

PECG Issue Revisited  
**Special Edition**

# REGISTER



THE NEWSLETTER OF CALIFORNIA'S COALITION FOR ADEQUATE SCHOOL HOUSING

## The Fair Competition and Taxpayer Savings Act Public Works Engineering Services – State Agencies or Private Firms?




The Fair Competition and Taxpayer Savings Act would permit state and local governments, special districts and school districts to contract with private companies for architectural and engineering (A & E) services. The initiative is sponsored by the Consulting Engineers and Land Surveyors of California (CELSOC) and supported by the American Institute for Architects (AIA), and is opposed by Californians Opposed to School and Road Delay (COSRD) which is affiliated with the Professional Engineers in California Government (PECG). The Initiative

has qualified for the November 2000 ballot, but a ballot number will not be assigned until all initiatives have qualified in June.

### **A Brief History**

In 1993, PECG initiated a complaint for declaratory and injunctive relief against the State of California to contend that the Division of the State Architect (DSA) is prohibited from contracting for services with private firms under the provisions of Article VII of the California Constitution. The action never proceeded to hearing.

In 1998, PECG sponsored Proposition 224 which, among other things, proposed to prohibit state and local governments from contracting with a private company in instances where work by civil service employees is less costly. Proposition 224 was defeated.

In 1999, an appeals court decision (SACCO v. San Francisco Unified School District) essentially banned the San Francisco Unified School District from contracting with private architectural and engineering firms. This decision is based on the charter of the city and county of San Francisco and would not apply to any other districts. Moreover, the decision is "unpublished" which means that it cannot be cited as authority in any other court case. 

### **In This Issue...**

- Pg 2** > **The Initiative**
- Pg 3** > **Secretary of State's Summary**
- Pg 3** > **C.A.S.H.'s Recommendation**
- Pg 4** > **Proponents Argument**
- Pg 4** > **List of Proponents**
- Pg 5** > **Opponents Argument**
- Pg 5** > **List of Opponents**
- Pg 6** > **Letter Sent by Proponents**
- Pg 7** > **Letter Sent by Opponents**

# FAIR COMPETITION AND TAXPAYER SAVINGS INITIATIVE

SECTION 1. TITLE. This measure shall be known and may be cited as the "Fair Competition and Taxpayer Savings Act."

SECTION 2. PURPOSE AND INTENT.

It is the intent of the people of the State of California in enacting this measure:

- (a) To remove existing restrictions on contracting for architectural and engineering services and to allow state, regional and local governments to use qualified private architectural and engineering firms to help deliver transportation, schools, water, seismic retrofit and other infrastructure projects safely, cost effectively and on time;
- (b) To encourage the kind of public/private partnerships necessary to ensure that California taxpayers benefit from the use of private sector experts to deliver transportation, schools, water, seismic retrofit and other infrastructure projects;
- (c) To promote fair competition so that both public and private sector architects and engineers work smarter, more efficiently and ultimately deliver better value to taxpayers;
- (d) To speed the completion of a multi-billion dollar backlog of highway, bridge, transit and other projects;
- (e) To ensure that contracting for architectural and engineering services occurs through a fair, competitive selection process, free of undue political influence, to obtain the best quality and value for California taxpayers; and
- (f) To ensure that private firms contracting for architectural and engineering services with governmental entities meet established design and construction standards and comply with standard accounting practices and permit financial and performance audits as necessary to ensure contract services are delivered within the agreed schedule and budget.

SECTION 3. Article XXII is hereby added to the California Constitution to read:

§ 1. The State of California and all other governmental entities, including, but not limited to, cities, counties, cities and counties, school districts and other special districts, local and regional agencies and joint power agencies, shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement. The choice and authority to contract shall extend to all phases of project development including permitting and environmental studies, rights-of-way services, design phase services and construction phase services. The choice and authority shall exist without regard to funding sources whether federal, state, regional, local or private, whether or not the project is programmed by a state, regional or local governmental entity, and whether or not the completed project is a part of any State owned or State operated system or facility.

