

California Association of Bond Oversight Committees

Questions and Responses from 2021 CABOC Annual Conference

Introduction

In this document, the questions asked at the California Association of Bond Oversight Committees (CABOC) 2021 Conference are listed along with the responses including those asked *via* Zoom “Chat” where there was insufficient time to present them to the panels.

For ease of access, the questions are grouped by topic as shown below:

- I. Citizens’ Bond Oversight Committee (CBOC) Independence**
- II. CBOC Membership**
- III. CBOC Meetings and Reports**
- IV. Construction Bond Project List**
- V. Memorandum of Understanding Bylaws**
- VI. CBOC Independent Legal Counsel**
- VII. Financial Audits**
- VIII. Performance Audits**
- IX. Questionable Use of Bond Funds**

Some of the questions were edited for clarity and consistency of terminology. Where there were multiple questions on the same issue, questions were combined. Some questions that were responded to during the Conference Question and Answer sessions were expanded and the response here may differ from the oral responses at the Conference.

The responses below are based on CABOC “Best Practices” – that is, what CABOC recommends CBOCs should have the power to do and should do. CABOC is very well aware that most CBOCs do not have the independence and power to implement all the recommendations discussed below.

CABOC is currently pursuing its legislative agenda to make it abundantly clear that, under both the spirit and the specific provisions of Proposition 39 of 2000, CBOCs are required, and CBOCs *do* have these powers and that districts *do* have the legal responsibility to ensure that their CBOCs do have the resources and access to information and personnel to make these happen.

In the meantime, CABOC stands ready to assist individual CBOCs and their members in performing their duties as outlined in the Education Code.

CABOC promotes the belief that each CBOC must be independent and possess the power to conduct its business as each CBOC, and its members, determines. While all districts and their associated CBOCs are subject to the same State laws and regulations, there can be significant differences between the specific bond ballot measures for each district and the conditions and environment they operate under at each district. Therefore, CABOC believes each individual CBOC must have the power to do what it believes is best for its district, ballot measure, and CBOC, as it itself decides and negotiates with its district.

For further information, use the “Contact Us” feature on the CABOC web site:

[California Association of Bond Oversight Committees | For Effective Oversight](#)

CABOC exists to serve CBOC members and other stakeholders; if you have a question or need expert assistance from those that have been there and done that, we want to hear from you.

Each question under each title is indented and numbered and presented in standard font. Responses are presented on the left margin and in *italics*.

I. CBOC Independence

1. Are the auditors accountable to the CBOC as well as the district? Can the CBOC utilize the auditors as a resource?

Yes, most definitely, auditors are responsible to the CBOC.

California Education Code (Ed Code) §15278(c) states, in part:

(c) In furtherance of its purpose, the citizens' oversight committee may engage in any of the following activities:

(1) 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 XIII A of the California Constitution.

(2) 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.

It should be understood that both financial and performance auditors are first responsible to the public, including the voters, taxpayers, residents, and, of course, students and parent/guardians. They report to the district governing board and the CBOC as representatives of the public interest.

CABOC recommends that the auditors present their reports directly to the CBOC at a public CBOC meeting, and that the CBOC be involved, working with the district, in the preparation of the request for proposal scope of work, selection of the auditors, development of the specific scope of each individual audit, progress reports, and receipt and review of draft reports. The CBOC should be able to ask questions of the auditor at every stage of the process (except procurement and contract negotiation).

CABOC recommends that, working with the district, CBOCs have the ability to make specific requests for audit work, including, for example, specific audit scope details to test program and project management, financial, and internal control procedures.

2. Even though the district must provide advisors, should staff decide who those advisors will be? For instance, when the CBOC demands an independent legal counsel, should staff be allowed to force the district's bond counsel on them instead?

*The CBOC must have the ability to select its own independent legal counsel and other advisors. The role of the district's staff should be to assist the CBOC in conducting the procurement, but **not** to have any role in the **selection** of the independent legal counsel or other advisor.*

*The entire point of the CBOC having its own independent legal counsel is to have an attorney that has the sole responsibility of working for the CBOC. The district's bond counsel is required, by its legal ethical requirements, to be responsible solely to its client(s) – which, depending on the specific legal details, would be the district, the bondholders, and/or other parties, but will **never** be the CBOC. Therefore, it is totally unacceptable for the district staff to attempt to deny the CBOC its right to have its own independent legal counsel and try to force it to use bond*

counsel, or another attorney that, under legal ethics, must be responsible only to the district and/or other parties other than the CBOC.

There are many situations where it will be useful to have the district's bond counsel, and/or other District legal counsel, to meet with the CBOC or with the CBOC's independent legal counsel. This is a totally normal and common situation; there is no need to have the CBOC's independent legal counsel do independent research, which could take considerable time and cost, if the CBOC's counsel can obtain the desired information from the district's counsel and then verify the information and analysis provided to its satisfaction.

3. What do you do if the bylaws prohibit the committee and/or member to conduct independent bond oversight?

*Since Proposition 39 and Ed Code §15278 et seq. not only **allows**, but **requires** CBOCs to conduct independent bond oversight, we assume that the question refers to some local legal, regulatory, or other provision. Since any local action must be consistent with these higher legal authorities, the general rule is that the higher legal authority rules – and, therefore, any “... laws that prohibit the (CBOC) and/or member to conduct independent bond oversight” would appear to be improper, invalid, and unenforceable.*

Therefore, it is very questionable that there is any law that would “... prohibit the committee and/or member to conduct independent bond oversight” – although it is certainly not unknown that some districts and/or district staff would make such statements.

If you find yourself in this situation, CABOC is here for you to provide advice and assistance.

