

COURT OF APPEAL NO. B262850

**IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 8**

**JAMES D. McGEE, and CALIFORNIA TAXPAYERS
ACTION NETWORK,**

Plaintiffs and Appellants,

vs.

**BALFOUR BEATTY CONSTRUCTION, LLC, and
TORRANCE UNIFIED SCHOOL DISTRICT, et al.,**

Defendants and Respondents.

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF; AMICUS CURIAE BRIEF OF CALIFORNIA SCHOOL
BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE
IN SUPPORT OF DEFENDANT/RESPONDENT TORRANCE
UNIFIED SCHOOL DISTRICT**

On Appeal From a Judgment of Dismissal of the Superior
Court for the State of California, County of Los Angeles
Superior Court Case No. YC069859
Honorable Ramona G. See, Judge

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**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(CAL. RULES OF COURT, RULE 8.208)**

There are no interested entities or persons to list in this certificate (Cal. Rules of Court, rule 8.208(e)(3)).

DATED: January 4, 2016 Respectfully submitted,

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**APPLICATION OF CALIFORNIA SCHOOL BOARDS
ASSOCIATION'S EDUCATION LEGAL ALLIANCE FOR
LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF
DEFENDANT/RESPONDENT TORRANCE UNIFIED
SCHOOL DISTRICT**

Pursuant to Rule 8.200(c) of the California Rules of Court, California School Boards Association's Education Legal Alliance respectfully requests leave to file the accompanying brief as amicus curiae in this proceeding in support of respondent Torrance Unified School District ("District"). Amicus curiae is the California School Boards Association's Education Legal Alliance ("ELA"). The California School Boards Association ("CSBA"), a California non-profit corporation, is a member-driven association composed of the governing boards of nearly 1,000 school districts and county offices of education throughout California. CSBA supports local school board governance and advocates on behalf of school districts and county offices of education. It does so by provision of a wide range of services including policy analysis, legal advocacy, legislative representation, professional development workshops, media, and information services. CSBA regularly guides local governing boards on the proper exercise of their authority. As part of CSBA, the ELA helps to ensure that local governing boards retain the authority to fully exercise the responsibilities vested in them by law to make policy and fiscal decisions for their local educational agencies. The ELA represents its members by addressing legal issues of statewide concern to school districts and county offices of education. The

ELA's activities include joining in litigation where the interests of public education are at stake.

No party or counsel for any party in this appeal authored the proposed amicus brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the amicus curiae made a monetary contribution intended to fund the preparation or submission of this brief.

DATED: January 4, 2016 Respectfully submitted,

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**AMICUS CURIAE BRIEF OF CALIFORNIA SCHOOL
BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE
IN SUPPORT OF DEFENDANT/RESPONDENT TORRANCE
UNIFIED SCHOOL DISTRICT**

I. INTRODUCTION

Amicus Curiae California School Boards Association's ("CSBA") Education Legal Alliance ("ELA" or "Amicus") submits this brief in support of Defendant/Respondent Torrance Unified School District ("District").

Amicus writes to provide the Court with practical information regarding the immediate and broad ranging impacts its decision will have on school districts throughout California. Additionally, Amicus writes to provide the Court with legal and factual information it may find helpful in rendering its decision.

Education Code section 17406 provides one method school districts may utilize to accomplish a school district facilities construction project. Simply stated, Education Code section 17406 permits a school district to lease its property to a third party so that the third party can construct facilities on the property. This provision has existed in largely the same form for decades. This "Lease-Leaseback" method allows for a collaborative project dynamic that produces, in many circumstances, better facilities outcomes for schools. While "hard bid" projects have a place, the Lease-Leaseback method is an option that was legally and properly afforded school districts by the Legislature and must be upheld.

School districts are granted broad authority under Education Code sections 17406 and 35061 to structure their agreements as they

determine is in their own "best interest." Appellants' attack ignores this broad grant of discretion plainly stated in Education Code section 17406 and fails to show how school districts generally, and Respondent District specifically, abuse their discretion under this statute.