§ 2. Nothing contained in Article VII of this Constitution shall be construed to limit, restrict or prohibit the State or any other governmental entities, including, but not limited to, cities, counties, cities and counties, school districts and other special districts, local and regional agencies and joint power agencies, from contracting with private entities for the performance of architectural and engineering services.

SECTION 4. Chapter 10.1 is hereby added to Division 5 of Title of the Government Code to read:

§ 4529.10. For purposes of Article XXII of the California Constitution and this act, the term "architectural and engineering services" shall include all architectural, landscape architectural, environmental, engineering, land surveying, and construction project management services.

§ 4529.11. All projects included in the State Transportation Improvement Program programmed and funded as interregional improvements or as regional improvements shall be subject to Article XXII of the California Constitution. The sponsoring governmental entity shall have the choice and the authority to contract with qualified private entities for architectural and engineering services. For projects programmed and funded as regional improvements, the sponsoring governmental entity shall be the regional or local project sponsor. For projects programmed and funded as interregional improvements, the sponsoring governmental entity shall be the State of California, unless there is a regional or local project sponsor, in which case the sponsoring governmental entity shall be the regional or local project sponsor. The regional or local project sponsor shall be a regional or local governmental entity.

§ 4529.12. All architectural and engineering services shall be procured pursuant to a fair, competitive selection process which prohibits governmental agency employees from participating in the selection process when they have a financial or business relationship with any private entity seeking the contract, and the procedure shall require compliance with all laws regarding political contributions, conflicts of interest or unlawful activities.

§ 4529.13. Nothing contained in this act shall be construed to change project design standards, seismic safety standards or project construction standards established by state, regional or local governmental entities. Nor shall any provision of this act be construed to prohibit or restrict the authority of the Legislature to statutorily provide different procurement methods for design-build projects or design-build-and-operate projects.

§ 4529.14. Architectural and engineering services contracts procured by public agencies shall be subject to standard accounting practices and may require financial and performance audits as necessary to ensure contract services are delivered within the agreed schedule and budget.

§ 4529.15. This act only applies to architectural and engineering services defined in Government Code section 4529.10. Nothing contained in this act shall be construed to expand or restrict the authority of governmental entities to contract for fire, ambulance, police, sheriff, probation, corrections or other peace officer services. Nor shall anything in this act be construed to expand or restrict the authority of governmental entities to contract for education services including but not limited to, teaching services, services of classified school personnel and school administrators.

§ 4529.16. This act shall not be applied in a manner that will result in the loss of federal funding to any governmental entity.

§ 4529.17. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

§ 4529.18. If any act of the Legislature conflicts with the provisions of this act, this act shall prevail.

§ 4529.19. This act shall be liberally construed to accomplish its purposes.


§ 4529.20. This act seeks to comprehensively regulate the matters which are contained within its provisions. These are matters of statewide concern and when enacted are intended to apply to charter cities as well as all other governmental entities.

SECTION 5. This initiative may be amended to further its purposes by statute, passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring, and signed by the Governor.

SECTION 6. If there is a conflicting initiative measure on the same ballot, which addresses and seeks to comprehensively regulate the same subject, only the provisions of this measure shall become operative if this measure receives the highest affirmative vote.

## **Secretary of State's Summary**

Overrides constitutional restrictions to allow state, local contracting with private entities for engineering and architectural services in all phases of public works projects; exempts such services from constitutional requirement to use civil service workforce. Requires competitive selection process for awarding contracts. Mandates compliance with rules regarding conflicts of interest, political contributions, unlawful activities. Subjects contracts for engineering and architectural services to standard accounting practices, with financial and perfor-

mance audits where necessary. Requires two-thirds vote of each house for legislative amendments. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local governments: This measure would result in an unknown impact on state contracting costs for architectural and engineering services, depending on future state decisions regarding the amount of work to be performed under contracts with private firms and their costs relative to civil service costs. 

## **C.A.S.H.'s Recommendation**

C.A.S.H. supports the Fair Competition and Taxpayer Savings Act because it would essentially codify existing law concerning a school district's method for choosing architectural and engineering services, and would not jeopardize a school district's ability to build schools.