4. What are some red flags the district does not want real oversight or lacks transparency?

*It must, of course, be understood that the following is **not** a complete list of such red flags.*

- a. The district does not allow the CBOC to operate as an independent entity that conducts its own business and oversight activities.*
- b. The district prohibits, or works to prevent, the CBOC from scheduling its own meetings or setting its own meeting agendas and/or otherwise attempts to control what the CBOC does.*
- c. The district prepares the CBOC bylaws or other rules of procedure and conduct, or insists on approving or disallowing the bylaws or bylaw provisions enacted by the CBOC.*
- d. The district does not fill all the required CBOC seats, does not fill the seats with members with the stipulated qualifications, does not fill vacant seats as quickly as reasonably possible, and/or appoints only allies to the CBOC who are inclined to see things as the district governing board sees things, rather than reaching out to the communities for members inclined to exercise independent judgement.*
- e. The district refuses to provide the CBOC its own independent legal counsel or other resources that the CBOC requires to properly conduct its oversight responsibilities.*

- f. *The district does not provide the CBOC with access to auditors and their reports, information, or individuals.*
- g. *The district does not provide, or significantly limits, the CBOC's access to District personnel and contractors.*
- h. *The district does not provide information on a timely basis and/or provides only partial or incorrect information.*
- i. *The district does not provide the CBOC with its own web site, controlled by the CBOC – the CBOC should have sole control over what is on the CBOC web site, what is added, and what is deleted.*
- j. *The district's own web site does not provide more than very summary information on construction bond finances and projects and other facilities information, such as the size and composition of facilities staff, table or organization, contact information, and maintenance and repairs policies and budget*
- k. *There are serious and apparently viable complaints from construction bond employees, contractor's employees, project neighbors, educational personnel, student parent/guardians, etc. that the district does not appear to be addressing, particularly if the same issues tend to repeat. Sources of such matters can include, but are not limited to, appearances at district board and CBOC meetings; letters, e-mails, and phone calls; and press/media/social media.*
- l. *The district does not have an experienced and capable facilities team, particularly on the capital improvement side, nor a detailed facilities improvement plan, nor detailed and strong facilities processes and procedures, including working and accessible information technology systems that are readily accessible by members of the public (for summary level information).*
- m. *The district does not have an internal audit or auditor-general, nor contract out for such services.*

5. If the district is under state control and the Board has no power ... how does the CBOC operate efficiently?

In this situation, the basic work of the CBOC should remain mostly unchanged, but the parties that the CBOC will be working with need to be adjusted.

Obviously, the CBOC should attempt to meet with the state-appointed administrator to initiate a line of communications and working relationship as soon as possible after such a transition. (The CBOC should continue its pre-existing relationship with the district governing board and remaining top management, even though they may not have as much, if any, power during the State takeover period – this is still important during the State control period and many of these individuals are likely to eventually return to their previous positions.)

As such State takeovers are usually implemented due to problems on the operations side, most commonly fiscal shortfalls that show the district becoming unable to continue to operate its schools, there may be major impacts on the construction bond program. Fiscal cutbacks on the

operations side often have a negative impact on facilities maintenance, repairs, and cleaning. The CBOC would likely want to see what impacts there could be on facilities operations, particularly as to how problems with operations could negatively impact the construction bond program, such as failures to make timely repairs leading to far larger costs for capital projects to replace a failed facility that could have been used for many years if the needed repairs had been performed when first identified. Obviously, the CBOC should be updated on changes in facilities management personnel and the working relationship between the facilities staff and the state administrator.

6. The CBOC at City College of San Francisco is not yet independent. The bond counsel minimized this term and said that the independence is extremely limited.

This lack of independence is, unfortunately, a not uncommon situation in California districts; although bond counsel actually commenting on the situation is uncommon. The CBOC, along with other stakeholders, should consider how it can utilize this statement, along with other issues and reports, to approach the district governing board to improve the situation.

In the Ed Code, the Legislature stated that the CBOC is “independent.” The Legislature did not elaborate on the word “independent.” CABOC recommends that a CBOC rely upon the statement in the Education code that the CBOC is to be independent.

As long as the CBOC is fulfilling its mission of reporting its investigation of bond expenditures, a CBOC should be on safe ground. If a district attempts to impose conditions about “independence” on the CBOC, the CBOC should report this to the public.

II. CBOC Membership

1. Can a member be removed if they no longer meet the requirement for which they were appointed, for instance, no longer a taxpayer rep.? How about if you are a CBOC member (parent of a child in the district) and your child has just graduated?

Ed Code §15282(a) lays out the membership requirements for CBOCs:

The citizens’ oversight committee shall consist of at least seven members who shall serve for a minimum term of two years without compensation and for no more than three consecutive terms. While consisting of a minimum of at least seven members, the citizens’ oversight committee shall be comprised, as follows:

(1) One member shall be active in a business organization representing the business community located within the school district or community college district.

(2) One member shall be active in a senior citizens’ organization.

(3) One member shall be active in a bona fide taxpayers’ organization.

(4) For a school district, one member shall be the parent or guardian of a child enrolled in the school district. For a community college district, one member shall be a student who is both currently enrolled in the community college district and active in a community college group, such as student government. The community college student

member may, at the discretion of the governing board of the community college district, serve up to six months after his or her graduation.

(5) For a school district, one member shall be both a parent or guardian of a child enrolled in the school district and active in a parent-teacher organization, such as the Parent Teacher Association or school site council. For a community college district, one member shall be active in the support and organization of a community college or the community colleges of the district, such as a member of an advisory council or foundation.

These requirements appear very clear; it appears very reasonable to question if a CBOC member can continue to serve if their required qualification lapses.

If this occurs, the CBOC chair (or other member) could communicate with the member at issue and ask if the member wishes to resign. If not, it is the duty of the district governing board to ensure that the CBOC has the proper membership and, if the CBOC believes that there may be an issue, best practice would be to direct the CBOC independent legal counsel to bring the issue to the attention of the district's legal counsel.

2. Much of the work of the CBOC suggests the need for members with technical skills, for example construction or accounting experience and expertise? How do we ensure that CBOC membership includes people with those capabilities?

The requirements for CBOC Members stated above are the minimum requirements; each district can elect to have additional members if it so chooses – and may have specific requirements for such members.

In addition, while under the State statutes previously cited, only the district's governing board can appoint CBOC members, it is perfectly proper for designated professional or civil organizations to nominate candidates for the district board to appoint. For example, at the Los Angeles Unified School District, there are bond oversight committee members that are nominated by the American Institute of Architects, the Chamber of Commerce, the Mayor of the City of Los Angeles, the Associated General Contractors, the Los Angeles County Federation of Labor, AFL-CIO (for construction trades), representatives from the local Parent-Teacher-Student Association chapters, a representative from the County Auditor-Controller's Office nominated by the County Board of Supervisors, and the California Charter School Association. Obviously, if this general approach is desirable, the decisions as to the nominating agencies would be customized to each district and its environment.

