standards of the Department of Industrial Relations had approved an apprenticeship program pursuant to Section 3075 of the Labor Code before January 1, 2014.

(b) “Chief” means the Chief of the Division of Apprenticeship Standards of the Department of Industrial Relations.

(c) “Graduate of an apprenticeship program” means either of the following:

(1) An individual that has been issued a certificate of completion under the authority of the California Apprenticeship Council for completing an apprenticeship program approved by the chief pursuant to Section 3075 of the Labor Code.

(2) An individual that has completed an apprenticeship program located outside California and approved for federal purposes pursuant to the apprenticeship regulations adopted by the federal Secretary of Labor.

(d) “Skilled and trained workforce” means a workforce that meets all of the following conditions:

(1) All the workers performing work in an apprenticeable occupation in the building and construction trades are either skilled journeypersons or apprentices registered in an apprenticeship program approved by the chief.

(2)

(A) For work performed on or after January 1, 2017, at least 30 percent of the skilled journeypersons employed to perform work on the contract or project by every contractor and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation. This requirement shall not apply to work performed in the occupation of teamster.

(B) For work performed on or after January 1, 2018, at least 40 percent of the skilled journeypersons employed to perform work on the contract or project by every contractor and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation, except that the requirements of subparagraph (A) shall continue to apply to work performed in the following occupations: acoustical installer, bricklayer, carpenter, cement mason, drywall installer or lather, marble mason, finisher, or setter, modular furniture or systems installer, operating engineer, pile driver, plasterer, roofer or waterproofer, stone mason, surveyor, teamster, terrazzo worker or finisher, and tile layer, setter, or finisher.

(C) For work performed on or after January 1, 2019, at least 50 percent of the skilled journeypersons employed to perform work on the contract or project by every contractor and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation, except that the requirements of subparagraph (A) shall continue to apply to work performed in the following occupations: acoustical installer, bricklayer, carpenter, cement mason, drywall installer or lather, marble mason, finisher, or setter, modular furniture or systems installer, operating engineer, pile driver, plasterer, roofer or waterproofer, stone mason, surveyor, teamster, terrazzo worker or finisher, and tile layer, setter, or finisher.

(D) For work performed on or after January 1, 2020, at least 60 percent of the skilled journeypersons employed to perform work on the contract or project by every contractor and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation, except that the requirements of subparagraph (A) shall continue to apply to work performed in the following occupations: acoustical installer, bricklayer, carpenter, cement mason, drywall installer or lather, marble mason, finisher, or setter, modular furniture or systems installer, operating engineer, pile driver, plasterer, roofer or waterproofer, stone mason, surveyor, teamster, terrazzo worker or finisher, and tile layer, setter, or finisher.

(3) For an apprenticeable occupation in which no apprenticeship program had been approved by the chief before January 1, 1995, up to one-half of the graduation percentage requirements of paragraph (2) may be satisfied by skilled journeypersons who commenced working in the apprenticeable occupation before the chief’s approval of an apprenticeship program for that occupation in the county in which the project is located.

(4) The apprenticeship graduation percentage requirements of paragraph (2) are satisfied if, in a particular calendar month, either of the following is true:

(A) At least the required percentage of the skilled journeypersons employed by the contractor or subcontractor to perform work on the contract or project meet the graduation percentage requirement.

(B) For the hours of work performed by skilled journeypersons employed by the contractor or subcontractor on the contract or project, the percentage of hours performed by skilled journeypersons who met the graduation requirement is at least equal to the required graduation percentage.

(5) The contractor or subcontractor need not meet the apprenticeship graduation requirements of paragraph (2) if, during the calendar month, the contractor or subcontractor employs skilled journeypersons to perform fewer than 10 hours of work on the contract or project.

(6) A subcontractor need not meet the apprenticeship graduation requirements of paragraph (2) if both of the following requirements are met:

(A) The subcontractor was not a listed subcontractor under Section 4104 or a substitute for a listed subcontractor.

(B) The subcontract does not exceed one-half of 1 percent of the price of the prime contract.

(e) “Skilled journeyperson” means a worker who either:

(1) Graduated from an apprenticeship program for the applicable occupation that was approved by the chief or located outside California and approved for federal purposes pursuant to the apprenticeship regulations adopted by the federal Secretary of Labor.

(2) Has at least as many hours of on-the-job experience in the applicable occupation as would be required to graduate from an apprenticeship program for the applicable occupation that is approved by the chief.

*(Amended by Stats. 2018, Ch. 882, Sec. 1. (AB 3018) Effective January 1, 2019.)*