For a sample resolution, go to the C.A.S.H. web site at [www.cashnet.org](http://www.cashnet.org)



# Proponents Argument

***Flexibility For School Construction Is Threatened  
A Growing Coalition Is Supporting a Measure That Will Preserve Local  
Flexibility and Control. Please Join Them In Supporting The "Fair  
Competition and Taxpayer Savings Act."***

*All proponents information was provided  
by the Taxpayers for Fair Competition.  
For more information please contact them  
at (650) 340-0470 in Burlingame or  
(310) 996-2600 in Los Angeles.*

## ***School Construction Needs To Be On A Fast Track, Now More Than Ever.***

Over the next ten years average enrollment in California's elementary and high schools is expected to grow by 114,000 students a year. This will only intensify the already critical need to build new schools as well as remodel and rehabilitate old ones.

In November of 1998 a \$9 billion school construction bond was passed by the voters. The California Business Roundtable has called for a ten-year capital outlay plan for K-12 schools of over \$28 billion to accommodate growth in school age populations.

However, even if the *funding* is available, the speed of school *construction could be seriously delayed by a new threat.*

## ***Existing Flexibility to Contract Out for Design Services – the First Step in School Construction – is at Risk.***

School districts currently enjoy the flexibility of contracting out for architectural and engineering services, if they so choose. This option is usually exercised in order to speed up a project or bring in specific expertise, such as seismic retrofitting.

However, a series of lawsuits brought by state employees (primarily Caltrans engineers) has effectively banned California State government from contracting with qualified private engineers and architects.

This has also begun to limit the ability of local government - including school districts – to choose where and

when to use private firms, putting many important local projects in jeopardy.

## ***School Districts Are Threatened In Several Ways – Most Recently by an Appeals Court Decision Banning Use Private Sector A&E firms in San Francisco***

*In September of 1999, an appeals court decision (SACCO v. San Francisco Unified) essentially banned the San Francisco school district from contracting with private A&E firms, The appeals court specifically cited PEGG v. Caltrans in making their decision. Can other school districts be far behind?*

In addition, there is trouble for schools at the state level.

The Department of General Services prepares standardized school plans and is further mandated to review all school plans prior to construction beginning. Due to the supreme court ban at the state level, the ability to hire this work out is now in serious jeopardy. An end to contracting for these services will certainly lead to costly and unnecessary delays in school construction.

In addition, state government is prohibited by law from accomplishing through local government entities – such as school districts – that which it is prohibited from doing on its own. Therefore, it's entirely possible that the state prohibition on contracting out for these services will be specifically extended to school districts in the not so distant future.

The state employees' lawsuit has already resulted in several local government entities actually canceling contracts with private firms. There's no reason not to expect school districts will be next.

*Continued on page 8*

# WHO SUPPORTS THE FAIR COMPETITION AND TAXPAYER SAVINGS ACT?

*(as of 4/17/00)*

*Following is a partial list of supporters for  
the Initiative. For a more detailed list,  
please visit the CELSOC Website at  
[www.celsoc.org](http://www.celsoc.org).*

## **STATEWIDE ORGANIZATIONS**

- California Chamber of Commerce
- California Taxpayers' Association
- Coalition for Adequate School Housing
- Operating Engineers, Local Union No. 3 (AFL-CIO)
- Operating Engineers, Local Union No. 12 (AFL-CIO)
- National Council for Public-Private Partnerships
- American Institute of Architects, California Chapter
- American Subcontractors Association, California Chapter
- Associated General Contractors
- California Association of Sheet Metal and Air Conditioning Contractors, National Association
- California Building Industry Association
- California Business Properties Association
- California Business Roundtable
- California Cement Promotion Council
- California Chapter, American Planning Association
- California Contract Cities Association
- California Fence Contractors Association
- Californians for Better Transportation
- California Groundwater Association
- California Manufacturers Association
- California Minority and Women's Business Coalition
- California Park & Recreation Society
- California Travel Parks Association
- California Trucking Association
- Civil Justice Association of California
- Coalition for Project Delivery
- Consulting Engineers and Land Surveyors of California
- National Federation of Independent Business
- Painting & Decorating Contractor Association
- Western Growers Association
- Western States Petroleum Association