For all members, the willingness to do the work, starting with consistent attendance at meetings, taking the time to learn about the district and the bond-funded construction program, reviewing the agenda package and coming to the meeting prepared, curiosity, and willingness to ask questions, are important qualifications.

3. Where do we get training, workshops, and continuous training? Are there other workshops and/or conferences?

As was discussed at the conference, CABOC is currently working very hard to add educational opportunities for CBOCs and other stakeholders.

We also recommend the training available from:

- a. *The California Debt and Investment Advisory Commission:*

[CDIAC \(ca.gov\)](http://CDIAC.ca.gov)

- b. *The California Grand Jurors Association:*

cgja.org/cgja-training

4. Our CBOC is missing a member from a taxpayer's group. Can we still meet without that person and add a member-at-large person?

As Ed Code §15282(a) reproduced above is quite specific, this does not appear to be allowable.

Each district and each CBOC should maintain a schedule of when each member's term will end. As the term end is approaching, there should be steps taken to have the existing, or a new, member appointed without a gap in service. Members that are considering resigning should be asked to give as much advance notice as possible for the same reason.

However, even for those CBOCs that take the above steps, there are always times when there is an open seat. In general, the district should work to fill these openings as quickly as possible. Some districts have an open CBOC member application page on their web site which allows anyone who is interested in serving on the CBOC to understand the requirements (including required qualifications and conflict of interest) and submit preliminary applications. This produces a list of candidates that allows open positions to be filled more quickly.

All districts and all CBOCs should be aware that, while short, transient unfilled seats on a CBOC are unlikely to be major issues if there is a process to fill them as soon as practical. Long-term vacancies, particularly of the statutory stipulated qualification for some CBOC seats, could potentially expose the district to legal issues, perhaps even including a legal action to halt construction bond activity because the statutory requirement for a CBOC is not being met.

III. CBOC Meetings and Reports

- 1. Bond oversight committees review bond expenditures with the guidance of performance and financial audits. But those are written a year or so after expenditures are authorized. What are the responsibilities or opportunities for bond oversight committees to review bond expenditures during the year, or the quarter, in which they occur—that is, when the funds are allocated by the college governing board? Are such actions/activities by CBOCs routine or exceptional?**

Oversight should begin with the CBOC making inquiries if the district has the proper personnel and systems in place to plan, design, finance, construct, and transfer programs and projects to operation; this can be done through performance audits directed to systems and internal control reviews.

*CBOCs can also review programs as they are advanced. For example, if a district is planning a major effort to upgrade technology to the classroom and at-home information technology access district-wide, this could be presented to the CBOC for its consideration of the program, including scope, costs, schedules (such as, when will work begin, and be completed, at each school site), etc. in the same way that such programs would be presented to the district board – preferably, **before** it is presented to the board, along with any concerns or suggested changes and improvements that the CBOC may propose.*

Similarly, individual projects at individual schools can be presented to the CBOC. The CBOC, working with the district, should determine what level of detail it wishes to see; for example, present every project for an entirely new school and every project over \$10 million at an existing school in detail and present a list of smaller projects – which individual CBOC members may wish to ask about.

Another useful tool can be exception reporting for projects. In essence, once there is an approved plan, if everything is proceeding according to plan, that's all the CBOC needs to know. However, if a project cost is more than \$50,000 or 10% (whichever is less) over budget, report it to the CBOC, along with the reasons why and what is being done to prevent future cost increases on this and on similar projects. If a project has a schedule delay of more than two months, or if it will not be ready for the beginning of the school year, provide an explanation and improvement action. If the features of a school are changed, such as removing classrooms or adding a swimming pool, report it. (The values and examples used in the above are for the purpose of illustration only; if this approach is used, the values and criteria should be determined for each individual district and CBOC. Also, the effectiveness of exception reporting is highly dependent upon having good and trusted control systems.)

In addition to project-level exception reporting, program-level reporting – as in, we're over budget for what we planned to spend for all new schools or roof replacements, can be useful.

For both project and program-level exception reporting, the main objective is to find out about problems as early as possible when there is still maximum opportunity to fix or change something.

- 2. Our district's-imposed bylaws called for meetings no more than quarterly. Back in January, when the Board approved the bylaws, the Board changed the text to allow meetings monthly. This change was pointed out to the CBOC President at its first meeting—a new CBOC was formed after a bond measure was passed last year. At the end of the meeting, the President just said to his colleagues, see you in three months. The possibility of having their meetings monthly was simply not discussed. The President also does not respond to emails, from what I can see, so follow up is difficult.**

First, CABOC recommends that CBOC bylaws be exclusively a CBOC matter; the district Board (and staff) should have no role in approving or changing bylaws other than making recommendations or offering opinions – which the CBOC should be free to accept, modify, or reject.

That said, the change to allow the CBOC to determine if it wants to meet more frequently appears to be a positive change.

The specific issue that is related appears to be one of the internal functioning of the specific CBOC. Was the CBOC presiding officer elected to that position at the first meeting of the new CBOC? Do your bylaws include the common provision that Robert's Rules of Order govern, which would allow for CBOC meetings to be run in the normal ways that meetings of equals usually are rather than what, from this description, appears to be more like a one-sided manner?

You may wish to meet with other CBOC members prior to the next meeting (being careful not to violate Brown Act prohibitions) to gain consensus to introduce and pass a motion for more frequent meetings. Do your bylaws provide for a member to introduce agenda items so that they may be considered at the next upcoming meeting after proper Brown Act notice is given?

You may wish to take other actions to work with the CBOC presiding officer and other CBOC members to clarify to him that the presiding officer's manner of directing the operation of the CBOC is not seen with favor by all members.

3. Are documents referred to in a CBOC agenda required to be posted?

This is primarily a matter for each CBOC to determine. As a general rule, it is probably best to err on the side of including important documents in the agenda package for each meeting, which would mean that such matters would be sent out to all CBOC members in advance, as well as being available on the CBOC website for members of the general public to review if they wish.

