

**THE
ISSUE**

Lease-leasebacks contracts must now be awarded in a specific competitive manner.

**WHY THE
CHANGE?**

Differing selection methods had created confusion regarding the lease-leaseback delivery method. Legislation provides clear guidance to districts for selection of contractors, and confirms lease-leaseback is a valid delivery method.

**WHAT CONTRACTORS
SHOULD KNOW**

Contractors must review lease-leaseback proposals and contract documents to ensure compliance with the new requirements.

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NEW LEGISLATION AB 2316 CHANGES LEASE-LEASEBACK CONSTRUCTION: EDUCATION CODE SECTION 17400

Effective January 1, 2017, AB 2316 is the new statutory framework for lease-leaseback contract award; it adds multiple provisions to Education Code section 17406. Districts are now required to select a lease-leaseback provider on a “best value” basis through a competitive selection process. AB 2316 provides guidance on when and how preconstruction services can be performed. It is critical to understand the ramifications of AB 2316 on your business.

**LEASE-LEASEBACK: NEW
COMPETITIVE SELECTION PROCESS**

Lease-leaseback prime contractors must be prequalified in accordance with Section 20111.6 of the Public Contract Code:

- Mechanical, electrical, and plumbing subcontractors must also be prequalified.

Lease-leaseback providers must be selected through one of the following:

- Request for Qualifications (RFQ) and sealed Request for Proposal Process (RFP); or
- Sealed RFP Process.

RFPs issued by districts must, at a minimum, include:

- An estimate of price of the project (range is acceptable);
- A clear, precise description of any preconstruction services that may be required;

- A clear, precise description of the facilities to be constructed;
- The key elements of the instrument to be awarded;
- A description of the format that proposals shall follow and the elements they shall contain;
- The standards the school district will use in evaluating proposals;
- The date on which sealed proposals are due; and
- The timetable the school district will follow in reviewing and evaluating proposals.

RFPs must be noticed and published at least 10 days before the date for receipt of the proposals.

RFPs must identify evaluation criteria, including relevant experience, safety record, price proposal, and any other factors specified by a district.

Price proposals shall include, at a district's discretion, either a lump-sum price or proposed fee, including any proposed fee for preconstruction services.

Districts are permitted to split the statutory requirements into a RFQ followed by a RFP with price information from proposers deemed most qualified, so long as the required information is provided.

LEASE-LEASEBACK: PROPOSAL SCORING

RFPs shall specify whether each criterion will be evaluated pass-fail or will be scored as part of best value score, and whether proposers must achieve any minimum score;

Districts must evaluate the sealed proposals based on the methodology set forth in the RFP and must rank proposals from highest best value to lowest best value;

An award shall be made to the proposer providing the best value to the district. Lowest price does not control.

LEASE-LEASEBACK: PRECONSTRUCTION SERVICES

The lease-leaseback instrument may provide for performance of preconstruction services so long as the instruments states that no work for which a contractor's license is required and for which Division of State Architect (DSA) approval is required can be performed prior to DSA approval.

LEASE-LEASEBACK: SUBCONTRACTORS

If the price proposal is not a lump-sum, the successful proposer shall provide district with objectively verifiable information of its costs to perform the services and shall select subcontractors through a competitive selection process:

- Notice and publication to subcontractors is required;

- Established reasonable qualification criteria and standards are required;
 - Subcontractors can be prequalified or short-listed;
- Must award subcontracts either on a best value basis or to lowest responsible bidder.

Once selected, subcontractors are afforded subcontractor listing protections of the Public Contract Code (i.e. bid shopping/substitution protections).

LEASE-LEASEBACK: FINAL PRICE

Once any preconstruction services are completed and subcontractors are selected, the lease-leaseback provider and district shall finalize price for the services to be provided. Final project price shall be approved or rejected at a public meeting.

LEASE-LEASEBACK: CONTRACTOR PROTECTIONS

Provides possible protection to contractors for pre-July 1, 2015 lease-leaseback contracts. If a pre-July 1, 2015 contract is deemed invalid because it was not competitively bid, a court has the discretion to allow the contractor to recover its reasonable costs (excluding profit) if all of the following are satisfied:

- The contractor performed the work based upon the good faith belief that the contract was legal and valid;
- The school district has reasonably determined that the work performed is satisfactory;
- The contractor did not commit fraud in obtaining or performing the contract; and
- The contract did not otherwise violate state law relative to construction and/or the leasing of public property. ■

If you have any questions regarding AB 2316, please contact an attorney at our office. You can visit our website at www.ftblaw.com.

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