## **EDUCATION**

- Alum Rock School District
- Barstow Unified School district
- Central Unified School District
- Clovis Unified School District
- Downey Unified School District
- Eastside Union School District
- Encinitas Union School District
- Folsom Cordova Unified School District
- Fresno Unified School District
- Lido Unified School District
- Montevia Unified School District
- Redding School District
- Vacaville unified School District
- West Fresno School District

# Opponents Argument

**The Schools, Transportation and Infrastructure Killer Initiative (STINKI)**  
*If you like traffic jams, overcrowded schools, and a shortage of hospital beds, you'll love STINKI.*

The following is a memorandum sent by Madalyn Frazzini, Deputy Chief Counsel for the California School Employees Association (CSEA) to Dave Low, the Assistant Director of Governmental Relations regarding the CELSOC Initiative. All opponents information was provided by Californians Opposed to School & Road Delay. For more information, please contact them at (916) 446-0512

You have requested a review of the CELSOC (Contracting Out) Initiative with respect to the impact it may have on school construction projects. As explained below, the initiative will result in delays in school construction projects due to the change it makes to the selection criteria which school and community college districts and county boards of education currently use to contract for architectural and engineering work.

Section 2 of the initiative. Titled Purpose and Intent, states, in pertinent part:

It is the intent of the people of the State of California in enacting this measure:

...(e) To ensure that contracting for architectural and engineering services occurs through a fair, competitive selection process...."

Additionally, the initiative adds provisions to the Government Code including a new Section 4529.12 which states, in relevant part: "All architectural and engineering services shall be procured pursuant to a fair competitive selection process..."

Under current law, school and college districts can contract for architectural and engineering services according to qualification-based selection (QBS) criteria. Specific, applicable QBS requirements include the selection of the most qualified firm

and negotiation of a reasonable price (Government Code section 4528), selection of a firm based on demonstrated competence and professional qualifications (Government Code section 4526 and Education Code section 1042(d)) and firm rankings based on statements of qualifications and performance data (Government Code section 4527).

These provisions of existing law appear to be in direct conflict with the initiative's stated intent and proposed Government Code section 4529.12. This new, "fair, competitive selection process" is undefined and contradicts existing QBS criteria. It seems the proposed section would repeal existing qualification-based selection criteria used by school and college districts, county boards of education, and other government entities in the state. Thus, the initiative would blur the standards required of public agencies, including school and college districts, and county boards of education, when they contract for architectural and engineering work.

As a consequence, the initiative will require interpretation and new regulations to define and clarify what is new by the new "fair, competitive selection process." Enactment of such regulations by the state, or by local agencies, such as school districts, when they do contract out as allowed by the initiative, will inevitably delay school construction projects while those regulations and policies to through the required development and hearing process. Delays in construction projects will also be the ultimate result due to the lawsuits that can be expected to attack the initiative's meaning and effect

In summary, delay in school construction and other vital infrastructure

*Continued on page 8*

## COALITION OPPOSED TO THE CELSOC INITIATIVE

*Following is a partial list of opponents to the Initiative. For more information please contact Californians Opposed to School & Road Delay at (916) 446-0512*

### STATE LEGISLATORS

#### Senators

- President Pro Tem John Burton
- Richard Alarcon
- Dede Alpert
- Joe Baca
- Martha Escutia
- Liz Figueroa
- Tom Hayden
- Teresa Hughes
- Patrick Johnston
- Kevin Murray
- Jack O'Connell
- Deborah Orriz
- Steve Peace
- Don Perata
- Hilda Solis

#### Assembly Members

- Dion Louise Aroner
- Thomas Calderon
- Dennis Cardoza
- Gilbert Cedillo
- Denise Moreno Ducheny
- Martin Gallegos
- Sally Havice
- Mike Honda
- Wally Knox
- Gloria Romero
- Nell Soto
- Darrell Steinberg
- Edward Vincent
- Carl Washington
- Patricia Wiggins
- Scott Wildman
- Roderick Wright