The plain language of Education Code section 17406 does not include a financing requirement. Even if *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, *as modified* (June 19, 2015), *review denied* (Aug. 26, 2015) ("*Davis*") is correct that a financing component is a necessary component to the agreement, despite the fact Education Code section 17406 says nothing about financing, the ability to structure that financing is expressly left to the discretion of the school districts. Education Code section 17406 subdivision (a) specifically states, "[t]he instrument...shall contain...other terms and conditions as the governing board may deem to be in the best interest of the school district." Moreover, Appellants' arguments that Education Code section 17406 agreements must be bid ignores the plain language of the statute and the fact that requiring bidding for such agreements would render portions of Education Code section 17062 meaningless. See *Los Alamitos Unified School District v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222, 1229-1230, *review denied* (Dec. 10, 2014).

As a practical matter, Amicus points out that school districts are *not* using the discretion vested in Education Code section 17406 because there is a desire to *increase* project costs or for some nefarious or sham purposes. School districts use such discretion because they determine it is in their best interest and the interest of the

students they serve for a variety of reasons. Chief among these reasons is that competitive bidding projects do not always produce an advantage because they do not provide school districts with true cost control or result in the delivery of a timely completed project.

Appellants' arguments that bidding is required for the "Facilities Lease" ignores the fact that Education Code section 17406 does not expressly require a facilities lease. If there is no requirement for a facilities lease, there can be no requirement that it be bid. The deal can be structured, as is stated in the statute, as each *district* determines to be in its "best interest."

II. ARGUMENT

A. On The Day The Decision In This Case Is Rendered, It Will Be Analyzed On Behalf Of Hundreds Of Schools And Will Affect School Facilities For Millions Of Students

According to the California Department of Education, approximately six million students attend public schools in California. (See, <http://www.cde.ca.gov/ds/sd/cb/ceffingertipfacts.asp>.) School districts face a difficult challenge of providing adequate facilities for all of these students. This challenge has been intensified due to the many questions left unanswered by the decision in *Davis*.

To provide the facilities required to meet the needs of their students, school districts have primarily utilized either Education Code section 17406¹ ("Section 17406") or the "*hard bid*" method authorized by Public Contract Code section 20111. While it is not

¹ All statutory references herein are to the California Education Code unless otherwise noted.

possible to identify exactly how many school districts have utilized the provisions of Section 17406, it has certainly been used by *hundreds* of school districts on *thousands* of projects. As an example of the prevalent use of Section 17406, counsel for Amicus confirmed with the Los Angeles Unified School District that its "Lease-Leaseback" program has produced more than 70 projects since 2003, totaling more than \$2.7 billion in expenditures.

The *Davis* decision has created confusion for many school districts that simply wish to properly comply with the provisions of Section 17406. Fundamentally, the *Davis* decision upheld the use of Section 17406 and even specified that agreements entered into pursuant to Section 17406 do not require competitive bidding. *Davis, supra* 237 Cal.App.4th at pp. 281-282. However, additional holdings of the *Davis* decision went beyond the plain language of Section 17406, creating many unanswered questions. The *Davis* decision was issued approximately five months after this Court issued an unpublished decision on the same causes of action that are currently before this Court. This Court's prior decision held in favor of the District, and now, this Court is being asked to revisit the same causes of action by the same Appellant as a result of the lack of clarity and disparity in opinions caused by the *Davis* decision. This lack of clarity has placed school districts in the difficult position of having to interpret the *Davis* decision at their own risk.² School districts need clarity on how they can use Section 17406.

² The newly-created risk is not created by use of the lease-leaseback method itself, but is instead due to the uncertainty caused by the lack

Given the widespread use of Section 17406 in California, Amicus wishes to point out this case will have an immediate and extraordinary effect on hundreds of school districts and will affect facilities provided to millions of students.