One common situation in CBOC meetings is staff bringing in a large report, or a PowerPoint™ presentation, that was not part of the agenda package and no CBOC member (or member of the public) had seen before it was presented – with the common excuse that there wasn't time to get it finished prior to the meeting. We suggest that CBOC leadership and members may wish to make it clear to staff that the date of the meeting was known long in advance and that the CBOC wants to receive all materials well in advance of the meeting date so that members – and the public – have time to review them and prepare.

4. Using volunteers to draft the Annual Report, it can take a very long time before the report is made public. Considering that something that happens in the first month of the year may not be reported for another 22 months. What would CABOC recommend for getting the Annual Report out to the public after a very brief time after the end of the year in question?

*Your district has a statutory responsibility to support its CBOC, including the resources to get the Annual Report out on a timely basis – and ten months after the end of the year being reported on is certainly **not** timely.*

What does your district provide in the way of administrative support for the CBOC? Whatever it may or may not be, it certainly sounds like it isn't enough to do the work necessary to get your annual report out on time. We suggest that you estimate how much you need, in terms of work-

hours and other resources, to do the job in a reasonable period of time, such as completing within three months of year-end, and then approach the CBOC liaison person on the district staff with a request for those resources, either in the form of district personnel or contractors.

Each CBOC should establish a process and schedule for getting its reports completed and published as quickly as practical, and then work hard to meet its schedule.

5. At our CBOC meeting, we receive a summary of the expenditures. Shouldn't we be receiving copies of detailed invoices? What can we do?

It is up to each CBOC, working with its district, to decide what the CBOC needs to see to fulfill its statutory mandated oversight responsibilities. There will be great differences in the needs between any two CBOCs due to the size of the district and the construction bond program, number and skills of the CBOC members, dedicated CBOC staff (if any), and other factors.

If your program is fairly small, and we're talking about a dozen or two invoices a month, it may be practical for you to go through those in detail – assuming that you have members that are willing to commit to doing that on an on-going basis. Keep in mind that, for some types of projects, the detailed invoices can be half-an-inch, or more, thick each month, with all the subcontractor invoices, individual time reports, Little Davis-Bacon compliance documents, etc.

Another method you might consider is to have a system review performed – does it appear that the district does a proper job of reviewing the invoices, one that you feel confident that you can rely upon?

If you still want to review detailed invoices, you might consider doing spot checks, relying on a random selection methodology to pick out a few invoices each month, or perhaps concentrating on those on projects, or those contractors, that have been troublesome in the past.

In any event, CABOC believes that CBOCs should have the right to review any records that they wish to see – and it is up to each CBOC to determine what it wants to review.

6. What are the rules for allowing minority reports from a bond oversight committee to be presented to an institution's governing board?

At this point, there are really no rules other than those that each CBOC wishes to implement. CABOC recommends, as a best practice, that the bylaws allow minority reports and that the bylaws have sufficient detail as to when minority reports are allowed and how they will be incorporated into the full report packages, CBOC minutes, etc.

7. Shouldn't a district have a financial officer capable of presenting the budget issues instead of hiring an outside expert to present?

In general, yes, particularly for larger districts and programs – but the context of this question is not known. It is certainly not unknown for a government agency to contract out sections of, most of, or even almost all of a construction program, which could include the financial control aspects.

You might consider asking your district to explain how it has organized its construction bond management program, including the financial aspects, and how it reached the conclusion to perform in that manner, and the justification thereof, including costs, time to implement, risks, difficulty of engaging qualified personnel as employees, etc.

8. Cancellation of a bond oversight committee meeting due to the lack of a quorum should be a rare occurrence. Whose responsibility is it to ensure, to the degree possible, that members attend meetings or that substitutes are brought in whenever the staff learns about unanticipated absences?

It is the responsibility of the CBOC to get its members to its meetings. The quorum for meetings should be established in the bylaws. The CBOC chair should work with support staff to develop methods of informing members of meetings and keeping those reminders going out. If necessary, the chair should either personally contact members or work with other members to keep working on members to attend.

Each CBOC may elect to have some of its administrative responsibilities – including informing CBOC members of the meeting schedule and encouraging them to attend – performed by district staff.

Some CBOC have MOUs and bylaws that provide for alternate members – if a primary member will not attend, then the alternate is called upon to fill in, with all the powers, including voting, as if the primary member was present. Setting up the alternates can be a lot of work, as can getting the right alternate to meetings, particularly if the alternate needs to fill in for a specific primary member, such as the taxpayer organization or senior citizen (if you go this way, it is suggested that you try to find a senior citizen who is a student parent and PTA member who also belongs to a taxpayer organization).

If your district has a process for recruiting potential CBOC members before there are openings, then the prospective members can be given “try-outs” as alternate members.

Be assured that getting enough members to CBOC meetings is not a problem at all exclusive to your CBOC.

9. If members miss excessive meetings, who is responsible for securing replacements— assuming that there are standards in the bylaws indicating when members become “inactive” due to excessive absences? (This situation sometimes occurs with student members who simply stop coming to meetings.) The responsibility for recruiting replacements often appears somewhat nebulous.

If there are members that consistently have attendance issues, the basic choices are keep working on them to attend by every practical means or, if there are still problems, ask if they will resign. Depending on how your bylaws are prepared to define the quorum requirements, this may be of some assistance.

There is little in the State statutes on the responsibility for recruiting CBOC members other than the requirement that all CBOC members must be appointed by the district governing board. CABOC recommends that the CBOC and the district work together to develop a methodology to find, qualify, and appoint good candidates quickly when needed, using whatever appears worth

doing for each district, including asking civic and professional organizations to nominate candidates and having a CBOC member sign-up site on the district website.

10. Does CABOC recommend that the CBOC turn over their responsibilities of setting their own agenda and preparing their own minutes?

Exactly the opposite – CABOC recommends that each CBOC enter into a binding MOU with its district that specifically provides that the CBOC shall prepare their own agendas for its own meetings – scheduled as the CBOC shall determine – and have responsibility for its own meeting minutes.

Of course, each CBOC should work with its district and particularly facilities staff in determining what should be on the agenda for each meeting and ensuring that district staff will be able to meet the CBOC’s desires.