### LABOR

- American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME)
- California School Employees Association (CSEA)
- Contra Costa County Public Employees Association - Local One
- Engineers and Architects Association
- Faculty Association of California Community Colleges (FACCO)
- International Federation of Professional & Technical Engineers, AFL-CIO (IFPTE)
- Los Rios College Federation of Teachers
- Professional Engineers in California Government (PECG)
- San Bernardino Public Employees Association
- San Luis Obispo County Employees Association, Inc.
- Santa Rosa City Employees Association (SRCEA)

### SENIOR & CONSUMER ADVOCATES

- California Legislative Council For Older Americans
- Congress of California Seniors
- Consumer Federation of California
- Retired Public Employees' Association of California (RPEA)

# Letter Sent by Proponents

March 30, 2000

Dear Californian:

**We are writing to ask for your support of an initiative that will be on the ballot this November. The Fair Competition and Taxpayer Savings Act would, very simply, give California's state and local governments the flexibility to contract with qualified private sector engineers and architects where it makes sense to do so—something 49 states can already do.**

**Why is this initiative necessary?** As a result of a series of lawsuits brought by a small group of government engineers who want to keep all the work in-house, California government is essentially banned from contracting with private engineers and architects. The Fair Competition and Taxpayer Savings Act is needed to overturn those lawsuits and allow California to use the common-sense approach of contracting with the private sector as necessary.

**How does this initiative impact schools?** As long as these court rulings are allowed to stand, the scope of their impact will continue to grow through additional lawsuits. **A September, 1999 appeals court decision (Sacco v. San Francisco) took specific aim at schools and directly impacts the flexibility school districts will have in the future to contract for necessary design work.**

According to the San Juan Unified School District's analysis, it was concluded that *"unless proactive action is taken, it is likely the state prohibition on contracting these services with private companies will be extended to school districts."*

Delays in building new schools and facilities will severely burden school districts at a time when we are facing an increase in enrollment and overcrowded classrooms.

That's why we need your support for the Fair Competition and Taxpayer Savings Act. Its passage is needed to overturn the damage done by existing court decisions and to prevent that damage from spreading further. Again, this common sense initiative would simply grant state and local governments – including school districts – the authority to contract for private design services if they so choose.

**Why do we need your support now for a November initiative?** The government engineers who brought the original lawsuits are working hard to keep this initiative from passing. Their strategy? Confuse as many organizations as possible about what this initiative will actually do. Your support will not only send a message to our opponents, but it will also prevent confusion on the part of voters in the fall.

Already, more than 200 organizations – including CASH – along with cities, counties and school districts have joined in support of this initiative. Please join the growing list of school districts that includes Monrovia Unified School District, Encinitas Unified School District, Central Unified School District, Clovis Unified School District, San Juan Unified School District, Downey Unified School District, Alum Rock School District, Redding School District, Barstow Unified School District, Fresno Unified School District and West Fresno School District in supporting the Fair Competition and Taxpayer Savings Act.

Please find enclosed information about the initiative along with a sample resolution. If you have any questions or need more information, please feel free to call Dana Rambo of the campaign at (650) 340-7048.

Thank you for your immediate consideration.

Sincerely,

Edward A. Sussman, Ed. D.  
Superintendent  
Downey Unified School District

Douglas P. DeVore  
Superintendent  
Encinitas Unified School District

Norman R. Siefkin  
Superintendent  
Folsom Cordova Unified School District

# Letter Sent by Opponents

January 12, 2000

Dear Californian:

We are writing to ask the \_\_\_\_\_ to please join the growing coalition opposed to the "Public Works" initiative.

The measure – sponsored by the Consulting Engineers and Land Surveyors of California (CELSOC) – will likely appear on the November 2000 ballot. The initiative authorizes the contracting out of all state and local architectural and engineering projects. This includes school and educational facility design work.