B. Public School Districts Are Granted Broad Discretion In Structuring Section 17406 Agreements, And Such Agreements Should Not Be Disturbed Absent Abuse Of Discretion

1. School Districts Are Vested With The Authority To Act In Any Manner Not In Conflict With Law

School districts are vested by statute and the California Constitution to "act in any manner which is not in conflict with or inconsistent with ... any law." Cal. Const., Art. IX section 14; Section 35160. Thus, "[t]here is a correlative limitation upon the authority of courts to control the actions of local school districts...courts should give substantial deference to the decisions of local school districts and boards within the scope of their broad discretion, and should intervene *only in clear cases of abuse of discretion.*" *Governing Bd. of Ripon Unified School Dist. v. Commission on Professional Conduct* (2009) 177 Cal.App.4th 1379, 1386, emphasis in original. School districts have been granted the express discretion to enter into Lease-Leaseback agreements with third parties for the construction of school facilities in accordance

of clarity in the *Davis* decision. Because *Davis* went beyond the statutory language, and created new requirements without offering any guidance, *Davis* left many questions about what districts *could do* under Section 17406.

with the plain language of Section 17406.

2. Section 17406 Contains Only Three Requirements

Efforts by Appellants and the *Davis* court have interfered with the discretion plainly afforded school districts in Section 17406. The plain language of Section 17406 contains *only* the following requirements:

- (a) a lease of real property belonging to the district for a minimum of \$1 in rent;
- (b) the lessee must construct, or provide for the construction of, building(s) on the premises for the use of the school district; and
- (c) title must revert back to the school district at the end of the lease term, and *may* provide for the vesting of title prior to the expiration of that term.

All other terms and conditions of the agreement are *expressly* left to what the governing board, in its discretion, "*deem(s) to be in the best interest of the school district.*" Section 17406, emphasis added.

3. The Discretion Afforded Under Section 17406 Is Apparent In Other Provisions Of Article 2, Which Anticipate The District's Discretion To Include Terms And Conditions Permitting Early Payment Of Obligations

Section 17406 is found within Section 17400 *et seq.* (hereinafter referred to as "Article 2"). Sections 17422 and 17423 address how leases made under Article 2 must be calculated toward the district's outstanding bonded indebtedness.

For example, Section 17422 counts fifty percent of remaining payments toward bonded indebtedness for "use" of the "building" due from the district "under any leases and agreements entered into by the district pursuant to this article, *if the leases and agreements were to run their full term...*" Section 17422 anticipates a district being able to pay off its obligations early, in accordance with the terms of the lease or agreement, but requires that the duration of the full term of the agreement be used to calculate bonded indebtedness. This provision illustrates the Legislature's grant of discretion to school districts in structuring its own agreements pursuant to Section 17406.

Similarly, Section 17423 creates a formula restricting use of Article 2 if fifty percent of amounts under leases or agreements made under Article 2, which would become due "*if the leases and agreements were to run their full term,*" exceed certain thresholds. Again, the legislature anticipated districts being able to structure their own deals, including the ability to pay off their obligations early.

The legislature *expressly* left the discretion to the district to determine the terms that were "in its best interest" and *expressly* anticipated the district having the ability to pay off its obligations early. Courts should not encroach on school districts' ability to exercise this statutorily granted discretion by expanding the provisions of Section 17406 to include requirements that were not approved by the Legislature.

4. Section 17406 Contains No Financing Requirement

Appellants and the *Davis* court interpret Section 17406 to require a financing component to the agreement. However, there is no mention in Section 17406 of any financing requirement, and thus,

there is no language in Section 17406 requiring school districts to include a financing component in the district's agreement. Holding so encroaches on the school districts' discretion to enter into an agreement with terms that are in the best interest of the school districts.

C. If Section 17406 Required Competitive Bidding, It Would Render Portions Of Section 17062 Meaningless

An agreement made pursuant to Section 17406 is exempt from compliance with competitive bidding requirements. This interpretation was not altered by the *Davis* decision.

An examination of other provisions in Article 2 further illustrates the Legislature's acknowledgment of this exemption from public bidding requirements. For example, Section 17062 provides: "(a) Notwithstanding Sections 20111 and 20118.4 of the Public Contract Code, or any other law, upon approval of funding pursuant to section 17061, a school district may utilize a request for qualifications and proposal process described in subdivision (a) of section 17061 to select and enter into a joint venture agreement with a developer to construct school facilities. The agreement may utilize section 17406." If competitive bidding were required for an agreement made pursuant to Section 17406, then Section 17062 would be meaningless. The first sentence specifically exempts districts from competitive bidding which may be required under Public Contract Code section 20111, and then in the next sentence, under Appellants' theory, competitive bidding would be required under Section 17406.