Also, many CBOCs have district staff actually take the minutes and prepare the first draft of the minutes, with the designated CBOC secretary reviewing and, as required, modifying the proposed minutes prior to the draft minutes being distributed in the agenda package for the next meeting.

IV. Construction Bond Project List

1. How do I find my construction bond expenditure list?

CABOC recommends that each district have this detail on its web site, organized to allow first-time users to find the information, at the level or detail, that they are interested in. This should include high-level summaries, but also detail down to individual schools, with a list of all projects at that school, including description of the project, cost, start and finish dates, and progress to date.

The original list, by statute, must have been included in the bond ballot measure presented to the electorate.

2. Should project lists be specific or general in nature?

There are large ongoing debates on this. It is certainly possible to read Prop. 39 and conclude that the project lists should be fairly specific – but many districts and construction program managers will reply that it is simply not practical to do that level of detail planning, scheduling, and cost estimation on a large number of projects at different sites over a multi-year period – and there are far too many factors that can change and the district must have the ability to respond to unexpected changes, such as huge increases in the costs of materials or a major fire at a school. Another common contention is that doing detailed planning for all proposed projects would require a lot of personnel resources, take a long time, and be expensive.

This question could refer to two different lists. The first is the list presented to the electorate in the bond ballot measure; the second the list of individual projects that is developed as the school construction bond program proceeds to implementation.

As to the first, the list on the ballot issue, there is no consensus as to how detailed and specific this should be; some are very specific down to individual projects at individual schools; other very general, such as how money for new school construction and how much for five or ten specific programs. It is not uncommon for districts to essentially put out a list that is a huge matrix, with one axis of the matrix a list of every existing school in the district and the other axis everything that could be done to an existing school from boiler replacement to upgrading the electrical system – plus a separate list for new schools, which may or may not be very specific as to site, grades, number of classrooms or student capacity, and features (competition football/soccer field, culinary arts emphasis, etc.

CABOC prefers to have more detailed lists in what is presented to the voters. However, they are expensive to prepare with any degree of accuracy and, as a result, many districts prefer to provide the minimum possible level of detail.

The controlling factor is what bond counsel will determine is required by the law.

*As to the second type of list, often referred to as the “Facilities Master Plan” (FMP), the actual action list of individual projects, by its nature, must be very detailed. The FMP should include both a big picture project list, prioritization, and planning budgets and details of each individual project. As individual projects move from planning to design to ready for contracting, “educational specifications,” such as the details of design (this school will have a Science-Technology-Engineering-Mathematics [STEM] design; this one will emphasize performing and visual arts, this one will have a competition football stadium, this one won’t, etc.) and materials criteria to be used should be added. The district should also have a detailed general specifications document, such as details of classroom size, lighting, heating/ventilation/air conditioning, fire and emergency alarms, etc. However, it is generally considered wise **not** to show the preliminary budget for specific projects that will be going out to bid to make sure that contractors will do their own cost estimates and be more motivated to “sharpen their pencils” to submit competitive bids and proposals.*

There are ways to consolidate projects for this form of the list – for example, have one contractor for heating/ventilation/air conditioning work at multiple schools – but, even if this is done, in order to have a degree of control over expenditures and contractors, there must be a detailed breakdown somewhere by site somewhere in the program/project control system.

*Best practice is for there to be one consolidated system that allows authorized users to access data at many levels, from detail project managers who are responsible for the electrical system in a new school to the overall program totals, with different people given different degrees of access (and access is the ability to **see** information, **not** the ability to change or add data). Any member of the public should be able to go down two or three levels, but only authorized insiders can access more detail – and very few people will have total access to everything and only specified personnel will have the authority to add, delete, or change data.*

3. How can a district maintain flexibility in its master plan to address unforeseen future events such as a pandemic?

Construction bond funds can only be utilized for capital projects; therefore, they could not be used, for example, to cover the costs of teachers during a period when local tax revenues fell due to COVID-19. That said, COVID has certainly impacted construction costs, such as material shortages during production work and supply line issues causing large increases in construction materials – if you can find them anywhere.

This question is an argument for making the project lists presented to the voters as flexible – as in non-specific – as bond counsel will allow. Again, this is still a discussion with two sides that has not been, and may never be, fully resolved.

4. If the specific list (wish list) included in the bond measure is substantially more than the bond amount, is it too much to ask to be provided with a priority list with project schedules?

You are certainly correct in observing that it has become common for the project lists presented in the bond ballot measures to include far more projects, at far greater total cost, than could possibly be completed with the value of the bonds authorized.

This is understandable as it is another way of providing flexibility for district and facilities leadership to be able to respond to changes in conditions.

Your observation that, with such an approach, a priority list appears both desirable and reasonable appears valid.

Perhaps the main reason that the priority list approach is not done more often is that, in order to get a new tax to pass (and Prop. 39 bond ballot issues are actually measures to allow property tax increases to cover the bond debt service), you need to get as many “yes” votes as possible. One proven way to get more “yes” votes is to promise as many things as possible to as many potential voters as possible – and potential “yes” voters who see “their” projects at “their” school far down the priority list could be regarded as less likely to vote in favor the tax increase if they are less likely to get something out of it.

V. Memorandum of Understanding

1. What is an MOU?

In this context, a Memorandum of Understanding (MOU) is a legally enforceable contract between a district (and its governing board) and a CBOC that spells out the rights, duties, and responsibilities of both parties; for example:

- a. How CBOC members are selected (or nominated) and appointed*
- b. Independence of the CBOC from the district*
- c. The CBOC is self-governing and prepares its own bylaws*
- d. The CBOC sets its own meeting schedule and agendas*
- e. The CBOC has access to district records and personnel*

- f. *The CBOC has the ability to access and report to the governing board when it wishes*
- g. *The district will contract and pay for independent legal counsel for the CBOC and other CBOC advisors and/or staff*
- h. *The district will budget for CBOC expenses*
- i. *The district will provide dedicated CBOC staff*
- j. *The CBOC will have specified access to construction bond program auditors*

(The above are examples; not all CBOC MOUs will have all these provisions and there are many other provisions that could be and have been added.) CABOC is preparing MOU templates for interested CBOCs to use as a baseline for their MOUs; these should be on the CABOC website before the end of 2021.