**The "Public Works" initiative is an attack on school and other public employees.** In recent years, the education community has worked together to foster a positive learning environment in our classrooms and on our campuses. In that same spirit of cooperation, we hope that you will recognize the divisiveness of the CELSOC initiative and join us in opposing the measure.

**The "Public Works" measure will eliminate school district control and delay school construction.** Read the initiative's fine print. The first purpose and intent of the initiative is "to remove existing restrictions on contracting..." such as requirements to select the best-qualified firm or to negotiate contract cost. The initiative also states that it will "comprehensively regulate matters which are contained within its provision." Furthermore, the initiative says it "shall prevail" over any other law. As a result it will eliminate current school district procedures for contracting out.

The result will be state regulation and loss of control for school district, administrators and parents.

**The "Public Works" Initiative will cause further delays in school construction and result in lengthy, contentious litigation.** Existing school district procedures for contracting out would be eliminated immediately. The state would eventually fill the void with new statutes and regulations to implement the initiative. Legislation will be required; regulations will have to be promulgated; the regulations will have to be approved by the Office of Administrative Law. Each of these steps will take time, delaying the construction of desperately needed schools for months or years.

The next hurdle will be the litigation. The new codes and regulations required by the Initiative will undoubtedly be the subject of years of very expensive and time-consuming litigation. **We need new schools, not more lawsuits.**

**The "Public Works" initiative is unnecessary.** While the CELSOC initiative guarantees loss of control, delay and uncertainty, it offers absolutely nothing to benefit our schools. School districts – and every other local jurisdiction – already have complete authority to contract out architectural and engineering design work.

**Your opposition would be extremely valuable to our efforts to defeat this measure.** We hope you agree that CELSOC's "Public Works" initiative threatens the education community's positive working relationship and is flawed public policy. Please join the coalition opposed to the initiative today.

Enclosed for your use is a draft resolution opposing the initiative, a personal endorsement form, a current list of individuals and organizations opposing the measure, the complete text of the measure, and additional background information.

Please review this material and fax back your opposition form to 916/446-0489. Thank you in advance. If you have any questions or seek additional information, please call Ted Toppin with the coalition at 916/446-0512.

Warm Regards,

Senator Jack O'Connell

Dave Low  
California School  
Employees Association

Willie Pelote  
AFSCME

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## Proponents Argument

Continued from page 4

### Local Control Will Be Surrendered To The State

If school districts are denied the ability to contract out for design services, you will lose the ability to decide when, where and how to build schools.

- **Schedule Control:** Does anyone really believe you'll be able to approach a big, Sacramento bureaucracy and insist a school plan be completed or inspected by the time you want it? Hardly.
- **Budget Control:** You can negotiate price with a private firm, but not with a Sacramento bureaucracy. The price will be whatever it says - and you'll have to pay the bill.

### Join the Fight to Preserve Local Flexibility and Control

The "Fair Competition and Taxpayer Savings Act" exists in both legislative

and initiative form. It is needed to overturn these lawsuits and ensure that state, regional, and local governments – including school districts – will have the option of contracting for engineering and architectural projects.

The "Fair Competition and Taxpayer Savings Act" will:

- **Preserve The Flexibility School Districts Need To Engage The Design Team That Best Meets Their Needs.**

Passage of the "Fair Competition and Taxpayer Savings Act" expressly allows state government, school districts and other local government entities the option of contracting with private engineers and architects. School districts should be able to make their own decisions about what will work best for them on any given project.

This measure applies only to architectural and engineering services, and does nothing to expand or restrict school districts' ability to contract for other types of services.

This measure doesn't make school districts or other local government entities do anything not already required.

- **Provide Taxpayer Safeguards And Accountability.**

Californians must be assured that taxpayer dollars are protected. Therefore, the initiative requires contracts be awarded through a competitive selection process that **does not alter current law governing the selection of private firms.** 🏠

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## Opponents Argument

Continued from page 5

projects can be expected if the initiative is adopted. Administrative rulemaking and litigation over the application of the new provisions in light of the ambiguous nature of the phrase "fair competitive selection process" could very well tie up school construction projects for lengthy periods of time.



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