Moreover, the practical implementation of Section 17406 creates a more transparent process, allowing the district to understand

the contractor's profit margins, and creates a more reliably accurate price estimate due to having fewer "change orders" and a guaranteed maximum price. See further discussion in Sections II.D.1 and II.D.2, below. Competitive bidding is not required for Lease-Leaseback agreements for this reason and for the reasons discussed in *Los Alamitos Unified School District v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222, 1227-1230, *review denied* (Dec. 10, 2014).

D. School Districts Do Not Use Section 17406 Because They Want The Projects To Cost *More* Or For Some Sham Purpose

Appellants appear to be operating under the misconception that competitively bid projects always result in the least amount of costs to school districts. On paper, awarding a construction project to the contractor with the lowest responsible and responsive bid appears to be the most cost-effective way to award a project. However, the reality is that the true cost of a project does not always end with the lowest bid price. And in some cases, competitive bidding has resulted in unnecessary additional expenditures of public funds, not by school districts but by inefficient contractors.

1. Appellants' Preferred "Hard Bid" Method Sacrifices Actual Price Control For The *Illusion* Of Lowest Price

In "hard bid" projects under Public Contract Code section 20111, school districts are forced to contract with the lowest responsive, responsible bidder. In practice, the bidder who submits the lowest bid *wins*. Simply put, unless the bid is unusually irresponsible (or "non-responsive"), a district is forced to accept the lowest bid it receives. For a school district to avoid awarding a

contract to a nonresponsible bidder, it must go through a due process hearing and is often subjected to costly legal challenges that can temporally and financially sabotage a project.

Under a "hard bid" scenario, what can happen is that contractors submit the lowest bid possible, and then submit "change orders" to increase the price of the project. Pub. Contract Code section 20118.4. This change order process creates an opportunity for disputes between contractor controlled "means and methods" of construction and design issues with project plans and specifications. Some contractors use this opportunity to increase profit margins. These disputes can become costly, resulting in possible payment disputes with subcontractors, resulting stop notice claims and litigation, and increased attorneys' fees to the school district. Often in these disputes, school districts have very little leverage to prevent costly litigation and are often at a disadvantage if there is an impact on completion time and the school district is facing an imminent school opening.

Appellants assert, without any factual or legal support, that school districts use the Lease-Leaseback process as a subterfuge for a sham purpose. (Appellants' Opening Brief, pp. 19, 22.) School districts use Section 17406 not for some subterfuge for a sham purpose or to create backroom deals with unscrupulous contractors. Rather, school districts use the Lease-Leaseback procedures because they are granted the discretion to do so pursuant to the plain language of Section 17406 and to prevent the added costs, time and headaches associated with the "change order" process inherent within the competitive bid process. As a result of these "change orders," the *bid*

price is never the *final* price, and the "hard bid's" objective of obtaining the *lowest* price is ironically lost.

2. Section 17406 Agreements Allow for Cost Control Through Subcontractor Bidding and Open-Book Accounting

Unlike in a "hard bid" project, in a Section 17406 agreement, a school district can obtain open access to the subcontractor bids, and openly negotiates the contractor's overhead and profit costs. By contrast, in a "hard bid" a district does not have any control over the contractor's profit margin and in most cases, does not know the contractor's profit margin. In a Section 17406 agreement, the district can obtain the subcontractor bids and negotiate every aspect of the price. As a result of subcontractor bidding shared with the school district by the contractor and through the school district's ability to compare overhead and profit percentages with other contractors, a school has greater latitude to check and negotiate price fairness. Also, school districts use Section 17406 agreements to negotiate a "guaranteed maximum price" ("GMP") which allows districts to know and control the actual project cost at the point when they enter into a contract.