2. Are CBOC's legally separate entities that have the right to enforce contractual agreements?

This is a complex and interesting legal question that has not been fully resolved. Part of the CABOC legislative agenda is to clarify it.

In this context, the question could be interpreted as asking, “If a CBOC does not have its own separate legal existence, then it must be part of the district, and how can a district contract with itself?”

Interestingly, even districts legal counsels that have argued that their CBOC does not have its own separate legal existence have agreed that a contract between the CBOC and the district is valid and enforceable – which makes this something of a moot point for this question.

*This question triggers a lot of potential legal problems. For example, not infrequently, there can be a contract for a major construction project that has potential major cost issues and the CBOC may be concerned that these could negatively impact the district's ability to complete all the projects on the list. If the CBOC asks the district for information, it could place the district in a tricky legal quagmire. If the CBOC **was** a separate legal entity, then it would not be covered by attorney-client privilege and any information shared by the district with the CBOC – such as the size of a potential settlement agreement with a contractor over construction claims – would destroy the privilege, which is not where the district would want to be when it is trying to negotiate a potential settlement. For this and other reasons, CABOC recommends that CBOCs not request, or have access to, privileged and/or confidential information.*

3. I understand that CABOC has embraced MOUs but should the CBOC be allowed to decide whether to use an MOU or should it be the directive of CABOC (as we just heard)?

Yes, certainly. The CABOC position on MOUs is that all CBOCs should have the legal right and the ability to enter into an MOU with their district and this is part of the CABOC legislative agenda.

If a CBOC does not believe that they need a MOU with their district, that is its decision.

VI. Bylaws

1. If the bylaws were already created by the district and distributed at the first meeting, can the CBOC revise the bylaws or develop their own later if needed?

CABOC's position is that the bylaws for the CBOC should be solely a matter for the CBOC to determine and that the district, the district's governing board, and district staff have no power over the bylaws.

Of course, there are a large number of districts that believe otherwise, with a range of district positions ranging from the bylaws are totally a matter for the district's governing board, to that the governing board has the final say on what is in the CBOC bylaws. Because, as of this time, there is no statutory or case law on this point, the power to adopt and change the bylaws is currently a matter of negotiation between the district and the CBOC. Gaining clarification of this to ensure that each CBOC is the sole authority for its own bylaws is part of CABOC's legislative agenda.

Therefore, at the present time, if the CBOC has had its bylaws prepared by the district and wants to make changes, and the CBOC makes changes unilaterally, it could expect pushback from the district. The CBOC should approach such matters with care and consultation with the district prior to taking any action would appear prudent.

CABOC is available to counsel such CBOCs as to how to proceed.

It should be noted that CABOC makes a distinction between bylaws, which relate to the rules as to how a CBOC operates internally, including such matters as selection and duties of officers, how meetings are scheduled and called, how agendas are prepared, etc., and the MOU, which details how the district and the CBOC interact and the duties, responsibilities, and powers of each in regard to the other. CABOC is aware of documents that are entitled CBOC "bylaws" that include matters that CABOC includes in the MOU. Therefore, in any discussion of "bylaws" and MOUs between the district and the CBOC, these definitions should be clearly discussed and understood by both parties as one of the first matters on the agenda.

2. Should district staff be allowed to selectively remove specific bylaws from the CBOC approved set of bylaws?

CABOC's position is "no" that bylaws are exclusive for internal operation of the CBOC and are solely a matter for the CBOC to prepare, adopt, and modify as the CBOC, and only the CBOC, may decide.

If the district wants to comment on, or propose changes to, CBOC bylaws, it has the same right to make such comments as any other party; but only the CBOC should have the power to prepare its own bylaws or adopt changes.

Again, at this time, many districts have adopted very different positions.

3. Can bylaws be changed with regard to terms that a CBOC member can serve? Our bylaws state that a member may serve three two-year terms and we are in year six. It will be very difficult for us to find all but two new members and teach them five years of our experience that includes extreme cost increases due to the pandemic.

CABOC recommends that matters that are established by State statute or other external laws, regulations, or contracts should not be duplicated in the bylaws; as these requirements already exist, there is no need to duplicate them in the bylaws, and if the provisions in the overriding statute, regulation, etc., are subsequently changed, the bylaws would have to be changed to comply and failure to make such changes could cause problems.

While Ed Code §15282(a) states, “The citizens’ oversight committee shall consist of at least seven members who shall serve for a minimum term of two years without compensation and for no more than three consecutive terms,” in practice, it is possible for CBOC members to serve longer than the six years stated above.

The process is for the district governing board to make an application to the California Board of Education (CBOE) for an extension for specific CBOC members for specific periods of time. It is recommended that such requests be discussed with CBOE staff and presented at least three months in advance of the expiration of the final term for the CBOC members being considered if possible. The history of such matters that have come before the CBOE in recent years is that every such request has been approved.

Obviously, the three-term, six-year limit in the CBOC bylaws should be removed as, even with CBOE approval of CBOC members serving for longer periods, the bylaw provisions could be interpreted as disallowing such extensions.

4. Are specific subcommittees recommended for CBOCs?

In the opinion of CABOC, CBOC subcommittees can be useful, but this is a matter for each individual CBOC to determine. CABOC is currently preparing a bylaws template, expected to be available on the CABOC web site before the end of 2021 that would include a provision for the establishment of subcommittees – if the CBOC wishes to include such a provision.

VII. CBOC Independent Legal Counsel

- 1. (There were several very similar versions of this and the following questions rendered; the questions that follow are a consolidation of these questions.) How do we acquire the independent legal counsel to represent CBOC and who pays for it? Is it expected that personal funds will pay for that? Is it legally required by legislation for a district to provide independent legal counsel? What is statute for CBOC to have independent counsel?**

Ed Code §15280(a) (1) states: “The governing board of the district shall, without expending bond funds, provide the citizens’ oversight committee with any necessary technical assistance and shall provide administrative assistance in furtherance of its purpose and sufficient resources to publicize the conclusions of the citizens’ oversight committee.”

