

# Is Charter School Work Public or Private?

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Contemplating charter school work? You may be asking yourself myriad questions. Is the job public or private? Is it union work? Do prevailing wage rates apply? Why aren't the jobs competitively bid?

Characterization of a construction project as "public" or "private" has broad implications, especially in California. But in the charter school arena, determining whether a project is public or private is anything but straightforward.

A charter school receives education funding primarily from the state. Its charter is authorized by the board of the local school district, a county board of education or directly by the State Board of Education. So you might think charter school construction is a public work. But that isn't necessarily the case. In fact, most charter school construction work is private.

If you are confused, take solace – you aren't alone. Courts across the United States have very different, often conflicting, holdings on this issue. California courts and tribunals (Department of Industrial Relations, the Attorney General) have skirted the issue, or just narrowly ruled on related issues, avoiding a holding squarely on point. Each year assembly bills are drafted, usually declaring charter schools to be public entities for certain purposes, but each bill has died on the floor or been vetoed, never becoming law. So where does California stand on this today?

## Public v. Private Works 101

In California, three main factors are used to analyze whether a construction project is public or private: (a) ownership; (b) funding; and (c) use.

By way of background, in 1992 the Charter Schools Act (CSA) revolu-

tionized public education by allowing laypersons to obtain charters to operate schools that function within public school districts, charge no tuition, and receive financing through state and local tax dollars. In 1998, California enacted Education Code section 47604, allowing charter schools to be operated by nonprofit corporations.

This nuance changes the landscape for charter school construction.

In *Wells v. One2One Learning Foundation, Inc.* (2006) 39 Cal.4th 1164, several charter schools argued that they should be treated the same as public school districts, pointing to language in the CSA and Education Code stating that charter schools are under the jurisdiction of the Public

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School System, and thus are public entities. The *Wells* court disagreed, holding that despite this language, because charter schools are not *operated* by the public school system, but rather, by nonprofit corporations, they are not public entities, and thus are exempt from the laws governing school districts.

The court focused on the autonomy and independent responsibility of charter school operators. When a charter school is operated by a non-profit corporation, the corporation



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is responsible for the school's debts and obligations, not the chartering authority. In other words, the public district, or chartering authority, is immune from financial liability for the charter school. Ergo, charter schools and public school districts are not the same; logic dictates that charter school corporations are private entities.

## Providing Public Education Doesn't Make It a Public Entity

In *Gateway Community Charter v. Spiess* (2017) 9 Cal.App.5th 499, a charter school claimed it was a quasi-municipal corporation to avoid liability under California employment laws. Although the court acknowledged that charter schools provide an essential government function, by providing public education through the charter schools they operate, nevertheless, the court concluded this did not make the charter school a public entity.

In coming to this decision, the *Gateway* court focused on several indicia of a public entity, that do not exist for charter schools: power to acquire property through eminent domain; power to impose taxes and fees upon those who live within its geographical jurisdiction (indeed, charter schools have no geographical jurisdiction, but exist pursuant to a charter); independent regulatory or police powers; and board members elected by the public. Given the absence of these key characteristics, the court concluded that charter schools are not quasi-municipal corporations

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like public school districts.

In sum, charter schools that are operated by nonprofit corporations are private entities, negating the first factor necessary for a public work, public ownership. However, a few operate as affiliates of the chartering district, and thus would be public.

### **Charter School Construction Usually Funded With Private Bonds**

Public funding may subject a construction project to public contracting laws, even if the owner is private.

The *Wells* court noted that although charter schools receive public monies to operate schools, the mere fact the schools receive public funds, earmarked for “public” education, does not mean public construction laws apply. A key factor is whether the public funding is actually going towards construction. Put another way, public monies assisting charter schools for educational purposes is not sufficient to trigger public works laws.

The key is determining the *source of money funding the construction*. Many charter schools finance construction solely with private, tax-exempt bonds or with private construction loans, rendering the construction a private work. A few charter schools do receive public money for construction, though,

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so it’s always a good idea to discuss construction funding sources prior to bid time.

But what if the construction debt is paid off with revenues derived from public funding? No case is directly on point. In similar situations, California courts have focused on whether: (1) a private developer or corporation is hiring the contractor; and (2) a private source of money is funding the construction.

Arguably, if a general contractor is hired by a non-profit corporation and paid solely from private money, the construction project is private. Thereafter, if the developer seeks to defray construction costs via rent payments from a school receiving public money, that is up to the developer. The law on this point is worth tracking and seems ripe for legislation or caselaw closing this potential loophole.

### **Nature of Use**

Finally, sometimes a project is deemed public based on the building’s use.

Current case law suggests that the use of charter school facilities by public students, wherein the school receives public money for their education, does not transform construction work on the building into a public work.

In *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576 the court held that “paying public funds for public services does not make incidental construction work done by a private provider of those services public works.” In sum, public funding of a charter school’s *education services*, by itself, does not transform *construction work* on the facilities into “public works.” For this work to be deemed public, the public funding needs to directly pay for the construction.

### **Conclusion**

In California, charter schools operated by non-profit corporations are private entities, despite contradictory language in the CSA, the fact they serve a government purpose, and even if, by charter, they voluntarily agree to be bound by specific public rules, like

the Brown Act or the Public Records Act. If the construction is fully funded with private bonds or a private loan, the project remains private, even if the building is used for public education.

California legislators have toyed with bills to address this subject. In February, 2018, AB 3222 was introduced, expanding the definition of “public works” to include any construction done for a charter school, even if financed by private bonds and done between private companies. Although the bill failed, contractors should be cautious in this arena, for the determination of whether charter school construction is public or private is a moving target that could change in the years to come. ■

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### *2019 Revisions*

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Labor Commissioner is required to publish on its website a list of contractors who are ineligible due to violations.

- AB 3018 also carries forward for contracts executed after January 1, 2019 that sections 2601-2603 of the Public Contracts Code must be attached to the contract.

While the skilled and trained workforce requirements are mandated for certain public owners and projects, public agencies are free to implement the requirements on any project. We are watching the legislature for future bills in this area and will monitor agencies for adoption of such requirements.

Stay tuned for further developments. ■

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