School districts have no incentive to pay more for a project than is necessary. Governing board members are accountable to the public through elections and are prohibited from participating in the ratification of contracts in which they have financial interest. Gov. Code section 1090 *et seq.* All documents associated with an agreement entered into pursuant to Section 17406 must be reviewed and approved in an open and public meeting in accordance with the

Brown Act whereby members of the public may ask questions and become fully informed regarding the district's contract approval process. Gov. Code section 54950 *et seq.* In most if not all circumstances, school districts conduct a request for proposal/request for qualifications process to vet contractors and to conduct a performance-based selection process. School districts that finance projects through local bonds are accountable to bond oversight committees. In short, hundreds of school districts are not using Lease-Leaseback agreements because they want to pay more for their construction projects. Rather, they are using Lease-Leaseback agreements because competitive bidding is not creating an advantage for them. Courts have exempted public entities from competitive bidding for this reason. See, *Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631, 635-636.

3. Lease-Leaseback Allows for Project Timing That More Closely Aligns With Complicated School Calendars

"Hard bid" projects create temporal issues that can compromise a school district's facilities objectives. "Hard bids" require preparation of the plans and specifications to be complete and approved by the Division of the State Architect prior to the publication of the notice inviting bids. Additionally, even after the plans and specifications are complete, a notice inviting bids must be published for at least two weeks prior to bid opening. After bids are opened, there can be bid protests that can cause further delays and ultimately derail a school project entirely.

School calendars can be complicated and are often not amenable to such temporal restrictions and disruptions. School calendars are legally required to be negotiated with employee unions, and must provide a specific number of instructional days while still accounting for staff development days and holidays. School calendars especially can create conflict on "hard bid" projects when work is being done on existing school facilities that house students, and which cannot be shut down in the middle of a school year.

In Lease-Leaseback projects, contractors are often involved very early on. As opposed to "hard bid" projects where contractors learn of the scope of work for the first time when preparing their bids, Lease-Leaseback contractors are often involved in the development of the plans and specifications. This can reduce the amount of time needed to allow the contractor to enter into a contract with the District, and allows for collaborative planning to minimize disruption of the school calendar. This early involvement also has proven to create a more efficient construction process, in part because there are no change orders as a result of the GMP.

**E. There Is No Requirement To Bid The "Facilities Lease,"
Because Section 17406 Does Not Require Two Documents**

Appellants argue that the "facilities lease" must be competitively bid despite the holding of *Davis*, which affirms the plain language of the statute does not require competitive bidding with regard to any agreement entered into pursuant to Section 17406. Appellants' arguments that the Facilities Lease must be bid ignores the fact that Section 17406 does not require a "Facilities Lease" at all. The plain language of the statute only refers to one instrument.

Districts are certainly *permitted* by Section 17406 to structure their agreement as a "facilities lease" if they determine it is in their "best interest," but it is not required. The fact that Section 17406 refers to only one instrument does not mean that a second instrument is *required*, or that a second instrument must be bid.

F. The Plain Language Of Section 17406 Should Be Honored

Districts have relied upon the will of the people as reflected in the plain language of Section 17406 for decades. Parties dissatisfied with the state of the law are afforded a legislative mechanism for effecting change: vote. The voice of the electorate resulted in the enactment of Section 17406, and should not be ignored.

III. CONCLUSION

Amicus California School Boards Association's Education Legal Alliance respectfully requests that the trial court's ruling should be upheld for the reasons stated above.

DATED: January 4, 2016 Respectfully submitted,

FAGEN FRIEDMAN &
FULFROST, LLP

By: /s/ Cynthia Smith
Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 3,706, including footnotes. In making this certification, I have relied on the word count of the Microsoft Word 2010 used to prepare the brief.

DATED: January 4, 2016

Respectfully submitted,

FAGEN FRIEDMAN & FULFROST, LLP

By: /s/ Cynthia M. Smith
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 520 Capitol Mall, Suite 400, Sacramento, CA 95814.

On January 4, 2016, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; PROPOSED AMICUS CURIAE BRIEF OF CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE IN SUPPORT OF DEFENDANT/RESPONDENT TORRANCE UNIFIED SCHOOL DISTRICT** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 4, 2016, at Sacramento, California.

/s/ Autumn Culbreth

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