CABOC’s interpretation of the above – which is shared by some districts – is that districts are required to fund CBOC independent legal counsel. However, the lack of detail in the statute

provides enough ambiguity that a district can claim that, since the requirement is not specifically detailed, this is a matter for the district to determine. Therefore, currently, it is a matter of negotiation between each CBOC and its district for CBOC independent legal counsel to exist and for the district to pay the costs.

*So, it is clear what is being discussed in this context, CBOC independent legal counsel means a law firm that works for the CBOC as its client that does no other work for the district. This specifically **excludes** district bond counsel, any law firm that does any other work for the district, and any district employee (while CABOC is aware of district employees that work exclusive for the CBOC, it is difficult to conceive that there would be sufficient CBOC legal matters that would require a full-time employee).*

The CABOC legislative agenda includes making CBOC independent legal counsel mandatory, with the district paying for the costs, if the CBOC so desires, and for the costs of the CBOC (including that of CBOC independent legal counsel) to be payable from construction bond funds if the district so elects.

*CABOC does **not** contemplate the costs of CBOC independent legal counsel being paid by non-district funds or a law firm providing these services pro bono; the costs of CBOC independent legal counsel should be paid by the district.*

2. If the district is paying for the attorney, isn't the district the client? I just would like to understand how an advisory board can act as a separate legal entity.

No, it is totally allowable for one party to pay for the costs of legal counsel that works for another party. This is specifically provided for in California legal cannons of ethics and is not at all uncommon.

*CBOCs are **oversight** committees, **not** advisory boards.*

3. Establishing an MOU and getting a dedicated legal counsel sound like heavy lifts—I'm looking at our own CBOC. Comments, please.

On this, there is no argument. Depending on the specifics of each district, each CBOC, and their relationship, it could certainly be a "heavy lift" to get the district to agree that its CBOC should have independent legal counsel and for the district to pay these costs. However, there are California districts that have agreed to their CBOC having its own independent legal counsel, so there is precedent.

CABOC is prepared to support CBOCs that are interested in pursuing this course of action.

VIII. Financial Audits

1. What is the difference between the general financial audit for the entire district and the required financial audit of the bond program(s)?

The financial audit of the district's Annual Report (or Annual Comprehensive Financial Report¹) includes the external presentation of the entire district's financial position, required to be presented under Generally Accepted Accounting Principles ("GAAP") and Generally Accepted Government Accounting Practices ("GAGAS") and audited under Generally Accepted Auditing Standards ("GAAS") and Government Audit Standards.

As to the audit requirements for the construction bond program, these are limited to those expenditures for that specific purpose from that specific funding source and related funding sources, as required by California statute. The same general accounting and auditing standards apply.

Most commonly, both audits are performed by the same auditor at the same time. Some audit work can be used to satisfy the requirements for both, but the audits of the bond program require additional unique work to be performed. It is also possible for these two audit requirements to be performed separately by different firms, but this is not commonly done because the costs would be higher and would require more resources from the entity being audited to work with two sets of auditors. For California districts, it is common for other required financial reports, such as those for federal grants, to be performed by the same "single auditor."

2. When a bond measure is approved, who is responsible for developing a fraud risk assessment?

In the context of the construction bond program, there are two audit risk assessments. Both involve the identification and quantification of risks, evaluation of the responses to these risks, monitoring and reporting risks, and reporting of the risks.

Each district should perform its own fraud risk assessment internally to look for weaknesses and where improvements are required, and results reported. This should be an on-going, never-ending process.

Separate from the entity's internal fraud risk assessment, auditors perform their own fraud risk assessments. Auditors may, where appropriate, incorporate the entity's internal fraud risk assessment while performing their own, but are required to perform sufficient work of their own to ensure that the entity's work can be relied upon. While part of the work of the auditor is to identify such risks and bring them to the attention of the entity being audited so that these weaknesses can be addressed, the auditors also use their audit risk assessment to indicate which specific areas of the audit require additional attention, such as increasing the number of

¹ This extended form of the annual report was formerly known as the Comprehensive Annual Financial Report, commonly shortened to "CAFR." However, when spoken, the latter sounds similar to an offensive slur in Afrikaaner, so the Government Financial Officers Association has decided to no longer use the older term.

transactions tested to gain a sufficient level of confidence that the reported outcomes are reasonable.

CBOCs should consider if they want to have an audit risk assessment, together with a review of school construction program and project control systems and internal control reviews, performed and reported to the CBOC to provide a foundation for the CBOC, and other stakeholders, to be able to rely upon reports rendered to the CBOC by the district and its facilities department.

3. What has been your experience where the cost savings identified in the audit exceed the cost of audit?

*While it is always desirable for an audit to produce benefits that exceed the costs of the audit, it is not always easy, or even possible, to fully quantify the benefits. For example, while identifying a weakness in controls could lead to improvements that reduce losses, trying to project how much losses have been lowered can be problematic. (How much fraud **didn't** occur because we improved controls? How much financial gain because of faster and more accurate reporting of activities? The recommended changes in process have led to projects being completed faster, which improves the educational experience – how do we quantify the dollar value of this acceleration?)*

The main objectives of the most common types of financial audits are to provide assurance that financial results reported can be relied upon and that proper controls are in place. Findings and recommendations that lead directly to cost savings, revenue enhancements, or other meaningful improvements in results that can be quantified should be regarded as a bonus.

IX. Performance Audits

What do I do if the district does not conduct a performance audit?

Ed Code §15286 states, “Consistent with the provisions contained in subparagraphs (C) and (D) of paragraph (3) of subdivision (b) of Section 1 of Article XIII A of the California Constitution, the required annual, independent financial and performance audits for the preceding fiscal year shall be submitted to the citizens’ oversight committee established pursuant to Section 15278 at the same time they are submitted to the school district or community college district, no later than March 31 of each year. These audits shall be conducted in accordance with the Government Auditing Standards issued by the Comptroller General of the United States for financial and performance audits.”

This provision clearly requires that performance audits be conducted. If a district is not complying with the requirement, the CBOC should draw the district’s attention to this violation.

CABOC recommends that all CBOCs work with their districts to develop the specific scope for performance audits to be conducted, as well as participating in the selection of the auditors and in the review of the audit results.

X. Questionable Use of Bond Funds

1. How do you define administrative cost? What are typical or non-typical costs?

*Proposition 39 of 2000 added the following language to the California Constitution, Article XIII A, Section 1. (b)(3)(A), which states, “A requirement that the proceeds from the sale of the bonds be used only for the purposes specified in Article XIII A, Section 1(b)(3), and not for any other purpose, including teacher and **administrator salaries** (**emphasis added**) and other school operating expenses.”*

While “teacher ... salaries” is relatively easy to understand, “administrator salaries” is more challenging to define, and there is no guidance in Proposition 39, its implementing State statutory provisions, or other elements of Proposition 39.

This lack of definition caused confusion to school construction bond personnel until then-California Attorney General Bill Lockyer issued his Opinion No. 04-110² on November 9, 2004, which concludes, “A school district may use Proposition 39 school bond proceeds to pay the salaries of district employees to the extent they perform administrative oversight work on construction projects authorized by a voter approved bond measure.” In the absence of statutory or case law, an Attorney General opinion is generally regarded as the best available legal authority. This opinion essentially disallows charging the general administrative salaries of a district, such as those of the Superintendent, to school construction bond funds, but allows the charging of such costs for administrative oversight work on construction projects that were authorized by bond measures approved by the voters.

What administrative salaries, and other administrative expenses, can be charged to Prop. 39 school construction bond funds can be very complex, and such issues are very frequently referred to district bond counsel. If a CBOC has questions if questionable costs are being charged, it should ask the district for its legal and accounting justification for doing so. It is possible that a district would refuse to provide a bond counsel opinion on the grounds of legal privilege, many districts will provide such information, and related information such as accounting department procedures and memos, references to GAAP and GAGAS, and indirect cost allocation plans.

2. My district’s bond language for an \$800+ million was comprehensive, but there was intentionally no project list—the language was written by the bond counsel. A bond Project list is being called for today but, in my district, this is not happening—again intentionally. The reason for this behavior is the Foothill-DeAnza³ decision of 2007.

It is difficult to respond to this very specific question without more information. There is a requirement in Proposition 39 and its implementing statutes for a project list to be presented to the voters as a key, required part of the bond ballot measure, so the complete absence of any

² [Opinion No. 04-110 \(ca.gov\)](#)

³ *Foothill-De Anza Community College District v. Melvin L. Emerich et al* (Santa Clara County Super.Ct.No. CV065060, H031120, [Foothill-De Anza v. Emerich :: 2007 :: California Courts of Appeal Decisions :: California Case Law :: California Law :: US Law :: Justia](#))

project list would appear quite questionable – and attempting to produce a project list after the bond ballot measure passes does not appear to be acceptable.

*The requirement for a project list as part of the ballot measure package is not well-defined. It is possible that this dispute is not one of, is there or is there not a project list, but rather, is the project list presented sufficient or not (the decision in Foothill-De Anza states, “The court also concluded that, although Measure C (the bond ballot measure before the court) did not set forth Proposition 39’s accountability provisions verbatim, the information it did supply was sufficient,” which can be read that there **was** a project list that was sufficient for the court (excerpts from the project list in Measure C are included in the decision), thereby rejecting the plaintiff’s contention that there was none, or that it was insufficient.*

We are unable to provide a definitive response without more data – and CABOC does not intend to be in the business of rendering opinions as to such documents being sufficient or not.

This type of question should be directed to competent legal counsel.

3. In some cases, the school district will rely on their legal advisor/attorney to interpret and justify the use of Bond funds. If the funds are used for relocation of staff due to unexpected damage on a school district building (not listed) - can CBOC have an independent attorney to get a 2nd opinion?

It is not possible to provide a specific response without more detail, but the use of construction bond funds for relocation of staff due to unexpected damage to a school district building may be questionable. Necessary facts are not included in the question, but, if the building in question is not a school or classroom, the use of school construction bond funds may not be appropriate. There are other fact sets where the use of school construction bond funds for relocation of staff may be allowable, such as the costs of providing temporary classrooms while a major rehabilitation capital project is conducted.

Asking the district for justification of such uses, including the opinion of bond counsel, appears a reasonable course of action to attempt to resolve this question.

4. What can you do if there is spending on a project not included in ballot language, aka Project List?

If the prospect of such a matter comes to the attention of the CBOC, it should ask the district for information and clarification. It should consult with legal counsel, starting with the CBOC independent legal counsel and, if possible, district bond counsel.

If more information is required, the CBOC should consider other actions, such as requesting that financial and/or performance audit work be conducted.

The CBOC should proceed with great caution if there is any possibility of an illegal act. Again, after consultation with legal counsel, referral to the proper law enforcement agency should be considered. CBOCs should proceed very carefully in attempting to investigate potential violations of law and should totally refrain from attempting investigations of alleged criminal acts.

5. What are the most common problems with bond spending?

*It must, of course, be understood that the following is **not** a complete list of such problems – and the number of variations on each question below are massive.*

- a. *There is spending for capital projects that were not included in the project list approved by the voters.*
- b. *There is spending for non-capital purposes.*
- c. *Proper procurement and project control procedures were not followed, or were not properly documented.*
- d. *The district does not have (employee and/or contractors) personnel with the skills necessary to manage major capital programs and projects and/or has a deficient organizational makeup and delegation of duties and responsibilities.*
- e. *The district does not have the systems and procedures necessary to manage major capital programs and projects.*
- f. *The district has attempted to begin construction too quickly for political purposes, resulting in poor project selection, design, and/or management.*
- g. *The district has failed to comply with all required statutory, regulatory, and contractual requirements.*
- h. *The district has failed to have sufficient outreach to the various communities it serves.*
- i. *The district has not properly interacted with the California Division of the State Architect and/or city/county on school plans*
- j. *The district has not properly interacted with the appropriate local fire marshal prior to school facility opening*
- k. *The district has not done outreach to construction contractors and construction trades to help ensure that there will be competition for construction projects and sufficient workers to get the work done.*
- l. *The district does not have proper claims and change order procedures or does not follow them.*
- m. *There are bonds issued, or proposed to be issued, for terms longer than 30 years (generally speaking, bonds should be issued for the shortest possible period) and/or the district has issued capital appreciation bonds (also referred to as “zero-coupon” bonds).*